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

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PREFACE

Academia should provide a forum for free and open discourse. Nonetheless, at too many institutions, views falling outside of a rigid, "liberal" orthodoxy often face hostility, if not censure, both inside and outside of the classroom.

—Adam B. Ross and Dennis W. Donley, Jr.
Preface to the first issue of the *Review*.

This is the 15th volume of the *Texas Review of Law & Politics*. The *Review* and conservatives face many of the same issues today as they did in the mid-nineties. Academia is still dominated by those forced to kow-tow to an old order. Democrats and Republicans have spent the last year wrangling over the same issues—Don't Ask, Don't Tell, comprehensive healthcare reform, the role of the federal government in the United States and the role of the United States in the world. The problems are the same, but the orthodox solutions seem staler every day. We at the *Review* don't pretend that we're right, but we at least aim to be unorthodox.

This issue covers a wide array of subjects. It begins with an article by Professor Richard Epstein, "Bleak Prospects," arguing that ObamaCare is an economic time bomb that promises to cripple the United States healthcare system. Professor Amitai Etzioni addresses how international legal norms must be re-thought to confront the growing problem of piracy in the 21st century in "Somali Pirates." Next, we have an article by Patrick J. Charles, "The Plenary Power Doctrine and the Constitutionality of Ideological Exclusions," exploring the history of excluding aliens on ideological grounds. In "Witness for the Defense," Daniel Huff examines the Constitution's limits on the ability to exert extraterritorial criminal jurisdiction. Ben Geslison argues that the Executive and Legislative Branches ought to be more mindful of constitutional limitations, rather than punting to the Judiciary, in "The Court Will Clean It Up." Robert Luther III examines the degree of state compliance with *Western States Paving v. Washington State DOT* in "Oversight, Enforcement, and Extension in Public Interest Litigation." Next, Shane Pennington returns to our pages in "Completing Ely's Representation," examining a "beefed up version" of representation reinforcement theory. Finally, Daniel Betts proposes a new way to assess judicial recusal in "How High Is Too High?"

We hope that you enjoy this anniversary issue. Even if you do not share the views expressed in some (or any) of the articles, we look forward to your support in bringing more ideological balance to legal scholarship.

John Scharbach
Editor in Chief

Austin, Texas
December 2010

BLEAK PROSPECTS: HOW HEALTH CARE REFORM HAS FAILED IN THE UNITED STATES

RICHARD A. EPSTEIN *

This Article examines the probable fate that awaits the systematic implementation of ObamaCare. Any effort to pile a massive new transfer and entitlement program on top of a hundred years of previous reforms is likely to fall prey to the law of diminishing marginal utility of additional forms of government intervention. That consequence is all the more likely for legislation that has strong redistributivist objectives but which lacks any techniques for dealing with the massive costs increases embedded in the program. A recent history of the Massachusetts health care initiative provides some indication of the inability to constrain costs except through the imposition of price controls that could easily drive private carriers into bankruptcy. The well-known Dartmouth Atlas, moreover, provides no evidence that there are massive inefficiencies that these price controls can bleed out of the system. The complex system of private health care exchanges or the certain expansion of Medicaid and the unlikely contraction of Medicare are likely to add only greater pressures to an already unworkable system.

* Laurence A. Tisch Professor of Law, New York University School of Law; Peter and Kirsten Bedford Senior Fellow, The Hoover Institution; James Parker Hall Distinguished Service Professor of Law, The University of Chicago. This Article is a much-expanded version of a speech that I delivered at the Chicago's Best Ideas lecture series, entitled "Can the United States Survive Health Care Reform?" on April 8, 2010. I have updated the talk to take into account events that occurred after the original speech was delivered. My thanks to Isaac Gruber, University of Chicago Law School Class of 2012, for his usual excellent research assistance.

I. INTRODUCTION: DIMINISHING MARGINAL RETURNS TO EVERYTHING

Over the past two years, the United States has entered into a phase of active government. Yet of all the many items on the agenda of President Barack Obama, none has proved more contentious, and it appears more unpopular, than his health care initiative.[1] The statute has a peculiarly awkward and self-aggrandizing title: the Patient Protection and Affordable Health Care Act.[2] It is likely that ObamaCare, as it is now known, for better or worse, will not supply patients with protection from anything except their own best judgment. Nor will its heavy and convoluted administrative provisions make health care more affordable, even though it will, through a crazy-quilt set of taxes and regulations, shift the forms of health care distribution in ways that are at present only dimly known. As long and as convoluted as the ObamaCare legislation is, it is only a small down payment on a massive set of initiatives whose content will become clear, if at all, only through the regulations that are now being fought over on the key features of the bill. It seems clear that this incipient and chaotic health care revolution will, unless it is hindered, delayed, watered down, or

1. *See, e.g.*, Jennifer Haberkorn, *Dems Run Away From Health Care*, POLITICO (Sept. 5, 2010), http://dyn.politico.com/printstory.cfm?uuid=DE1E691B-18FE-70B2-A813ACC3D55691DE ("A Kaiser Family Foundation poll . . . showed 43 percent of the public supports the [health care] overhaul and 45 percent are opposed. Much of the disagreement falls along party lines.").

2. Patient Protection and Affordable Care Act (ObamaCare), Pub. L. No. 111-148, 124 Stat. 119 (2010).

repealed, surely count as a larger and ultimately more dramatic change than the 1965 Medicare legislation which was one of the centerpieces of President Lyndon Johnson's Great Society.[3]

Before we turn to any of its particulars, it is useful to set out in a priori terms the reasons why ObamaCare is likely to crater and to do so in grand fashion. The key principle has nothing to do with health care in specific. Rather, it rests on the general proposition that there are diminishing marginal returns to any activity that government or private parties attempt, including increased government regulation. In the United States, we have experienced four major waves of government regulation in the past hundred years.

The first of those waves began with the progressive reforms of Woodrow Wilson's administration, especially in areas of trade regulation. That period saw the creation of the Federal Trade Commission in 1914[4] and the passage of the Clayton Act[5] that same year. The Clayton Act strengthened enforcement of the 1890 Sherman Anti-Trust Act,[6] while at the same time exempting both labor unions and agriculture from the strictures of the antitrust laws in a clear form of selective interest group regulation.

Matters slowed during the First World War and the 1920s, but the dislocations of the 1929 stock market crash and its aftermath ushered in a second wave of progressive reforms during the New Deal. The New Deal properly begins with Herbert Hoover's administration, and not Franklin Roosevelt's. Even before Roosevelt took office, Hoover presided over passage of the Smoot–Hawley Tariff,[7] the Davis–Bacon Act of 1931,[8] massive tax increases of the Revenue Act of 1932,[9] and the Norris–LaGuardia Act of

3. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified as amended at subchapter XVIII of 42 U.S.C.).

4. Federal Trade Commission Act of 1914, Pub. L. No. 63-203, 38 Stat. 717 (codified as amended at 15 U.S.C. §§ 41–58 (2006)).

5. Pub. L. No. 63-212, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12–27 (2006)).

6. 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2006)).

7. Tariff Act of 1930 (Smoot–Hawley Tariff), Pub. L. No. 71-361, 46 Stat. 590 (codified as amended at 19 U.S.C. §§ 1202–1683g (2006)).

8. Pub. L. No. 71-798, 46 Stat. 1494 (codified as amended at 40 U.S.C. §§ 3141–3148 (2006)).

9. Pub. L. No. 72-154, 47 Stat. 169.

1932.[10] Each of these actions in its own way limited the sphere of private enterprise and increased the scope of government power over the economy. The pace of that regulatory oversight only increased during the Roosevelt years, much of whose legacy is still in place. This legacy includes the National Labor Relations Act,[11] the Agricultural Adjustment Act,[12] the Securities and Exchange Act of 1934,[13] the Fair Labor Standards Act,[14] and of course, the creation of the Social Security system in 1935.[15] As with the legislation that preceded it, most of these statutes increased government power over the economy, particularly by strengthening labor and agriculture cartels until they became a fixed feature of the American economy.

The third wave of regulation is a creature of the 1960s, the Johnson Era, which continued through the Nixon Administration in the early 1970s, proving that Democrats have no monopoly on big government. The 1960s-era legislation was directed less toward the traditional beneficiaries of regulation: agriculture, labor, and consumer protection. Instead, it was largely a conscious effort to increase the rate of transfer payments, either express or implicit, from rich to poor.[16] Much of it had to do with the Civil Rights Act of 1964[17] and the Medicare and Medicaid legislation.[18] On other fronts, the third wave of legislation regulated environmental protection,[19] endangered species,[20]

10. Pub. L. No. 72-65, 47 Stat. 70.

11. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2006)).

12. Pub. L. No. 73-10, 48 Stat. 31 (1933) (codified as amended at 7 U.S.C. §§ 601–627 (2006)).

13. Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78kk (2006)).

14. Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201–219 (2006)).

15. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (codified as amended in scattered sections of 42 U.S.C.).

16. *See* Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (repealed 1981) (creating numerous programs intended to provide social services to the poor at the expense of taxpayers).

17. Pub. L. No. 88-352, 78 Stat. 241.

18. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified as amended at 42 U.S.C. §§ 1395–1396 (2006)).

19. *See, e.g.*, Clean Water Act of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387 (2006)); National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§

employee pensions,[21] and workplace safety.[22] Although some of these interventions are sensible, most are not. They naïvely assume that wealth transfer is a zero-sum game and that society only faces a question as to how great a loss in wealth is needed to secure any increase, by some elusive standard, in individual utility. Without question, all of this legislation increases the government's role in both the regulation of private businesses and in the direct operation of the economy.

These first three waves form the backbone of our modern regulatory state. Yet despite this large regulatory overhang, the newest round of feverish legislative activity contains not one single word about deregulation, which would have the dual benefit of raising tax revenues and reducing government expenditures.[23] Far from alleviating earlier burdens, this latest wave of regulation is, in fact, far more intrusive than any of the previous three. My view is that with this wave of regulation, the United States has now crossed the point of diminishing returns—even if, as I believe was the case, we had not crossed it earlier. The expected cost of running the entire regulatory apparatus, especially its health care component, will turn out to be exceedingly high under any accurate accounting of the burdens that these measures impose. On the other side, the supposed benefits of such regulation will turn out to be both evanescent and uncertain.

The only certain consequence of the ObamaCare regulation is a dismal one: an unfortunate mad scramble of political intrigue as various health care providers and groups seek to secure favorable places or reimbursement rates for their own particular programs. In my judgment,

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4321–4370 (2006)); Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392 (codified as amended at 42 U.S.C. §§ 7401–7671 (2006)).

20. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531–1544 (2006)).

21. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 29 U.S.C. and 26 U.S.C.).

22. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651–678 (2006)).

23. *See, e.g.*, Richard A. Epstein & David A. Hyman, *Controlling the Costs of Medical Care: A Dose of Deregulation* 18, 38 (Univ. of Chi. Law & Econ., Olin Working Paper No. 418, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1158547.

the persistent decline in both liberty and prosperity in the United States will continue apace. The great battle of the next generation will not identify those able to garner the lion's share of a social gain created by a vibrant economy. It will address a more tragic question: in a time of falling wealth, who is going to bear the brunt of the decline? Generally speaking, fights over prosperity add some levity into the air. Fights over deprivation, on the other hand, only produce a level of ugly recrimination that nobody wants to witness. As we all know, the political climate in Washington today seems to be more divisive and acrimonious than it has been in many years.[24] The resentments are not limited to bipartisan quarrels. They go to fundamental differences in worldview that drive every modern controversy. These differences play out over all aspects of health care reform at the state and federal level. The main dispute is over the ultimate measure of social welfare in the United States.

I am a dyed-in-the-wool traditional, consequentialist *Paretian*—a term that derives from Vilfredo Pareto, who first identified this measure of social welfare.[25] To be sure, it seems hard to get worked up over a term that no one quite understands or a great economist whom no one quite remembers. Paretianism does not raise a banner under which a candidate can win a lot of votes. But it is worthwhile to explain why this measure of social welfare proves so attractive in principle. Under the Pareto principle, the differences in wealth between one person and another are rendered irrelevant. Instead, the key question to ask about any coercive form of government interaction is whether or not it is capable of generating a Pareto improvement. What that term means is this: is it possible to find a way, through state intervention, to make at least some people better off and nobody else worse off? Ideally, it would be better if everyone could be made better off

24. For one side of the political coin, see Richard Sisik, *Glenn Beck Says America is Wandering into the Darkness Because of 'Divisive Politics'*, N.Y. DAILY NEWS (Aug. 28, 2010), http://www.nydailynews.com/news/national/2010/08/28/2010-08-28_glenn_beck_says_washington_rallys_purpose_is_to_help_lead_america_out_of_the_dar.html. For the other side, see Bob Herbert, *America Is Better than This*, N.Y. TIMES (Aug. 28, 2010), http://www.nytimes.com/2010/08/28/opinion/28herbert.html ("[Glenn] Beck is an ignorant, divisive, pathetic figure.").

25. *See* VILFREDO PARETO, MANUAL OF POLITICAL ECONOMY 261 (Ann S. Schwier & Alfred N. Page eds., Ann S. Schwier trans., 1971) (1906).

simultaneously.[26] But even if only the first objective can be achieved, and no one is made worse off, it would no longer be necessary to look with suspicion on the differentials in wealth that emerge through voluntary market transactions or government interventions. The second objective, however, which is to make everyone better off simultaneously, is less problematic because both parties receive gains and it is not necessary to worry unduly about exactly which party happens to get which particular benefit. State coercion finds it more difficult to reach that position of mutual advantage, though in select cases—such as the control of force or monopoly—it can.

So as long as you are expanding the size of the social pie, competitive forces will tend to create wealth distributions that will be less extreme than it might first appear. This proposition holds even with respect to the very rich. If the rich compete for their economic returns, much like monopoly profits, they will be exposed to pressure from new entrants into their line of business, and the "free money" to which all of us aspire will be available to none of us. So we work to expand the pie knowing that each individual will take care of his or own slice—so long as the government role is circumscribed.

II. SOCIAL WELFARE AND HEALTH CARE

At this juncture, our question becomes: how should this Paretian worldview be applied to the problem of healthcare? The answer is to start with deregulation where the social returns are likely to be the greatest. There are too many layers of regulation in the United States health care system. Many of them have survived for purely parochial or historical reasons. Virtually all of these reforms have proved unwise and should be eliminated.

First, we should remove the present prohibitions on interstate competition with respect to insurance in the individual and in the group markets.[27] Given that politics often makes for strange bedfellows, it should come as no

26. I have argued for stricter standards of social improvement, with constraints on the division of the surplus in order to control factional behavior. *See* RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 79–82, 98–103 (1993).

27. *See* McCarran–Ferguson Act, 15 U.S.C. §§ 1011–1015 (1945).

surprise that ObamaCare took the opposite tack.[28] Thus, any government that actively seeks a more comprehensive system of redistribution will soft-pedal deregulation in order to keep the support of those insurance companies that reap, or at least think they reap, their monopoly profits from state barriers to entry.

The position of these insurance companies is, however, always made more precarious by yet another regulatory feature that merits rapid extinction: insurance mandates. Companies that want to write insurance policies are always free to withdraw from the business, which they will not do because, by taking that step, they lose all chance to recover their sunk costs and to make their future profits. So wedded to the marketplace, they must comply with certain minimum standards imposed by either state or federal mandates, all of which gum up the operation of voluntary markets.[29] These are not isolated events. The Council for Affordable Health Insurance (CAHI) produced a detailed catalogue of some 1,961 state mandates as of 2008. Its report contained the warning that "more [mandates] are on their way."[30]

State governments are not the only actors in this game. Congress passed a federal mandate during the height of the financial crisis, in September 2008, aiming for parity in mental health benefits for all people in the United States enrolled in private plans.[31] The effect of such mandates, many hundreds of which are now in effect, often goes unobserved on a daily basis but its cumulative effect is real. It is, invariably, to reduce the sum of consumer and producer surplus with respect that both customers and their insurers derive from the voluntary plans that remain in

28. Jennifer Haberkorn, *Health Law Could Ban Low-Cost Plans*, POLITICO (June 8, 2010), http://dyn.politico.com/printstory.cfm?uuid=142CBE3B-18FE-70B2-A82B15071E682918.

29. VICTORIA CRAIG BUNCE & JP WIESKE, COUNCIL FOR AFFORDABLE HEALTH INS., HEALTH INSURANCE MANDATES IN THE STATES 2008, at 2 (2008), *available at* http://www.cahi.org/cahi_contents/resources/pdf/HealthInsuranceMandates2008.pdf. For updates, see VICTORIA CRAIG BUNCE & JP WIESKE, COUNCIL FOR AFFORDABLE HEALTH INS., HEALTH INSURANCE MANDATES IN THE STATES 2010, (2010), *available at* http://www.cahi.org/cahi_contents/resources/pdf/Mandatesinthe States2010.pdf.

30. BUNCE & JP WIESKE, HEALTH INSURANCE MANDATES IN THE STATES 2008, *supra* note 20, at 2.

31. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765, 3881–93 (to be codified at 29 U.S.C. § 1185a and 42 U.S.C. § 300gg-5).

business. In concrete terms, CAHI "estimate[d] that mandated benefits currently increase the cost of basic health coverage from a little less than 20% to more than 50%, depending on the state and its mandates."[32]

These numbers should not be ignored. On theoretical grounds alone, the size of the consumer and producer surplus has to decrease as the number and severity of mandates increase. If the new item was worth more than it cost, health care providers and insurers would have every incentive to include it in the basic plan, by sharing the gains. But a smaller combined surplus can still be positive, so that those plans remain in place so long as both sides can absorb the hit. This reduction in the combined surplus, however, technically counts as a social loss even if it is never recorded in any official social account that looks solely at the numbers of insured persons currently on the private rolls. But on some occasions, the size of the tax comes to exceed the combined surplus to the parties, and the insurance coverage dissolves. It is yet another instance of the principle of diminishing marginal social returns. When the government starts putting on the next round of mandated benefits, the entire package is no longer worth having. Since the insurer cannot get rid of that cargo that makes the boat too heavy, the boat capsizes and sinks, thereby increasing the number of uninsured individuals.

This is not a small phenomenon. Over the last thirty years, the number of people with employer plans dropped from about 60% to 50%.[33] Even so, the precise numbers really do not matter; what really counts is that the direction of the trend is inexorable, and its size is not inconsiderable. Yet once the employer boat is capsized by mandates, the individuals who are left to fend for themselves in the individual and small group markets, or on public support, find it rough going indeed. The good news is that these trends should be reversible. Therefore, with greater competition and fewer mandates, the voluntary market

32. BUNCE & JP WIESKE, HEALTH INSURANCE MANDATES IN THE STATES 2008, *supra* note 29, at 2.

33. MARK W. STANTON, U.S. DEP'T OF HEALTH AND HUMAN SERVS., AGENCY FOR HEALTHCARE RESEARCH AND QUALITY, EMPLOYER-SPONSORED HEALTHCARE: TRENDS AND ACCESS (2004), *available at* http://www.ahrq.gov/research/empspria/empspria.pdf.

should correspondingly revive as people are allowed to buy, to suit their own preferences, a lower level of insurance protection for a lesser sum of money.

As a social analyst, it is dangerous to base one's work on some predetermined notion of what people need for their own good. It is not that ordinary people are perfect judges of their own character and aims. It is that they, with their social network—family, employers, friends, church groups, and other agents—will generally do a lot better making judgments about their individual needs than the United States government. To put it delicately, the administrative agencies of the United States are not exactly run by individuals whose constitutional and economic wisdom is beyond reproach.

So, the essential logic of the small-government Pareto-improvement approach is to identify and remove these large pockets of unwise regulation. This path cuts down state administrative costs, increases the level of private choice, opens access, and raises tax revenues. People will flock back to insurance markets as the price for coverage goes down. Unfortunately, the dominant philosophy in Washington today moves in exactly the opposite direction. Even the Chamber of Commerce, traditionally no bastion of redistributionists, has an agenda that includes many of the most objectionable features that made their way into ObamaCare. These include: "[e]liminating the use of pre-existing conditions or health status; [g]uaranteeing that any individual or entity will be issued a policy; [g]uaranteeing that policies will not be revoked; [p]lac[ing] reasonable limits on rating differences; [s]ubsidies for those who cannot afford coverage."[34]

This agenda shows no interest in designing legislative reforms to promote Pareto improvements. On the contrary, it evinces a concern for the elimination of wealth differentials on the assumption that income redistribution is one of the major objectives of health care reform. This shift in approach is no small adjustment. It is a profound transformation of how we think about the role of

34. *Access to Affordable Health Care*, U.S. CHAMBER OF COMMERCE http://www.uschamber.com/issues/health/access-affordable-health-care (last visited Oct. 16, 2010).

government. One stylized numerical illustration highlights the difference between the Paretian view and redistributionist points of view. Start with ten people whose current welfare, for simplicity, equals ten units of wealth. Now one of them improves to twelve units of wealth while everyone else remains at ten units. A Paretian is quite happy about that transformation because it generates a net improvement of two units of wealth.[35]

Yet that example, which illustrates a social improvement under the Pareto standard, counts as anything but a success if a strong form of egalitarianism is allowed to influence the shape of our ultimate social goal. On that egalitarian assumption, any deviation from that initial distribution of parity which allows one person to advance more than any other can no longer be regarded as an unquestionable social improvement. It can be regarded as a festering source of social unrest in the form of rising economic inequality. There is no question that many supporters of health care reform are driven not by a desire to expand the pie but rather by their profound sense that equalization of the size of each slice is the first order of business. In a press conference, here is what Senator Max Baucus[36] said about this issue:

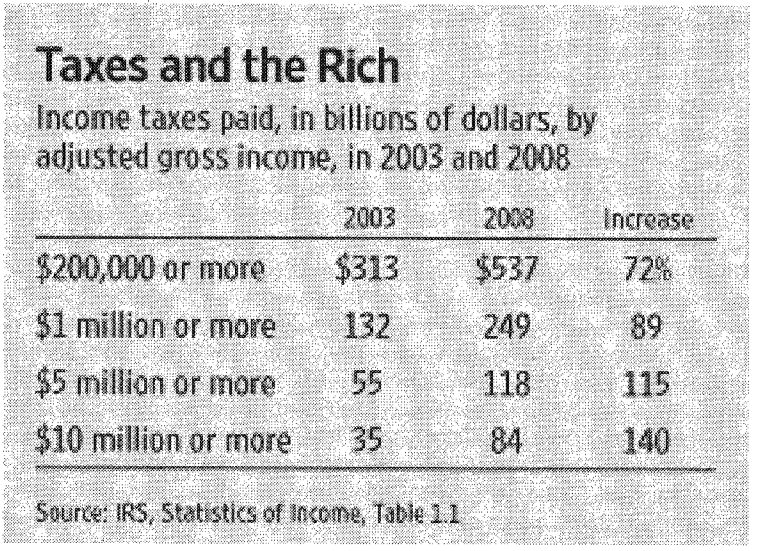
> Too often, too much of late, the last couple . . . years, the maldistribution of income in America has gone up way too much, the wealthy are getting way, way too wealthy, and the middle income class is left behind. Wages have not kept up with the increased income of the highest incomes of Americans. This legislation will have the effect of addressing that maldistribution of income in America.[37]

35. I use wealth in this example because it is more easily measured than utility. In principle, however, the same argument holds even if we deal with subjective utility. All we need to do is report that every person but one remains the same, and that last person experiences an improvement in his or her personal position. But utilizing wealth is preferable in these examples, because it is a publicly observable unit which better facilitates comparisons and overall assessments. A flawed measure that can be counted is better for social purposes than a more reliable theoretical standard that proves unadministrable in practice.

36. Senator Baucus also, incidentally, admitted to not reading the entire ObamaCare bill. *See* Jordan Fabian, *Key Senate Democrat Suggests That He Didn't Read Entire Healthcare Reform Bill*, THE HILL (Aug. 25, 2010), http://thehill.com/blogs/blog-briefing-room/news/115749-sen-baucus-suggests-he-did-not-read-entire-health-bill.

37. *Dem Senator: Health Legislation Will Address the "Mal-Distribution of Income in America,"* REAL CLEAR POLITICS (Mar. 25, 2010),

It is hard to know where to begin with this hyperbolic statement. The first point goes to implicit rejection of the Pareto formula. The rich are getting "way too wealthy" even if their wealth does not come from transfer payments taken from the poor. For Baucus, it is the size of the gap that is the wrong; not the source of its origin. Yet increased wealth in the system has all sorts of collateral consequences, including higher tax revenues for the United States Treasury. On this point, tax cuts increase overall wealth and tax revenues, as is well illustrated by this chart from the Internal Revenue



Taxes and the Rich

Income taxes paid, in billions of dollars, by adjusted gross income, in 2003 and 2008

	2003	2008	Increase
$200,000 or more	$313	$537	72%
$1 million or more	132	249	89
$5 million or more	55	118	115
$10 million or more	35	84	140

Source: IRS, Statistics of Income, Table 1.1

Service (IRS).[38]

The data are even more impressive than this table indicates, for in any dynamic sense, lower rates translate into higher tax revenues. Government estimates usually rely on the naïve assumption that changes in tax rates do not alter behavior, when quite the opposite is true. In one of its most recent (and sound) diatribes against higher taxation, the Wall Street Journal published:

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http://www.realclearpolitics.com/video/2010/03/25/dem_senator_health_legislation_will_address_the_mal-distribution_of_income_in_america.html.

38. *See* STATISTICS OF INCOME DIVISION, IRS, tbl. 1.1 (2010), *available at* http://www.irs.gov/pub/irs-soi/08in11si.xls; STATISTICS OF INCOME DIVISION, IRS, tbl. 1.1 (2005), *available at* http://www.irs.gov/pub/irs-soi/03in11si.xls.

> According to the most recent IRS data on actual tax payments, total revenues collected over the period 2003-07 were about $350 billion higher than Joint Tax and the Congressional Budget Office predicted when the 2003 tax cuts were enacted. Moreover, the wealthiest taxpayers paid a *larger* share of all income taxes from the beginning to the end of this period. The IRS data show that in 2003 those with incomes above $200,000 paid $313 billion in income tax. By 2007 they paid $610 billion.[39]

Of these trends, Senator Baucus is blissfully ignorant. Worse still, Baucus assumes descriptively that a ponderous health care bill will have the effect of moving wealth from poor to rich simply because that comports with his intention. But here the crisscross pattern of provisions will vindicate the law of unintended consequences by inducing a set of displacements and responses that could easily lead to losses to individuals who may actually like their current situation, which they will not be able to replicate under the new legislation. In addition, administrative drag and perverse incentives mean there will be less wealth to go around, which cannot help those who are poor. A better solution is to expand the pie and worry about distribution only after those allocative gains are made, by a policy that I like to call "redistribution last."[40]

III. OVER THE EDGE

In its largest sense, the major problem for any program of redistribution is whether it can be executed in ways that do not shrink the size of the pie. In the case of ObamaCare, the correct answer is *no*, even if the answer for more modest programs may be *yes*. The *yes* answer for the modest state programs comes from my sense, shared by many others,[41] that low levels of persistent government redistribution will be met with a high level of popular acceptance. If anyone

39. *The $31 Billion Revenue Fantasy*, WALL ST. J. (Aug. 28, 2010), http://online.wsj.com/article/SB10001424052748703876404575200621394266894.html (emphasis in original).

40. Richard A. Epstein, *Decentralized Responses to Good Fortune and Bad Luck*, 9 THEORETICAL INQUIRIES IN L. 309 (2008).

41. *See generally*, Arthur C. Brooks, *A Nation of Givers*, THE AMERICAN, (Mar./Apr. 2008), http://www.american.com/archive/2008/march-april-magazine-contents/a-nation-of-givers.

watches how people spend their own money, they may not tithe themselves the full 10%, but they are always willing *up to a point* to help out through churches, other social groups, hospital drives, and public service campaigns for those less fortunate than themselves. However, like every other good thing on planet Earth, too much of a good thing becomes a bad thing. The law of diminishing marginal returns to scale also applies to charitable endeavors. In other words, the marginal cost of extra units of redistribution relative to their benefit eventually goes negative. The great danger that I see in the current health care system is that we have now passed the point of optimal redistribution and are very much on the downward slide. I think that today's resentments have all coalesced around this basic concern of the median voter in the United States: "As hard as I work, am I left worse off than I was before because of a series of programs that allow opportunists to profit at my expense?"[42]

To go beyond health care for the moment, take President Obama's announcement of yet another misguided program with respect to additional relief for those people who have fallen behind on their mortgage payments.[43] It turned out that the dominant response that came to the White House was from people in control of their own mortgages saying, "Why do I want to live in a country which is going to tax me enough so they might throw *me* into default?"[44] What should be done with these mortgages is to allow the foreclosures. Let the property then return to the market at their lower but more accurate valuations. At that point, new sales—which fell to an all-time low in July 2010[45]—can pick up,

42. For an example of this concern, see John Hood, *The Great Redistribution Machine*, NAT'L REV. ONLINE (Mar. 27, 2007), http://www.nationalreview.com/corner/139731/great-redistribution-machine/john-hood.

43. Helping Families Save Their Homes Act of 2009, Pub. L. No. 111-22, 123 Stat. 1632. For my criticism of this type of legislation, see Richard A. Epstein, *The Subprime Crisis: Why One Bad Turn Leads to Another*, 2 J. BUS. ENTREPRENEURSHIP & L. 198 (2008).

44. *See, e.g.*, John W. Schoen, *No 'Magic Bullet' in Obama Housing Relief Plan*, MSNBC.COM (Feb. 19, 2009), http://www.msnbc.msn.com/id/29260537/ ("Many homeowners, some of whom also are struggling to make payments, are furious at the prospect of seeing their taxes used to help pay their neighbor's mortgage.").

45. *New Home Sales at All-Time Low*, CBS NEWS (Aug. 25, 2010), http://www.cbsnews.com/stories/2010/08/25/business/main6804275.shtml ("[N]ew home sales fell 12.4 percent in July from a month earlier to a seasonally adjusted annual sales pace of 276,600. That was the slowest pace on records dating back to 1963.").

without having to deal with legacy obligations artificially kept unrealized on both the public and the private books. I think that this tough-minded view is exactly the right sentiment to hold on that issue. The miserable performance of the government's Home Affordable Modification Program[46] (HAMP) is typical of the current situation. With the equivalent of glossy government online brochures[47] coupled with slow implementation, high default rates persisted even after renegotiation took place.[48] Force feeding will not work. The mistakes of HAMP should serve as a warning bell for how we think about other initiatives, including those that pertain to health care.

Given these lessons, the basic diagnosis of the path of the ObamaCare legislation is already in, and it falsifies the naïve Baucus prediction that the distributive consequences of complex legislation are benign. Let me explain very briefly why this is supposed to be the case. According to White House estimates, some 31 million people who are currently outside the system will now be supplied with first class health care.[49] I regard this claim as a snare and a delusion. There is not enough money in the public treasury to give that number of people the lavish set of benefits mandated under ObamaCare. You cannot supply Cadillac health care[50] to that number of people, many of whom are in

46. U.S. DEP'T OF THE TREASURY, MAKING HOME AFFORDABLE: SUMMARY OF GUIDELINES (2009), *available at* http://www.treas.gov/press/releases/reports/guidelines_summary.pdf.

47. *See* MAKING HOME AFFORDABLE, http://www.makinghomeaffordable.gov (last visited Nov. 3, 2010).

48. Darrell Issa & Jim Jordan, Opinion, *Cleaning Up the Mortgage Mess*, WALL ST. J. (Aug. 25, 2010), http://online.wsj.com/article/SB10001424052748704075604575356663725805580.html ("HAMP has failed to meet the administration's own projections. According to government figures released on Monday, only 434,716 homeowners have received permanent mortgage modifications as of July. Meanwhile, the Treasury Department has cancelled the temporary modifications of 616,839 borrowers, with 96,025 modifications cancelled last month alone.").

49. Remarks on Health Care Reform, 2010 DAILY COMP. PRES. DOC. 147 (Mar. 3, 2010), *available at* http://www.gpoaccess.gov/presdocs/2010/DCPD-201000147.pdf ("Even those who acknowledge the problem of the uninsured say we just can't afford to help them right now, which is why the Republican proposal only covers 3 million uninsured Americans while we cover over 31 million.").

50. "Cadillac" health plans are high-cost health plans with low deductibles, drug coverage, vision and dental care, and low or no copayments. *See* Keith B. Richburg, *What Makes a Health Care Plan a 'Cadillac'?*, WASH. POST (Oct. 1, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/09/30/AR2009093004730.html.

bad shape, while keeping the current levels of health care in place for everyone else who now finds coverage within the system.

One key problem is how to arrange for a system in which the government pays the bulk of the bill while the insured has options of which coverage to demand. This is not the usual price control problem of government intervention in private markets. Rather, this is a greater problem of trying to figure out how to limit private discretion when the individual who chooses coverage often pays less than 10% of the bill. There is no good way to estimate the dollars. Nor is there any private benchmark against which the coverage can be measured, given that the massive controls and taxes on the private sector will so influence prices that no one can treat this overheated and overregulated private market as the lodestar for the government-dominated subsidized market.

This overemphasis on health care benefits relative to other needs leads to real distortions when we know that it is quite unlikely that individuals in this targeted group would make this same level of heavy health care expenditures if they had received outright cash grants. Generally speaking, most people will intuitively gravitate towards an "equal-marginal" solution. They want their last dollar spent on health care to give them the same amount of benefit as it gives them on education, on food and shelter, on recreation, and on everything else. Exactly how they achieve that objective is hard to state in the abstract, but the want of concrete knowledge on this point furnishes no argument for additional government mandates. It is an argument for private choices because it is much easier for individuals to make their own equal-marginal judgments than it is for them to explain to everybody else how they made their judgments and why those outcomes are right for themselves, even if they might prove wrong for everybody else.

By pushing large new sums of wealth into health care in so haphazard a fashion, serving this new population will turn out to be more expensive than we might suppose. Yet the only place that that money can come from is out of the

hide of median voter,[51] either in terms of higher taxes or a value-added tax (VAT) which many European countries commonly use to fund their rather expensive welfare states.[52] Additionally, it is harder to make a VAT progressive even if the income tax is progressive. The VAT will become a broad-based tax, which will hit the middle class.[53] Here in the United States, the adverse consequences of ObamaCare are likely to cut more deeply, for the median voter is likely to lose his or her healthcare coverage from the implementation of this program. So much for the benevolent redistribution of Senator Baucus.

A quick look at calculations will, without question, confirm quantitatively what is known qualitatively. Just simply looking at the size and the scope of the obligation, it becomes evident that too much has been bit off too soon. First, just posit that the average benefit package will be provided at a cost, on average, of $3,000 per person annually—an estimate that looks low. Multiply that by thirty million people, and you come up with a figure of around $900 billion in annual expenditures if nothing is done to control the cost side, which is no easy task given the dominant role that the government as purchaser of health care services. As usual, ObamaCare makes no effort to reengineer services that could be rationally reorganized, such that the likely pushback will require doctors and other health care providers to receive fewer dollars while providing more extensive services.

The upshot will be that the same physicians—and it is not all physicians—who favor ObamaCare in the abstract[54] will

51. *See* Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to Hon. Jerry Lewis, Ranking Member, U.S. House of Representatives Appropriations Comm. (May 11, 2010) (on file with the Cong. Budget Office), *available at* http://www.cbo.gov/ftpdocs/114xx/doc11490/LewisLtr_HR3590.pdf.

52. Fred Lucas, *Obama Administration Sends Mixed Message on VAT as Fiscal Commission Prepares First Meeting*, CNS NEWS (Apr. 23, 2010), http://www.cnsnews.com/news/article/64671.

53. JANICE SHAW CROUSE, CONCERNED WOMEN FOR AM., OBAMANOMICS: SUMMARY OF THE ANALYSES AND COMMENTARY RELATED TO THE FINANCIAL IMPACT OF OBAMACARE ON WOMEN AND FAMILIES 31 (2010), http://www.cwfa.org/images/content/Obamanomics.pdf (noting that European value-added taxes average around 20% and in the United States, such a tax set at 10% could raise perhaps $500 billion per year, or about $4,300 per household).

54. *See generally*, Ryan M. Antiel, et al., *Physicians' Beliefs and U.S. Health Care Reform—A National Survey*, NEW ENG. J. MED. (Sept. 14, 2009), http://www.nejm.org/doi/pdf/10.1056/NEJMp0907876?ssource=hcrc.

flee from the system when and if the new system of fee reimbursement is put into place.[55] Short of involuntary servitude, the government cannot alter the supply curve of physicians. Fewer dollars means fewer doctors. In particular, many primary care physicians near retirement age will elect to take that option. Take a physician at an age at which early retirement or job redeployment is a viable option—say, in his or her late fifties or early sixties. Early retirement becomes the only option if the government pushes through a decline in rates that will not allow physicians to cover their extensive costs in administering these new programs while simultaneously meeting preexisting obligations (including rent and support staff). The usual consequence of price controls is shortages; thanks to ObamaCare, we can expect shortages in the supply of physicians, and particularly in those who supply primary care.

The situation will get worse because the economics of private health care plans will be so costly that the payment of penalty tax amounting to 2.5% of their household income may look attractive to nearly four million people.[56] This disintegration of the private health care system may well be the ulterior motive of many ObamaCare supporters who think that a single-payer system can avoid the many pitfalls of the current market. But if so, the campaign for ObamaCare will have turned out to be a classic case of bait and switch.

A central theme of the Obama's 2008 campaign and the early months of his presidency was that "[i]f you have insurance that you like, then you will be able to keep that insurance."[57] In retrospect, this was not a real promise. The first thing you discovered when you looked at the statute is that the definition of a "grandfathered health plan" is wholly unclear. Right now we know that adding new employees or new dependents of old or new employees does not deny a

55. *See infra* note 94.

56. Stephen Ohlemacher, *Nearly 4M People Could Pay Without Health Coverage*, YAHOO! FINANCE (Apr. 22, 2010), http://finance.yahoo.com/news/Nearly-4M-people-could-pay-apf-2747238688.html.

57. Remarks at a Town Hall Meeting and a Question-and-Answer Session on Health Care Reform, 2009 DAILY COMP. PRES. DOC. 604 (July 28, 2009), *available at* http://www.gpoaccess.gov/presdocs/2009/DCPD-200900604.pdf.

plan protected status. But it is not clear from reading the act exactly what happens if there are any other changes to the plan, such as changes in coverage, price, mergers, and the like. As one study noted, "[i]t is still not clear, however, whether any significant modifications of coverage under a plan design will alter its grandfathered status,"[58] a regrettable state of affairs that once again shows the enormous impact that the regulations will have on the scope of the action. It could easily turn out when the dust settles that any important change is tantamount to creating a new plan and losing their protected status.

Of course, every health plan is amended countless times in order to take into account difference in rates, coverage, benefits, formulas, and so forth. By one reading of the statue definition, each of us, quite without our own knowledge, has been enrolled in hundreds of different plans over the years, all of which, strangely, have had the same single plan number. But even for grandfathered plans that run this gauntlet, the established rules are not inviolate. There are phased introductions of substantive requirements that apply to these plans, dealing with key issues such as preexisting conditions, coverage for dependents up to age twenty-six, rescission, and coverage limits, each of which has its own complex web of interpretive rules.[59] It looks like a classical instance of undermining ordinary expectations with a set of highly restrictive and counterintuitive statutory definitions. But regardless of the rhetoric, within five years the original grandfathered plan will be as extinct as the dodo.

But before then, all these fine points really matter. The new plans do not get statutory protection from government oversight. The new plans all have to receive that benediction, which they can only get if they run through a regulatory gauntlet, which—in total disregard of marginalist principles—operates as though more health care is invariably better for the consumer than less. But without any grandfathered protection, everyone starts at square one

58. BENICO, GRANDFATHERED HEALTH PLANS AND THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (2010), *available at* http://www.benico.com/docs/Grandfathered_health_plans(PPACA).pdf (discussing ObamaCare § 1251 (Preservation of Right to Maintain Existing Coverage)).

59. *Id.* at 2.

in a regulatory environment that is not quite to their liking. In time, historical continuity was displaced by a view that additional levels of consumer protection were required, without any real showing of systematic dissatisfaction by the people who were actually enrolled in these various plans. Throw in mandates and other regulatory hurdles, and the administrative load becomes truly high. Yet higher taxes and higher unemployment levels can accentuate the downward slide in a double dip recession, which will add more people to an overextended public sector with an insatiable appetite for huge, but unfunded, state subsidies.

IV. THE MASSACHUSETTS EARLY WARNING SYSTEM

There are many people who think that such gloomy forecasts are inappropriate.[60] Unfortunately, we already have an early warning signal that no combination of taxes and regulations can cover the expanded obligation base. That warning comes in the form of the extended legal battle now taking place in Massachusetts over RomneyCare,[61] the so-called "Republican model"[62] for the national health care plan. In February 2010, Massachusetts Governor Deval Patrick persuaded his insurance commission to switch from a "notice" system to a "prior approval" system of rate regulation in reviewing the new set of rate packages put forward by the various health care plans.[63]

The difference between the notice and approval systems is huge in dealing with insurance. A notice system is essentially a full disclosure system. Pilgrim Health Care, a large state insurer, has to give notice to the state commission of how it plans to proceed with various groups of insureds. Thus, it is imperative that the insurer supplies the

60. For a view typical of the ObamaCare boosters, *see* Jonathan Cohn, *On the House*, NEW REPUBLIC (Jan. 5, 2010), http://www.tnr.com/article/health-care/the-house.

61. An Act Providing Access to Affordable, Quality, Accountable Health Care, 2006 MASS. ACTS ch. 58, *available at* http://www.malegislature.gov/Laws/SessionLaws/Acts/2006/Chapter58

62. *See* Edmund F. Haislmaier, *Mitt's Fit: Romney's Health Plan Is No Sop to Socialism*, NAT'L REV. ONLINE (Jan. 27, 2006), http://old.nationalreview.com/comment/haislmaier200601271110.asp.

63. Kay Lazar, Michael Levenson & Robert Weisman, *Patrick Wants Health Cost Veto*, BOS. GLOBE (Feb. 11, 2010), http://www.boston.com/news/local/massachusetts/articles/2010/02/11/patrick_wants_health_cost_veto/.

plans that it announces, as a check against insurer fraud by way of a bait-and-switch operation. However, the firm that supplies notice has complete freedom in setting its rates without any administrative hassle or blowback. The insurance commission relies on competition to restrain rates. It makes no effort to try to figure out which rates give the firm a suitable rate of return.

The moment a state switches to an approval system, it has essentially abandoned that disclosure model in favor of a new procedure that lets government agents determine whether or not industry firms have garnered "excessive profits." Now some may say that this is something that governments always do when dealing with regulated industries. That proposition is both right and wrong. Such government approval is something governments do when they regulate industries with some kind of a monopoly power—typically the network industries that supply power or telecommunications utilities.[64] But it is not the kind of task that governments usually undertake with regard to competitive industries, where there are no monopoly profits to bleed out of the system. What government regulation can do in competitive industries is create mischief by reducing the prices charged by participant companies so that they cannot earn a competitive rate of return, even as they are forced to bear the new compliance costs of a regulatory regime that treats their every action under a presumption of distrust.

In principle, an approval system should give rise to serious constitutional challenges, even under the very weak laws of property protection that exist in other areas.[65] With rate regulation, the law requires concern over whether the rates allowed permit the company to earn a risk-adjusted rate of return.[66] Both Massachusetts and Maine, however, have explicitly disavowed that standard. Their definition of

64. *See generally*, LAWRENCE J. WHITE, U.S. PUBLIC POLICY TOWARD NETWORK INDUSTRIES 22 (1999).

65. For a discussion of the constitutional implications of regulation, see Richard A. Epstein, *Exit Rights and Insurance Regulation: From Federalism to Takings*, 7 GEO. MASON L. REV. 293 (1999). For a more general statement of the problem, see Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147 (1992).

66. *See, e.g.*, Duquesne Light Co. v. Barasch, 488 U.S. 299, 315–16 (1989).

"excessive" is no longer whether one receives a monopoly rate of return, which everybody admits that you are not. Rather, the newer definition of "excessive" now condemns making the kinds of profits that only seem to be inappropriate to a large firm at a time when there are many people without any healthcare coverage at all. That share-the-wealth—and share-the-misery—approach has made a difference. The Massachusetts Insurance Commission in February 2010 managed to reject 235 out of 274 proposed rate increases, promising to allow only smaller increases in exchange.[67] In the interim, the insurance companies announced that they would not sell insurance coverage to some 800,000 individuals in that market niche until the legal position had been clarified.[68] Massachusetts did not take this threat to leave lying down and responded that it would fine any company with the temerity to withdraw from the local market. In response, the insurance carriers filed a lawsuit seeking to knock out the statute, but the Massachusetts Superior Court quickly announced that it would only hear the case after the matter had gone through several additional months of administrative hearings.[69] In the interim, the court was not prepared to allow the companies any level of increased revenues, deeming that their cash position was strong enough to avoid bankruptcy and that they could recoup the additional fees from their many individual policyholders to the extent that these might be ultimately granted.[70] Several days later, the same court held that the state was entitled to enforce its rate orders in part because its orders were endowed with a presumption of legitimacy, which meant that the state did not have to prove irreparable harm to force the individual insurance

67. Paul Howard, *Bay State Health-Care Blues*, NAT'L REV. ONLINE (Aug. 5, 2010), http://www.nationalreview.com/articles/243613/bay-state-health-care-blues-paul-howard.

68. Thomas Cheplick, *Massachusetts Health Insurance Rate Cap Creates Legal, Financial Problems*, HEARTLAND INST. (Aug. 7, 2010), http://www.heartland.org/healthpolicy-news.org/article/28147/Massachusetts_Health_Insurance_Rate_Cap_Creates_Legal_Financial_Problems.html.

69. Mass. Ass'n of Health Plans v. Murphy, No. 10-1377-BLS2, 2010 WL 2102726 (Mass. Super. Apr. 12, 2010).

70. *Id.* at *10–11.

companies to remain in the marketplace.[71] The older tradition whereby the constitutionality of rates was determined before they were put into effect has not been followed.

The Massachusetts saga has yet to wind itself down. But the situation is ominous. The procedural delays could easily slow down the review of the applications for rate increases next year. Ultimately, there are two scenarios: either the companies win and they pull out of the state, at which point Massachusetts has a real problem of how to supply coverage when faced with heavy deficits, or the companies lose, at which point they go bankrupt in the short run and the state has to face exactly the same problem, only on a larger scale. In Massachusetts, the rock and the hard place are the only two possible outcomes. The ostensible purpose of ObamaCare is that when government imposes rates regulation on private firms, they will unearth magical efficiencies that no one thought possible. Necessity is thus the mother of invention, and firms innovate in ways that they did not think possible before the government intervened. But this bit of wishful thinking ignores the reality of the competitive forces which drive firms to find low-cost ways to deliver health care. And it understates the likelihood, which is already in place, that smaller firms will rush to find larger partners in order to rid themselves of the high fixed costs of regulatory compliance.[72] Concentrated industries may be less than ideal, but they are preferable to bankrupt firms.

V. THE DARTMOUTH ATLAS

The ostensible reason for why health care is "different" is that it should be possible to squeeze out the waste in the system through prudent price regulation. One impetus for the Massachusetts plan was the comprehensive reviews on the cost of delivering health care in the United States

71. Mass. Ass'n of Health Plans v. Murphy, No. 10-1377-BLS2, 2010 WL 2102723 (Mass. Super. Apr. 23, 2010).

72. *See* Robert Pear, *Consumer Risks Feared as Health Law Spurs Mergers*, N.Y. TIMES (Nov. 20, 2010), http://www.nytimes.com/2010/11/21/health/policy/21health.html.

through the Dartmouth Atlas,[73] which announces its mission in no uncertain terms:

> For more than 20 years, the Dartmouth Atlas Project has documented glaring variations in how medical resources are distributed and used in the United States. The project uses Medicare data to provide information and analysis about national, regional, and local markets, as well as hospitals and their affiliated physicians. This research has helped policymakers, the media, health care analysts and others improve their understanding of our health care system and forms the foundation for many of the ongoing efforts to improve health and health systems across America.[74]

The immediate question raised by these studies is why these gaps do not disappear under the force of market pressures. There are two explanations. The first starts with restriction of the Dartmouth Atlas to "Medicare Data," which is *not* a randomly selected set of data.[75] It is data that comes exclusively from one, albeit massive, government program. To the extent that these price differentials are unjustified, it represents condemnation on how government provides its services. If twenty years of work has not eliminated these gaps, why think that clever maneuvers in the next iteration of health care reform will change the results?

At this point, two questions surge to the fore. The first is whether these price differentials are found on the private side of the marketplace, for which the answer seems to be no. Tomas Philipson and his colleagues have done careful studies for paired patients in Medicare and in private plans which show that the differentials are far smaller in the private sector than under Medicare,[76] largely competed away on the private side where the gaps are in the order of three

73. *See* DARTMOUTH ATLAS OF HEALTH CARE, http://www.dartmouthatlas.org/ (last visited Nov. 25, 2010).

74. *Id.*

75. *See Frequently Asked Questions*, DARTMOUTH ATLAS OF HEALTH CARE, http://www.dartmouthatlas.org/gettingstarted/faq/ (noting that the Atlas "focus[es] on Medicare data").

76. Tomas J. Philipson et al., *Geographic Variation in Health Care: The Role of Private Markets*, 2010 BROOKINGS PAPERS ON ECON. ACTIVITY: SPRING 325.

to four times smaller.[77] On this model, the sensible response is to deviate away from Medicare in order to find a relatively fast way to control for differences.

A second difficulty with the Dartmouth studies is that they do not control for success. The studies on price differentials often show the costs incurred in the year before death, which can vary substantially by institutions. But in and of itself, it shows nothing until evidence is presented about the people in the different treatment centers who *live.* A cancer program that saves 60% of its patients may well cost more than one that saves only 20% of its patients. But the cost differential that seems justified by these outcomes is lost if you only look at the dead patients in both groups.

Put both of these points together, and it becomes clear that the overall estimations of health care effectiveness are very difficult to make. Yet it is an implicit assumption behind ObamaCare, like it was behind the Massachusetts system, that regulation of the private sector could eliminate its persistent and large inefficiencies in the private sector, and so too for the endemic weaknesses in the government sector. But the former is in all likelihood more efficient than was presupposed, and the latter is more difficult to correct. The false optimism of comprehensive health care reform follows from the combined impact of these two plans. But owing to the complexity of the underlying institutional arrangements, one pointed prediction is that imposing price controls on top of the current system will not improve matters in either the short or long run. It is yet another instance where the Baucus hope of smooth redistribution is so misguided.[78] The Baucus approach creates a greater level of confusion and chaos than is now in place, as everybody tries to scramble for some private advantage. Some firms will get windfalls; some will disappear in mergers and other takeovers; and still others will perish. The upshot is a demand for nationalization, now that the so-called private sector will have failed yet again.

77. *Id.* at 350–51.

78. *See Dem Senator: Health Legislation Will Address the "Mal-Distribution of Income in America," supra* note 37.

VI. SOME MECHANICS OF OBAMACARE

As with so much complex legislation, lofty objectives are often undermined by sloppy mechanics, and nowhere is that more true than with ObamaCare. I will discuss two major problem areas apart from what I have previously discussed above: first, the private insurance exchanges, and second, state involvement with Medicare and Medicaid.

A. *Private Insurance Exchanges*

The first major challenge for ObamaCare is to structure its so-called "insurance exchanges."[79] Like all exchanges, the health care exchange is not an open access regime. The only insurers entitled to join that exchange have to meet certain key requirements: for example, the kinds of coverage they have to supply, the persons to whom they must supply it, and the number and types of individuals they have to enroll. The fixes here standardize some portion of the insurance deal in ways that undermine the ability of innovative firms to gain greater market share by altering the type of coverage that they choose to supply.

Here is one example of the problem: in ordinary private markets, individual firms often specialize in particular niches where they have expertise. Some insurance companies will target the main consumer markets; others may choose to specialize in older populations or those subject to the risk of certain kinds of diseases, such as cancer or heart attacks. High-risk customers can afford huge opportunities for insurers to profit by managing risk, so long as the firm is able to charge premiums that cover both the risks that remain and the administrative costs of reducing those risks to an acceptable level. Because specialization in subpopulations is a way in which most insurance markets work, there is no reason to force all insurance companies to offer coverage in geographical regions they do not want to go or in patient populations they do not wish to cover. The secret to success in every market is the ability of a firm to

79. For my earlier account on this score, somewhat outdated by the passage of events, see Richard A. Epstein, *Impermissible Ratemaking in Health-Insurance Reform: Why the Reid Bill Is Unconstitutional*, MED. PROGRESS TODAY (Dec. 18, 2009), http://www.medicalprogresstoday.com/enewsletters/mpt_ind.php?pid=1834&nid=250.

move simultaneously on multiple margins so as to get the best mix for it and its customers. The need is to keep prices high enough to cover costs but low enough to keep and attract customers. Any and all efforts to maximize profits must be made in light of the threat of entry. Nothing concentrates the mind so well.

Now, nobody can say that this art of designing an insurance policy, or indeed a complex array of insurance policies, always succeeds. Yet by the same token, no one should ever insist on matters of system design that the best be the enemy of the good. What can be said with some confidence about these health care programs is that they do a pretty good job of mixing, matching, and monitoring. In running a health care network, it is extremely difficult to make sure that physicians perform as desired, given the manifest agency-costs problems in overseeing highly paid professionals. Every physician is going to be under constant pressure by patients who want ever more care for fixed payments that they have already made. Physicians often show personal loyalties to their patients. But every time an insurer or other health care provider lets expenses run out of control, the added costs are borne by other patients. At some point—I do not know where that point comes—the health care provider has to act like the Grinch. Profligacy will jeopardize the long-term sustainability of the health care program.

One certain road to perdition in this environment is to make a decision to honor all patient health care requests that provide some value for their patients. It is never the right question to ask whether in each instance a health care plan provides benefits greater than zero. The answer to that question is virtually always yes. The harder question for the health care provider is whether the benefit sought is greater than the cost of supplying it, for which there are no clearly quantifiable answers on either the benefit or the cost side of the equation. Thus, any successful firm has to develop very accurate internal measures and maintain strong internal controls to succeed, all of which relate to its patient base and physician pool. The ability to collect and interpret aggregate data is critical. This process necessarily requires the successful firm to take some, but not all, control over

patients out of the hands of physicians. One reason why many doctors do not like health maintenance organizations (HMOs) and insurance companies is that they use overall measurements and tested protocols to displace the judgment of individual physicians who are trained to have unwavering confidence in their own judgment.

These tasks are made vastly more complex if any health care plan is required to accept all comers,[80] without rights of refusal based on preexisting medical condition or other background risk conditions.[81] Companies are similarly subject to obligations for the guaranteed renewal of coverage[82] and are denied any rights of rescission.[83] Underwriting is thus removed by participation on the exchange, which is a de facto necessity to attract the government contribution to individual patients. At this point, a good reputation can work in reverse by leading to an oversubscription of patients whom the plan does not have the capacity to serve. Somebody has to be refused. Unfortunately, under ObamaCare, an external randomized program determines who gets accepted and who gets rejected, without regard to the way in which the composition of the patient pool may influence the costs of providing needed services. ObamaCare does not have any obvious dollar-for-dollar revenue offset even for those insurers taking on an abundance of high-cost and high-risk patients, including those with known and expensive preexisting conditions. Any firm's ability to market to discrete populations through age, sex, disease, condition, or location segmentation is heavily compromised.

And it gets even worse. While the firm has an obligation to take patients with known disabilities, the patients have no obligation to stay with the firm. The adverse selection problem thus grows by leaps and bounds. The experience under the Massachusetts law bears this out.[84] People sign

80. *See* ObamaCare § 2702 (Guaranteed Availability of Coverage).

81. *See id.* § 2704(a) ("A group health plan and a health insurance issuer offering group or individual health insurance coverage may not impose any preexisting condition exclusion with respect to such plan or coverage.").

82. *See id.* § 2793 (Health Ins. Consumer Info).

83. *See id.* § 2712 (Prohibitions on Rescissions).

84. *See* Kay Lazar, *Short-term Customers Boosting Health Costs*, BOS. GLOBE (Apr. 4, 2010), http://www.boston.com/news/local/massachusetts/articles/2010/

up just before they need major treatment, and then withdraw from the plan when their treatment is completed. The premiums cannot adjust to the risk because the implicit assumption in this market is that only insurers play questionable games in dealing with patients. But that assumption goes against the entire history of insurance law, in which the greater knowledge that insureds have of their condition imbues them with duties to disclose relevant conditions to the insurer. This authorizes insurers to write policies that protect them against this risk of adverse selection, which has individuals sign up when they know that their expected benefits will exceed their premiums.[85] The Massachusetts plan thus has the risks running in the wrong direction, which is what happens when a deep ideological priority blocks a more serious consideration of where the real risks lie.

Unfortunately, there is no effective firm response once consumer opportunism is allowed to run riot. The only way to make up the loss on problem cases is through premium hikes on well-behaved plan participants, but at this point those healthy individuals have a strong incentive to leave the pool because their risks are not sufficiently large to justify the added costs. Thus, the whole market on the private side unravels unless the state imposes heavily coercive measures on well-behaved customers. But there is no reason why the preexisting conditions have to present an insuperable obstacle to rational insurance markets. In the mid-1990s, John Cochrane of the University of Chicago Booth School of Business and I independently developed a contractual solution that relies on long-term contracts to

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04/04/short_term_customers_boosting_health_costs/ ("Thousands of consumers are gaming Massachusetts' 2006 health insurance law by buying insurance when they need to cover pricey medical care, such as fertility treatments and knee surgery, and then swiftly dropping coverage, a practice that insurance executives say is driving up costs for other people and small businesses.").

85. *See, e.g.*, Lindenau v. Desborough, 108 Eng. Rep. 1160, 1163 (1828) (Bayley, J.). In *Lindenau*, the court stated,

> I think that in all cases of insurance, whether on ships, houses, or lives, the underwriter should be informed of every material circumstance within the knowledge of the assured; and that the proper question is, whether any particular circumstance was in fact material? [sic] and not whether the party believed it to be so.

Id.

handle the problem of preexisting conditions.[86] The basic idea is as follows: In the good state of the world when you are twenty-five, like most graduate students, you go out and buy two kinds of insurance. The first kind is insurance to cover you for the present year, and the second is a different kind of insurance that gives you "bad news" coverage in the event that some bad condition should show up in your life. If an insurance carrier could keep everybody in these programs, the amount of money that an insurance carrier earns on the "bad news" portion of the premium situation should be able to cover the higher rates needed for those people with newly emergent conditions.

Note that this program gives all young people an incentive to buy insurance early. That is the exact opposite of the current situation in Massachusetts, where it pays for people to wait until they get bad news before buying insurance. However, this two-part plan only works if the companies that supply it can be sure that they can keep all the "bad news" money if their insureds decide to cancel their policy. At this point, job portability can be improved because the bad news part of the coverage can be transferred across insurers if workers change jobs. Yet the whole program will fall to pieces if healthy insureds are allowed to withdraw from the program at will, recovering their bad news premiums in full once they chose to leave the system. A viable long-term system depends on holding both insureds and their insurers to their long-term contracts. Yet once health care becomes a "right," no one has a real incentive to buy protection when healthy for the time that they become sick. Better to wait when the now-preexisting condition does not allow the insurer the right to raise premiums or exclude you from the plan. There is, sadly, a bipartisan consensus in favor of this fashionable-but-flawed view of insurance without any correlation between the risk assumed and the premiums collected.[87]

There is a lesson to be learned about the stability of insurance plans. No plan will prove to be stable if people can

86. *See* RICHARD A. EPSTEIN, MORTAL PERIL: OUR INALIENABLE RIGHT TO HEALTH CARE 138–40 (1997); John H. Cochrane, *Time-Consistent Health Insurance*, 103 J. POL. ECON. 445 (1995).

87. *See, e.g.*, *Access to Affordable Health Care*, *supra* note 34.

enter and exit at will in order to pick up subsidies that someone else has to pay. Voluntary markets may well price some people out of the market, but they surely prevent the fatal disintegration which shuts down the market. So long as no one receives a conscious cross-subsidy, people will stay in a plan that costs them less than it is worth. If their premiums are computed correctly, they no longer worry about the composition of the pool, no matter who else is in the plan. They will always look for better offers, which will come only from a company that can provide the same coverage for less, precisely as things should be in a competitive environment. The great genius of this system is that it does not matter to anyone who else has insurance from this company. But if each person has to insure the risks of others, then everyone wants to be in a pool where they receive subsidies from others, which is a simple impossibility. The moral is this: think of insurance for yourself as a right, and be prepared to have it become a duty.

These exchanges, therefore, are faced with difficulties at every turn, given that there is no pricing system that can handle the implicit subsidies given to so many individuals at one time. These exchanges could easily break down. Just because an exchange is open for business does not mean that somebody will decide to participate in it. These logistics are not easy to resolve. It will not be easy to push employers or insurers much harder. Nor can one push harder on health care providers. So it is back to the usual outcome under price controls. It is necessary to constrain prices by letting let people form queues, which dissipate some of the demand. That will happen in the United States, as it has long occurred in Canada.[88] How long the queue becomes depends on the size of the subsidies to those in need of health care. There are no easy fixes.

B. *State Involvement with Medicare and Medicaid*

The difficulties on the private side are matched by those on the public side, through Medicare and Medicaid, whose

88. *See, e.g.*, Clifford Krauss, *Long Lines Mar Canada's Low-Cost Health Care*, N.Y. TIMES, Feb. 13, 2003, at A3.

pricing structures do nothing to constrain the demand for medical services. Nobody who has looked at Medicare finances over the last ten years questions these particulars. But on the question of whether the system will become insolvent, the only question is when: 2016, 2018, or 2022? The 2010 Annual Report for the Trustees of Social Security and Medicare states officially that the passage of ObamaCare has pushed back by twelve years the date at which Medicare is anticipated to go insolvent, from 2017 to 2029.[89] It sounds, therefore, that it is possible to get blood from a stone. But the same report that makes this rosy report contains an unusual disclaimer by Richard S. Foster, its chief actuary, which reveals the exact opposite message, worth quoting in part:

> [T]he financial projections shown in this report for Medicare do not represent a reasonable expectation for actual program operations in either the short range (as a result of the unsustainable reductions in physician payment rates) or the long range (because of the strong likelihood that the statutory reductions in price updates for most categories of Medicare provider services will not be viable).[90]

Mr. Foster has put his finger on the essential difficulty. The numbers that the Medicare report relied upon are make-believe. ObamaCare included a set of cuts in reimbursement fees that are not sustainable. Congress has imposed these restrictions before but has always relented in order to keep doctors inside the system. The same scheme will play out on a grand scale under ObamaCare. Foster does give his estimate of when the system will go into debt, but without some genuine change, that date will come sooner than 2017, and certainly not later.

Medicaid is in the same dire straits. Right now it is a dominant component of most state budgets. States, such as Illinois, are consistently in arrears on their payments for nine months up to one year, simply because they cannot

89. SOC. SEC. AND MEDICARE BDS OF TRS, A SUMMARY OF THE 2010 ANNUAL REPORTS (2010).

90. RICHARD S. FOSTER, STATEMENT OF ACTUARIAL OPINION, 2010 ANNUAL REPORT OF THE BDS. OF TRS. OF THE FED. HOSP. INS. & FED. SUPPLEMENTAL MED. INS. TRUST FUNDS 282 (2010).

meet the revenue requirements.[91] No private institution can afford to wait that long for reimbursement without getting a costly interim line of credit financing, because workers and customers cannot wait that long for their repayment.

Now, what is going to happen? On Medicare, it may be possible to means-test some of the benefits, which will make a small dent in the program but not much. Right now, there are different rates for individuals in different income brackets, but those charged to the richest taxpayers are still well below cost. I do not expect that to change radically in the near future. It seems almost foolish to ask if political wisdom exists in Washington to make the hard choices. The answer, of course, is that there is none. Partisanship here is not necessary because there are few Republicans willing to call for a reexamination of the benefit structures under Medicare from the ground up. Rather, during the debate over ObamaCare, most Republicans treated the need to protect this massive subsidy for their preferred clientele as an objection to introducing a second one. What is needed is more Republicans who are prepared to look hard at the embedded cross-subsidies driving the Medicare program. What is not needed is more Democrats living under the delusion that we can afford to expand Medicare subsidies to just about everyone. In this case the intellectual rot starts at the top: knowing presidential gazes, lofty claims, and rhetorical self-confidence do not a coherent health care program make.[92] We cannot reduce deficits by first spending

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91. *See* Emma Jackson, *Tough Choices Ahead as State Fiscal Crisis Threatens Illinois' Medicaid Program*, MEDILL REPORTS (Feb. 17, 2010), http://news.medill.northwestern.edu/chicago/news.aspx?id=157156. Jackson reports,

> Medicaid liabilities roughly total $663 million, according to the Illinois Dept. of Healthcare and Family Services, and monthly payments to safety net hospitals aren't covered under the prompt pay requirements, leaving those providers out in the cold . . . . With tax revenues at a record low, Illinois has been using short-term borrowing to fix the Medicaid funding crisis.

Id.

92. *See, e.g.*, Remarks to the American Medical Association National Conference in Chicago, Illinois, 2009 DAILY COMP. PRES. DOC. 466 (June 15, 2009), *available at* http://www.gpoaccess.gov/presdocs/2009/DCPD-200900466.pdf. There President Obama stated,

> [W]e will keep this promise: If you like your doctor, you will be able to keep your doctor. Period. If you like your health care plan, you will be able to keep your health care plan. Period. No one will take it away. No

trillions of dollars in the hope that the money will materialize from economic growth that is already being stifled by the prospect of higher taxes in 2011. Nor is it possible to balance a budget by collecting taxes over ten years and spending the revenues within seven years.[93]

On the Medicaid side, matters are even more complicated because ObamaCare hopes to ramp up the payments for Medicaid recipients. It will offer some federal subsidies in the short run, but in the long run, it will be up to the states to pick up an ever larger share of the bill.[94] A convenient summary of these complex provisions is found in a complaint that Florida and other states have brought against the United States government for its encroachment on state sovereignty through the operation of this program. It is worth quoting in full, if only to illustrate the massive but unsustainable nature of this program:

> 40. The Act requires states to expand massively their Medicaid programs and to create exchanges through which individuals can purchase healthcare insurance coverage. The federal government is to provide partial funding for the exchanges, but will cease doing so after 2015. Should a state not wish to participate in the exchanges, it can opt out only if it provides coverage for uninsured individuals with incomes between 133 percent and 200 percent of the federal poverty level, a higher income level than that which would be applied for participating states under the Act. The only other way for a state to avoid the Act's requirements is to drop out of the Medicaid program, leaving millions of persons uninsured.
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> 41. Those states left with no practical alternative but to participate in the Act will have to expand their Medicaid coverage to include all individuals under age 65 with incomes up to 133 percent of the federal poverty level. The states' coverage burdens will increase significantly after 2016, both in actual dollars and in proportion to the contributions of the federal government.

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matter what. My view is that health care reform should be guided by a simple principle: fix what's broken and build on what works.

Id.

93. THE HENRY J. KAISER FAMILY FOUND., MEDICARE FACT SHEET: MEDICARE SPENDING AND FINANCING (2010), http://www.kff.org/medicare/upload/7305-05.pdf.

94. *See generally* ObamaCare § 2201 (Enrollment Simplification and Coordination with State Health Insurance Exchanges).

> 42. The federal government will not provide necessary funding or resources to the states to administer the Act. Nevertheless, states will be required to provide oversight of the newly-created insurance markets, including, inter alia, instituting regulations, consumer protections, rate reviews, solvency and reserve fund requirements, and premium taxes. States also must enroll all of the newly-eligible Medicaid beneficiaries (many of whom will be subject to a penalty if they fail to enroll), coordinate enrollment with the new exchanges, and implement other specified changes. The Act further requires states to establish an office of health insurance consumer assistance or an ombudsman program to advocate for people in the new programs.[95]

On this occasion, I do not wish to comment on the constitutional issues raised by this provision.[96] The states face a Hobson's choice. They are technically not required to participate in this program, but if they don't, they will be forced to take up insurance without federal assistance for many of their neediest residents. Correspondingly, their citizens will be forced to pay into the federal treasury to support Medicaid payments to citizens in other states. So companies have to stay in, but the denial of an effective exit right does not put the needed dollars in the state to cover these onerous obligations. The specter of large pensions for public employees is not some abstract danger down the road. It is a present reality for the many major states forced to slash other programs relating to social services and education at both the K-12 and university level.[97] There is only so long that anyone can pretend that fiscal woes at one level of government can be cured by payments from some other level of government. If federal, state, and local governments all face serious problems with bloated public budgets, none can lend a boost to any of the others. The only interesting question is not whether any of these ships can

95. Complaint at 10–11, Florida v. Dep't of Health & Human Servs., No. 3:10-cv-91 (N.D. Fla. Mar. 23, 2010).

96. *See* Richard A. Epstein, *ObamaCare's Phony Medicaid 'Deal': The New Health Law Unconstitutionally Coerces the States*, WALL ST. J., May 10, 2010, at A15.

97. *See, e.g.*, *N.J. Gov. Chris Christie's Budget Is Expected to Slash School Funds by $820M*, NJ.COM (Mar. 15, 2010), http://www.nj.com/news/index.ssf/2010/03/nj_school_officials_budget_cut.html.

right themselves under their current burdens. It is the sadder question: which of these ships will sink first, and will it bring down others in the undertow?

VII. CONCLUSIONS: NEGATIVE SYNERGIES

We can now see the combined effect of ObamaCare on the public and private sides. The private insurance market is likely to implode under the combined weight of mandates and price constraints, which will hit hardest at the small and individual market. These market segments are likely going to prove unsustainable without subsidies, and probably unsustainable even with subsides. But pushing these people into the public sector will not work, given the antiquated structure and shaky finances of both Medicare and Medicaid, neither of which is designed for universal coverage. But other sources of revenue are not available unless large segments of the economy are reformed, starting with bloated public pensions. Reform, therefore, will be a horrific struggle as it turns out that the only sacred contractual obligations in the eyes of some courts are those which states enter into with their unions. At bottom, these are only disguised multiperiod transfer payments from ordinary taxpayers to union retirees overpaid by a factor of two or three. To use the sanctity of contract argument to protect bloated payments resulting from self-dealing is the wrong way to go.

We can thus see the real dilemma, which explains why *Bleak Prospects* is an appropriate title for this Article. The health care problem cannot be cured on the backs of other institutions. Yet at present, there is no real willingness on the part of either political party to rethink this problem from the ground up. There is no easy way to handle this question if we try to regulate the terms and conditions of medical service in great detail. The more promising alternative is to find ways to provide relatively modest cash transfers to people on a need-basis to supplement the purchase of private health care insurance. Such an approach is exemplified by the program that Governor Mitch Daniels has implemented

in Indiana,[98] targeting individuals in need of assistance while ineligible for Medicaid.

Without a detailed analysis of the Indiana program, it should be sufficient to point out the philosophical orientation that animates its differences from the federal approach. ObamaCare starts from the assumption that private markets cannot work without heavy government oversight, which it imposes with ruinous consequences. In contrast, the Daniels program starts with the assumption that markets work well and then seeks to make modest wealth transfers to level access to health care, without trying to rework the system from the ground up. It adheres far more closely to the maxim of "redistribution last."

Of course, the Indiana program is not pure laissez-faire, which might in fact be the better alternative if building a system up from the ground floor. But for these purposes, it is sufficient to point out that in a head-to-head comparison, in the early going, Indiana beats Massachusetts in a landslide. The only real question is whether intelligent reform at the state level can survive foolish regulation at the federal level. No one knows the answer to that question. But it is being becoming increasingly clear that the passage of ObamaCare has not ended the debate over health care reform in the United States. Perhaps the silver lining is that ObamaCare is so bad that it may not survive the rout of the Democrats in the November 2010 midterm elections. After all, as Rahm Emanuel once said, a crisis is too important to waste.[99]

98. *See* Paul Howard, *Will ObamaCare Kill Indiana's Promising Experiment in Health-Care Reform?*, IDEAS IN ACTION (Aug. 4, 2010), http://www.ideasinactiontv.com/tcs_daily/2010/08/will-obamacare-kill-indianas-promising-experiment-in-health-care-reform.html.

99. *See* Gerald F. Seib, *In Crisis, Opportunity for Obama*, WALL ST. J., Nov. 21, 2008, at A2.

SOMALI PIRATES: AN EXPANSIVE INTERPRETATION OF HUMAN RIGHTS

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I. INTRODUCTION

Sometimes a complex issue can be captured in a few very simple words: "Prosecuting suspected pirates detained in international waters has proved difficult."[1] And according to Douglas Burnett, an expert in maritime law, pirates are treated with a "catch and release philosophy that's usually reserved for trout."[2] Indeed, despite the fact that there has been a considerable increase in piracy in the Gulf of Aden and Indian Ocean as of 2007—Somali pirates have taken hundreds of hostages, terrorized commercial and recreational shipping, and imposed a considerable economic burden on seafaring—the majority of pirates who capture hostages were paid off, and even when caught, they were not detained or prosecuted.[3] Few pirates have been confronted and killed.[4]

These observations are puzzling, given that piracy has been considered for centuries a very serious offense by most, if not all, nations and pirates were regularly killed or executed after, at most, a rather perfunctory hearing by the captain of the ship that captured them. As is often the case, more than one factor helps explain these observations, such as the vastness of the area involved. This Essay focuses on one set of factors—the effects of the interpretation of the human rights extended to pirates in recent decades.

The main thesis of this Essay is that the human rights extended to these pirates were at least initially interpreted in such an expansive way that they prevented proper attention to two basic common goods: the safety and livelihood of civilians and the right to freedom of navigation in international waters. In this way, the expansive

1. Sarah Childress, *U.S. Holds Suspects After Pirate Standoff*, WALL ST. J., Apr. 2, 2010, at A11.

2. *All Things Considered: U.S. Navy Captures Pirates* (NPR radio broadcast Apr. 1, 2010), *transcript available at* http://www.npr.org/templates/story/story.php?storyId=125468411 (reporting that Burnett said this).

3. *See, e.g.*, Corey Flintoff, *Prosecuting Pirates: No More Walking the Plank*, NPR (Jan. 9, 2010), http://www.npr.org/templates/story/story.php?storyId=99169738 (discussing the difficulties of prosecuting captured pirates).

4. *Id.*

interpretation of human rights violated what responsive communitarians consider a legitimate balance between rights and public safety.[5] Moreover, this interpretation of human rights undermines the rights' normativity.

In effect, one can see a parallel between the expansive interpretation of human rights in the case at hand and the expansive interpretations of individual rights in the 1980s. In the 1980s, following vastly overdue and highly justified extension of de jure and de facto rights to minorities, women, handicapped persons, and others, came some trivial extensions of rights that undermined their standing. Telling examples include the claim that the right to play Santa Claus was violated by Macy's when it refused to re-engage a person who had previously played Santa Claus but had started taking psychotropic medications.[6] And, in Santa Monica, a feminist argued that a city ordinance limiting restroom use to the gender noted on the restroom door—unless there were more than three people in line in the women's restroom, at which point a woman could use the men's room—infringed on women's rights, for it restricted their ability to use any bathroom any time.[7] At that time, Mary Ann Glendon's book *Rights Talk* spelled out the damage caused by excessively expanding the otherwise cardinal and valuable precept of rights.[8] The key argument here advanced is not that pirates are without rights but that the interpretations of these rights have been expanded to the point that it undermines the rights of all other persons and corrodes the rights themselves. Additionally, the rights enjoyed by pirates must be balanced against concerns for the common good.

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5. *See generally* Amitai Etzioni, *Too Many Rights, Too Few Responsibilities*, *in* TOWARD A GLOBAL CIVIL SOCIETY 99, 99–105 (Michael Walzer ed., 1995) (discussing broadly a balance between rights and public safety).

6. David Margolick, *Man With AIDS Virus Sues To Be a Macy's Santa Again*, N.Y. TIMES, Aug. 29, 1991, at B1 (reporting that the man here described filed a discrimination claim, contending that Macy's denied him the position on the basis of his HIV-positive status and that Macy's fear of his Prozac use was unfounded and a smokescreen).

7. Nancy Hill-Holtzman, *Santa Monica OKs Restroom Law*, L.A. TIMES, Nov. 14, 1991, at ME3; Robert Reinhold, *Santa Monica Journal; In Land of Liberals, Restroom Rights Are Rolled Back*, N.Y. TIMES, Nov. 15, 1991, at A14.

8. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

Others have called attention to the expansive interpretations of pirates' rights and the antisocial results. Eugene Kontorovich, a law professor at Northwestern University, wrote:

> While international law has developed to include many new crimes, the successful prosecution of piracy has grown more difficult than it was in the age when ships were powered by sails. Although international law obligates nations to repress piracy, many legal rules, practical constraints, and other considerations pull states in the opposite direction.[9]

Others have called the treatment of pirates' rights the equivalent of granting "'a get out of jail card.'"[10] John Bolton, a former permanent U.S. representative to the United Nations, added that "due process is only that process that is due, and the pirates have already had more than enough."[11]

Pirates, in recent years, have not been confronted aggressively, and many times, even when they have been caught, they have simply been released. For example, in May 2009, Portuguese forces found dynamite, automatic rifles, and rocket-propelled grenades on the mother ship of pirates they had chased away from seeking to board a German tanker. The Portuguese merely disarmed the pirates and set them free.[12] Danish forces set ten suspected pirates free in September 2008.[13] Canadian forces pursued and then boarded a pirate vessel in April 2009, confiscated the weapons they found, and let the pirates go.[14] In April 2009, Dutch forces even set pirates free who had been holding hostages onboard a ship.[15] In November 2009, Greek

9. Eugene Kontorovich, *"A Guantanamo on the Sea": The Difficulties of Prosecuting Pirates and Terrorists*, 98 CALIF. L. REV. 243, 256 (2010).

10. John S. Burnett, *Captain Kidd, Human-Rights Victim*, N.Y. TIMES, Apr. 20, 2008, at WK12.

11. John Bolton, *A 'World Turned Upside Down'? U.S. Now a Judicial Target for Defending Lawful Commerce*, WASH. TIMES, Apr. 17, 2009, at A21.

12. *Piracy: Wrong Signals,* ECONOMIST, May 9, 2009, at 62.

13. Oliver Hawkins, *What to Do with a Captured Pirate,* BBC NEWS (Mar. 10, 2009), http://news.bbc.co.uk /2/hi/in_depth/7932205.stm.

14. Alison Bevege, *Somali Pirates Nabbed, Released by Canadian Frigate,* CANADA.COM (Apr. 19, 2009), http://www2.canada.com/topics/news/story.html?id=1512697.

15. *Dutch Forces Free Pirate Captives,* BBC NEWS (Apr. 18, 2009), http://news.bbc.co.uk/2/hi/africa/8005730.stm.

forces captured pirates who were believed to have attacked a French cargo ship; the pirates were released within a week.[16] In April 2010, U.S. naval forces captured eleven pirates, ensured that they "had no means to conduct any more attacks," and destroyed their mother ship but then released them onto two small skiffs.[17] *The Sunday Times* reported that between August 2008 and September 2009, 343 suspected pirates were captured, disarmed, and released, compared to the 212 who were held for prosecution.[18] In numerous other cases, pirates were simply paid to let their hostages go.[19]

Since 2007, pirates have acted with considerable impunity. In 2007 alone, 433 seafarers were either taken hostage, assaulted, injured, or killed by Somali pirates.[20] In 2008, the incidents of piracy off the Horn of Africa doubled, and pirates attacked 135 ships, seized forty-four, and took more than 600 seafarers hostage.[21] The trend continued though 2009; as of the year's end, pirates had attacked 200 ships, successfully seizing over forty and taking at least 679 seafarers hostage.[22] In exchange for the release of some of

16. Jon Ungoed-Thomas & Marie Woolf, *Navy Releases Somali Pirates Caught Red-Handed*, TIMES ONLINE (Nov. 29, 2009), http://www.timesonline.co.uk/tol/news/world/africa/article6936318.ece.

17. Commander, Combined Maritime Forces Public Affairs, *Combined Maritime Forces Flagship Intercepts Somali Pirates*, NAVY.MIL (Apr. 2, 2010), http://www.navy.mil/search/display.asp?story_id=52370.

18. Ungoed-Thomas & Woolf, *supra* note 16.

19. *See, e.g.*, *Report: Somali Pirates Release SKorean Ship*, ASSOCIATED PRESS (Nov. 6, 2010), http://www.google.com/hostednews/ap/article/ALeqM5iPkCAL7ghy26OqicdqrEOnQx0d6g?docId=f8a35bde92904468a359fffed1fb0947 (reporting that pirates were paid to release a South Korean supertanker).

20. Burnett, *supra* note 10.

21. *Piracy in Waters Off the Coast of Somalia*, INT'L MAR. ORG., http://www.imo.org/home.asp?topic_id=1178.

22. *Reports on Acts of Piracy and Armed Robbery Against Ships: Issued Monthly—Acts Reported During December 2009*, INT'L MAR. ORG., 3, 6–7 (Jan. 26, 2010), http://www.imo.org/includes/blastData.asp/doc_id=12379/147.pdf; *Reports on Acts of Piracy and Armed Robbery Against Ships: Issued Monthly—Acts Reported During November 2009*, INT'L MAR. ORG., 3, 7–10 (Jan. 26, 2010), http://www.imo.org/includes/blastData.asp/doc_id=12378/146.pdf; *Reports on Acts of Piracy and Armed Robbery Against Ships: Issued Monthly—Acts Reported During September 2009*, INT'L MAR. ORG., 9–10 (Jan. 12, 2010), http://www.imo.org/includes/blastData.asp/doc_id=12298/143.pdf; *Reports on Acts of Piracy and Armed Robbery Against Ships: Issued Monthly—Acts Reported During October 2009*, INT'L MAR. ORG., 3, 7–8 (Jan. 12, 2010), http://www.imo.org/includes/blastData.asp/doc_id=12299/145.pdf; *Reports on Acts of Piracy and Armed Robbery Against Ships: Issued Monthly—Acts Reported During August 2009*, INT'L MAR. ORG., 5 (Oct. 10, 2009),

ships and hostages, pirates took in as much as $120 million in 2008[23] and an estimated $100 million in 2009.[24] 2010 appears to be unfolding in a similar manner. Between January and September 2010, pirates hijacked more than thirty ships and netted tens of millions of dollars in ransom; they are on track to have "another banner year."[25]

Thousands of employees on commercial ships peacefully navigating the high seas, some carrying food, aid, and medical supplies to war-torn zones of Africa, now must fear that they may be kidnapped by armed men and injured, killed, or held hostage for months, if not years. The obvious question is, given that security is the first duty of every state, why have the nations of the world not responded more forcefully to this threat? This Essay focuses on a subquestion: what role did an expansive interpretation of pirates' human rights play in preventing legitimate and effective peacekeeping in this area?

Part II of this Essay deals briefly with the historical background and current status of piracy in international law, pointing to the fact that piracy has been considered for centuries a universal crime of great severity and is only paralleled in the modern law of the high seas by prohibitions on the transport of slaves. Part III discusses the problems

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http://www.imo.org/includes/blastData.asp/doc_id=11909/142.pdf; *Reports on Acts of Piracy and Armed Robbery Against Ships: Issued Monthly—Acts Reported During July 2009,* INT'L MAR. ORG., 3, 5 (Oct.10, 2009), http://www.imo.org/includes/blastData.asp/doc_id=11908/141.pdf; *Reports on Acts of Piracy and Armed Robbery Against Ships: Issued Monthly—Acts Reported During June 2009,* INT'L MAR. ORG., 3, 7–8 (July 7, 2009), http://www.imo.org/includes/blastDataOnly.asp/data_id%3D25980/138.pdf; *Reports on Acts of Piracy and Armed Robbery Against Ships: Issued Monthly—Acts Reported During May 2009,* INT'L MAR. ORG., 3, 7–11 (June 17, 2009), http://www.imo.org/includes/blastDataOnly.asp/data_id%3D25979/137.pdf; *Reports on Acts of Piracy and Armed Robbery Against Ships: Issued Monthly—Acts Reported During April 2009,* INT'L MAR. ORG., 3–6, 9–13 (May 5, 2009), http://www.imo.org/includes/blastDataOnly.asp/data_id%3D25553/136.pdf; *Reports on Acts of Piracy and Armed Robbery Against Ships: Issued Monthly—Acts Reported During February 2009,* INT'L MAR. ORG., 3, 7–9 (Apr. 22, 2009), http://www.imo.org/includes/blastDataOnly.asp/data_id%3D25551/134.pdf; *Reports on Acts of Piracy and Armed Robbery Against Ships: Issued Monthly—Acts Reported During March 2009,* INT'L MAR. ORG., 3, 5–10 (Apr. 6, 2009), http://www.imo.org/includes/blastDataOnly.asp/data_id%3D25552/135.pdf.

23. Jeffrey Gettleman, *Pirates Outmaneuver Warships Off Somalia,* N.Y. TIMES (Dec. 15, 2008), http://www.nytimes.com/2008/12/16/world/africa/16pirate.html.

24. *Somalia's Pirates: A Long War of the Waters,* ECONOMIST, Jan. 9, 2010, at 47.

25. Jeffrey Gettleman & Eric Schmitt, *U.S. Marines Free Ship and Capture Somali Pirates without Bloodshed,* N.Y. TIMES, Sept. 10, 2010, at A4.

that arise from the status of pirates as civilians. Part IV deals with the various international human rights interpretations that have greatly limited an effective response to the increase in piracy from 2007–2010. Part V introduces responsive communitarian ideas that call for balancing rights with concerns for the common good—in the case at hand, elementary safety on the high seas.

II. PIRACY: A MAJOR CRIME

For centuries, maritime piracy has been considered a universal crime of great severity. As far back as 1615, British courts had determined that pirates were *hostis humani generis*[26]—an enemy of all mankind.[27] Judges in U.S. courts have made similar statements in past centuries.[28] As noted in one eighteenth-century law book, pirates captured on the high seas where it was not possible to obtain a legal judgment were subject to summary execution.[29] Captain Andres Breijo, the Spanish naval officer in Operation Atalanta, the EU's antipiracy mission, commented, "'In the old days, when the navy would catch a pirate, they would tie his hands and feet and throw him back in the sea' . . . ."[30]

Piracy is a crime subject to universal jurisdiction: any state, regardless of whether or not it has any claim or connection to the property, perpetrators, or victims, may detain and prosecute suspected pirates.[31] With regard to Somalia in particular, the UN Security Council (SC) has

26. R v. Marsh, (1615) 81 Eng. Rep. 23 (K.B.).

27. Sanford Levinson, *"Precommitment" and "Postcommitment": The Ban on Torture in the Wake of September 11*, 81 TEX. L. REV. 2013, 2017 (2003).

28. United States v. Brig Malek Adhel, 43 U.S. 210, 232 (1844); United States v. Smith, 18 U.S. 153, 156 (1820).

29. JACOB GILES, A NEW LAW-DICTIONARY 525 (8th ed. 1762).

30. Justin Stares, *Pirates Protected From EU Task Force by Human Rights,* TELEGRAPH (Nov. 1, 2008), http://www.telegraph.co.uk/news/worldnews/africaandindianocean/somalia/3363258/Pirates-protected-from-EU-task-force-by-human-rights.html.

31. United Nations Convention on the Law of the Sea art. 100, 105, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. The modern view of piracy in international law is found in the United Nations Convention on the Law of the Sea (UNCLOS). UNCLOS proclaims that all states have a "duty to cooperate in the repression of piracy" and grants permission for every state to seize pirates and their ships and use their domestic courts to determine which actions to take with regard to penalties and property. *See also* United States v. Shi, 525 F.3d 709 (9th Cir. 2008), *cert denied*, 129 S. Ct. 324 (2008).

adopted five resolutions under Chapter VII of the UN Charter to aid in the capture of pirates off the Horn of Africa. In June 2008, with the consent of the Somali government, the SC passed Resolution 1816, which recognizes that states may conduct antipiracy operations within Somali territorial waters.[32] A few months later, in October, the SC passed Resolution 1838, which called upon states with ships or airplanes in the area "to use on the high seas and airspace off the coast of Somalia the necessary means . . . for the repression of acts of piracy."[33] On December 2, the Security Council adopted Resolution 1846, which encouraged states "to cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia, consistent with applicable international law including international human rights law."[34] Lastly, when Resolution 1816 expired in December 2008, the SC passed Resolution 1851, which called upon states to deploy military aircraft and naval vessels to the area and authorized states to "undertake all necessary measures that are appropriate *in Somalia*" to suppress "acts of piracy and armed robbery at sea."[35] The resolution was adopted for the period of a year and explicitly approved military raids on Somali land "to interdict those using Somali territory to plan, facilitate or undertake" maritime piracy.[36]

Thus, unlike in more controversial international interventions, including armed humanitarian interventions such as in Kosovo and Sudan, the international law pertaining to the capture and trial of the Somali pirates enjoys a broad consensus and a clear framework, and both

32. S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008).

33. S.C. Res. 1838, ¶ 3, U.N. Doc. S/RES/1838 (Oct. 7, 2008). Security Council Resolution 1844, which is not discussed in this section, places targeted sanctions on individuals or entities "engaging in or providing support for acts that threaten the peace, security or stability of Somalia" or "obstructing the delivery of humanitarian assistance to Somalia, or access to, or distribution of, humanitarian assistance in Somalia." S.C. Res. 1844, ¶ 8, U.N. Doc. S/RES/1844 (Nov. 20, 2008).

34. S.C. Res. 1846, ¶ 14, U.N. Doc. S/RES/1846 (Dec. 2, 2008).

35. S.C. Res. 1851, ¶ 6, U.N. Doc. S/RES/1851 (Dec. 16, 2008) (emphasis added).

36. Press Release, U.N. Sec. Council, Security Council Authorizes States to Use Land-Based Operations in Somalia as Part of Fight Against Piracy Off Coast, Unanimously Adopting 1851 (Dec. 16, 2008), *available at* http://www.un.org/News/Press/docs/2008/sc9541.doc.htm.

the crime itself and the perpetrators of the crime are relatively easily identified. Given the clear and present danger posed by pirates, and the extensive normative and legal background regarding the ways they ought to be treated, one would expect that there would be few if any obstacles to establishing secure passage for all.[37]

III. PIRATES, CIVILIAN STATUS, AND CIVILIAN RIGHTS

In a sort of replay of the debate concerning the rights of suspected terrorists and insurgents—which focused on whether they should be treated like criminals or POWs[38]—the question arises whether pirates should be treated as civilians, with all the rights thereof, as unlawful combatants, or in some other way.

A. *Procedural Rights of Free Nations in Domestic Courts*

There is no international court with the jurisdiction to try pirates, and by the framework set forth in the United Nations Convention on the Law of the Sea, pirates are to be prosecuted in the domestic courts of whatever nation seizes them.[39] Thus, pirates are currently treated as if they are entitled to trial in a civilian criminal court, and they are granted the full panoply of criminal procedural rights of the citizens (and residents) of the particular country in which they are tried.

Given that piracy occurs on the high seas, the nature of the confrontations often involved, and the absence of police or other law-enforcement agents, adhering to this approach is highly problematic.

For example, collecting evidence on the high seas that will hold up in a criminal court is often impractical. In March 2009, the U.S. Navy released nine suspected pirates, as the

37. This reference is to legal and normative issues because this Essay does not deal with operational and logistical problems, such as the difficulties imposed by the large size of the area involved or that warships no longer have brig facilities. *See* James Kraska & Brian Wilson, *Fighting Pirates: The Pen and the Sword*, WORLD POL'Y J., Winter 2008/09, at 46.

38. *See generally* PHILLIP BOBBITT, TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY (2008); BENJAMIN WITTES, LAW AND THE LONG WAR (2008); Amitai Etzioni, *Terrorists: Neither Soldiers nor Criminals*, MIL. REV., July–Aug. 2009, at 108, 108–09 (discussing whether terrorists should be treated like criminals or soldiers).

39. UNCLOS art. 105.

evidence against them was "not ironclad," in part due to their nighttime capture.[40] In November 2009, Belgian Commander Jan De Beurme described rushing to the scene of a pirate attack only to see the suspects in the skiff throw things overboard.[41] Left without evidence, the commander held that he was forced not only to set the suspected pirates free but to also fix their broken engine.[42] And the evidence that is collected is difficult to segregate and sequester in order to meet the standards of noncontamination and the evidentiary chain of custody required by law.[43] Nor can one expect that those under attack will read pirates their Miranda rights—and ask them if they understood them—before the pirates blurt out any information that might be used against them in a court of law. Providing merchant ships with the personnel or training required to collect fingerprints, DNA, and other such evidence adds a burden for ships that are often stuffed with low-paid sailors from developing nations. (Nor it is clear that training merchant-ship personnel in such matters would be useful, as they are civilians and not law-enforcement personnel.)

In one case, FBI agents were flown to the scene to help collect evidence, but this is often not practical; even these agents may have a hard time collecting evidence under the circumstances.[44] U.S. Coast Guard law-enforcement detachments have been assigned to a Navy task force "to help collect and train ship-boarding team members in the best methods of collecting prosecutable evidence."[45] Also, the U.S. Naval Criminal Investigative Service has special agents assigned to Combined Task Force-151 who "conduct

40. Kate Wiltrout, *Nine Suspected Pirates Set Free; Others Could Face Trials*, VIRGINIAN-PILOT (March 3, 2009), http://hamptonroads.com/2009/03/nine-suspected-pirates-set-free-others-could-face-trials.

41. Will Ross, *Drones Scour the Sea for Pirates*, BBC NEWS (Nov. 10, 2009), http://news.bbc.co.uk/2/hi/8352631.stm.

42. *Id.*

43. *See, e.g.*, FED. R. EVID. 901; United States v. Dent, 149 F.3d 180, 188 (3d Cir. 1998) (citing United States v. Kelly, 14 F.3d 1169, 1175 (7th Cir. 1994)); United States v. Howard-Arias, 679 F.2d 363, 366 (4th Cir. 1982).

44. Serge F. Kovaleski et al., *Talks Break Down in Standoff with Pirates*, N.Y. TIMES, Apr. 12, 2009, at A12.

45. Jacquelyn S. Porth, *Legal Experts Take Action to Prosecute Pirates*, AMERICA.GOV, (Feb. 27, 2009), http://www.america.gov/st/peacesec-english/2009/February/20090227144346sjhtrop0.3818781.html.

interviews of suspects and witnesses and coordinate with lawyers and foreign law enforcement."[46]

Consider that even under the less-demanding tribunals that terrorism suspects face, the evidence, often obtained on the battlefield, frequently does not meet the tribunals' standards. Military prosecutors have estimated that under the Military Commissions Act they have enough evidence to be able to bring to trial, at best, only eighty Guantanamo detainees.[47] Domestic criminal courts' evidentiary standards are higher, and hence, even more difficult to meet.[48]

All of this means that of those pirates who are detained and turned over to legal authorities, the majority are "unlikely to ever stand trial primarily due to a lack of available evidence and substantial legal hurdles."[49] This seems to be one reason pirates are released rather than detained and prosecuted—and continue to terrorize the high seas.

A recent example illustrates the difficulty of prosecuting pirates in U.S. courts. On April 10, 2010, a skiff fired a shot at a U.S. Navy vessel, which returned fire and destroyed the skiff. One man was killed and the remaining six were arrested on piracy charges. The defense argued that the U.S. Supreme Court had defined piracy in 1820 as "robbery at sea" and thus the men's actions did not meet this definition. The judge in the case, Raymond A. Jackson, threw the piracy charges out, concluding that the government "failed to establish that any unauthorized acts of violence or aggression committed on the high seas constitutes piracy."[50]

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46. *Id.*

47. *Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Benjamin Wittes, Fellow and Research Director in Public Law, The Brookings Institution), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=3390&wit_id=7214.

48. *See* Michael B. Mukasey, *The Obama Administration & the War on Terror*, 33 HARV. J.L. & PUB. POL'Y 953, 959 (2010) (arguing that trials at Guantanamo were "governed by rules of evidence whose touchstone for admissibility is simply relevance and apparent reliability, rather than conformity to all the technical rigors of the Federal Rules of Evidence."). *Compare* Military Commissions Act of 2009, 10 U.S.C.A. § 949a (West 2010), *with, e.g.*, FED. R. EVID. 801–04.

49. Richard Meade, *In the Dock: The Problems with Prosecuting Pirates*, LLOYD'S LIST, May 1, 2009.

50. John Schwartz, *Somalis No Longer Face Federal Piracy Charges*, N.Y. TIMES, Aug. 18, 2010, at A16.

It is difficult to understand why taking steps to commit a crime—punishable in other areas of conduct from bank robberies to murder, albeit less severely than if the crime has been actually committed—does not apply to piracy, long considered a major offense worldwide.

B. *A Matter of Jurisdiction: Military Pursuit of Civilian Criminals?*

As pirates are treated as civilians but function beyond any nation's territory, at least one nation has found it difficult to deal with them. Germany was caught in a new catch-22: the German police were not equipped to combat pirates off the coast of Somalia, but the military, which does have the capability to do so, was at first prevented from dealing with them because pirates are considered to be civilians. Walter Kolbow, a member of the Social Democratic Party, contended that "according to our understanding of the law, police officers but not soldiers may arrest criminals."[51] Other Germans feared that allowing the German navy to take on police duties would open the floodgates for military actions against civilians in Germany. The debate in the German parliament over the response to piracy off the coast of Somalia lasted for the better part of 2008, despite German ships having been attacked and German citizens having been taken hostage on multiple occasions in early to mid-2008.[52] While the German parliament debated the matter, a German naval vessel participating in Operation Enduring Freedom was unable to do anything but provide assistance to ships in emergencies,[53] which in practice meant that the navy could chase away pirates who were engaged in an attack but could not pursue them if they backed down, catch

51. *The Law and the High Seas: Germany Looks to Battle Pirates*, SPEIGEL ONLINE INT'L (Nov. 21, 2008), http://www.spiegel.de/international/germany/0,1518,591891,00.html.

52. *See Berlin Looks at Ways to Battle Somali Kidnappers*, SPEIGEL ONLINE INT'L (June 26, 2008), http://www.spiegel.de/international/germany/0,1518,562204,00.html; *Somali Pirates Demand $2 Million Ransom for German Hostages*, DEUTSCHE WELLE (Jan. 7, 2008), http://www.dw-world.de/dw/article/0,,3453015,00.html; *Somali Pirates Release German, Japanese Ships: Maritime Group*, AFP (Sept. 11, 2008), http://afp.google.com/article/ALeqM5jVT4IZcmwMTPVm1yw2hKbb7Aqm-g.

53. *See Berlin Looks at Ways to Battle Somali Kidnappers*, *supra* note 52.

them, or detain them—let alone shoot them.[54] This situation changed in December 2008 when the German parliament voted to deploy troops as part of the EU's Operation Atalanta, authorizing the use of force to suppress piracy.[55] However, the ambiguities involved continued to hobble German (and other nations') antipiracy operations. This was one reason, among others, that Germany's GSG-9 federal police unit, which is trained to handle hostage situations, was recalled in 2009 when it set out to free hostages held by pirates off the coast of Somalia.[56]

A new understanding of the legal status of pirates may be called for, as it is for terrorists. Currently, pirates are often treated as if they are entitled to all the rights of the citizens of whatever nation captures or contends with them on the high seas, which in turn is one more reason they are rarely deterred and, in effect, prosper.[57]

IV. RIGHTS DERIVED FROM INTERNATIONAL LAW

A. *Imminent Danger*

For some of those untutored in legal matters, the best way to deal with pirates may be to shoot them on sight. After all, modern maritime pirates are much like armed intruders who break into one's home. Some have warned against such a response on pragmatic grounds—Somali pirates have been careful not to harm their hostages, as long as they were not confronted. Arming merchant ships might lead to an escalation of violence, and many ports do not allow firearms aboard civilian vessels in port.[58] And while warships and other government-authorized vessels do have a right to defend themselves and others through the use of deadly

54. *German Navy Inspector Discusses Expansion of Navy Powers to Combat Piracy*, BBC MONITORING EUROPEAN, Apr. 28, 2008.

55. Press Release, EU NAVFOR, German Bundestag Decides on German Atalanta Mandate (Dec. 19, 2008), *available at* http://www.eunavfor.eu/2008/12/german-bundestag-decides-on-german-atalanta-mandate.

56. *Are German Anti-Pirate Forces Hampered by Bureaucrats?*, SPEIGEL ONLINE INT'L (May 14, 2009), http://www.spiegel.de/international/germany/0,1518,624908,00.html.

57. Flintoff, *supra* note 3.

58. *See, e.g.*, *Port of Pascagoula Tariff*, PORT OF PASCAGOULA, http://www.portofpascagoula.com/sectionI.html (stating the prohibition of weapons on any port property).

force if attacked, military personnel are expected to detain and try pirates if possible, rather than to kill them.[59] This expectation is in line with the domestic policy in democratic society according to which law enforcement officers are often criticized when they discharge their firearms when they could have instead arrested a criminal or convinced him to surrender. Thus, when pirates captured and held hostage Captain Richard Philips on board the Maersk Alabama, President Obama granted the authority for the Navy to use force only if the captain was in "imminent danger."[60] Indeed, the three pirates were shot and killed only when one of them aimed an AK-47 at the hostage.[61]

It should be noted that such criteria maximize danger to the hostage and minimize risk for the hostage takers. This is the case because the pirates could have easy killed the captain out of sight or the snipers may not have been able to shoot the pirates in the split second it takes to kill an unarmed hostage. Moreover, the pirates were increasingly on edge after the captain tried to escape, the USS Bainbridge closed in, and their food, water, and fuel supply dwindled.[62] To limit killing the pirates to visible imminent danger is to set a high price on the human rights of pirates at the expense of the rights of the hostage.[63]

One may argue that there is nothing expansive about the imminent danger standard. The use of force in maritime law enforcement is a well-established customary international standard.[64] All across the globe, this standard is reflected in domestic police force policies (including the U.S.).[65] However,

59. DEP'T OF THE ARMY, F-M 27-10, THE LAW OF LAND WARFARE app. at A-1 (1956) ("The law of war . . . requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes . . . .").

60. Robert D. McFadden & Scott Shane, *Navy Rescues Captain, Killing 3 Pirate Captors,* N.Y. TIMES, Apr. 13, 2009, at A1.

61. *Id.*

62. *Id.*

63. *See* Universal Declaration of Human Rights art. 3, art. 6, G.A. Res. 210, U.N. GAOR, 3rd Sess. (1948) ("Everyone has the right to life, liberty and security of person.") ("Everyone has the right to recognition everywhere as a person before the law.").

64. Patricia Jimenez Kwast, *Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Suriname Award,* 13 J. CONFLICT & SECURITY L., 49, 56 (2008).

65. *See, e.g.*, 14 U.S.C. § 89 (2006) (granting the use of force for maritime law enforcement to the United States Coast Guard).

the balance between the security of the civilians on ships peacefully negotiating the high seas—and the rights of pirates (and terrorists)—Is not cast in stone. Throughout legal history, this balance has been re-examined and revised. Given the ease with which pirates operate, it deserves another round of re-examination.

B. *Asylum and Extradition*

Another source of legal difficulties in confronting pirates results from asylum and extradition laws. First, if a European nation brings a Somali pirate to its shores for trial, the pirate may be able to remain in the country under asylum laws. At least by the laws of EU countries, a person need not show that he had been specifically targeted in his country of origin; it suffices to show that there is enough indiscriminant violence taking place in the applicant's place of origin that he would face a real risk of his life being in danger if he were returned.[66] It is a standard, authorities fear, pirates may meet and one reason they fear bringing pirates to their shores.

That they may qualify for asylum is not an idle legal speculation. In the 1995 case *Chahal v. The United Kingdom*, the European Court of Human Rights ruled that Article 3 of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) provides that where there are substantial grounds for believing the deportee would be at risk of torture, "his conduct cannot be a material consideration."[67] Thus, pirates cannot be shipped back to Somalia if they can show that they may be tortured in that country.

Given these rules concerning asylum and Somalia's current political situation—ongoing attacks from the Al Shabaab insurgents that control Kismaayo and the deep south and the sporadic fighting between Puntland and Somaliland—the British Foreign Office, has decided that in order to prevent the possibility that captured pirates could

66. Case C-465/07, Elgafaji v. Staatssecretaris van Justitie, 2 C.M.L.R. 45 (2009).

67. Chahal v. United Kingdom, 22 Eur. Ct. H.R. 413 (1996).

claim asylum in the UK, the Royal Navy should refrain from bringing pirates to trial in the UK.[68]

Furthermore, states that capture pirates but that are, like the UK, either unwilling or unable to prosecute them domestically are effectively barred from extraditing the pirates to Somalia for trial by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the ECHR. Article 3 of the CAT states "No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[69] Under Sharia, which is applied in varying degrees throughout Somalia,[70] the pirates could face very severe punishments, which would constitute torture under international law and under the domestic laws in many of the patrolling countries.[71]

Furthermore, Article 3 of the ECHR bars torture and inhuman or degrading treatment or punishment,[72] and while it does not explicitly state a prohibition on extraditing a person to a state in which he would be in danger of being tortured, in its 1989 decision in the case of *Soering v. U.K.*, the European Court of Human Rights held that:

> It would hardly be compatible with the underlying values of the Convention . . . were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would

68. Marie Woolf, *Pirates Can Claim UK Asylum*, TIMES (London) (Apr. 13, 2008), http://www.timesonline.co.uk/tol/news/uk/article3736239.ece.

69. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

70. *See Human Rights*, UNITED NATIONS POLITICAL OFFICE FOR SOMALIA (Sept. 15, 2009), http://unpos.unmissions.org/Default.aspx?tabid=1928; *see also Sharia Imposed at Somali MPs Base*, BBC News (Jan. 27, 2009), http://news.bbc.co.uk/2/hi/africa/7854527.stm; *Somali Region to Switch to Sharia*, BBC NEWS (Nov. 20, 2006), http://news.bbc.co.uk/2/hi/africa/6166960.stm (both discussing the use of Sharia law and courts in Somalia).

71. While the Transitional Government of Somalia could offer countries assurances that the captured pirates would not be subject to torture, the acceptance of these assurances depends the judgment that they are valid. As a side note, the pirates operating off the coast of Somalia have not fallen inside the protections of the Geneva Conventions up to date. *See generally* Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 TUL. MAR. L.J. 1 (2008) (discussing situations in which the Geneva Conventions might apply).

72. Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, CETS 005, 213 U.N.T.S. 222.

> be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, . . . would plainly be contrary to the spirit and intendment of the Article . . . .[73]

This decision is binding on all signatories to ECHR, which includes all European states that have deployed warships to the effort to repress piracy off the coast of Somalia.

C. *No Delegation*

A nation reluctant to try pirates in its domestic courts and unable to legally extradite them to their country of origin might seek to turn them over to another nation for trial (and punishment if convicted). Furthermore, many countries cannot prosecute pirates because they "don't have domestic statutes on their books that allow for the prosecution of the crime of piracy because it was long considered a thing of the past," according to Peter Chalk of the RAND Corporation.[74] Indeed, the United States, Denmark, the EU, and the United Kingdom have all agreed with Kenya that it will accept captured pirates and try them in its courts.[75] And while Kenya has recently stated that it is seeking to cancel these agreements and cease acceptance of pirates for trial, citing the burden to its court system,[76] the option also faces opposition on human rights grounds. The agreement between the U.S. and Kenya has led to criticism from Human Rights Watch (HRW), which contends that the Kenyan justice system does not guarantee a fair trial. HRW stated, "[t]he [Kenyan] police have a terrible record of long periods of detention without trial," that there are "terrible conditions in the prisons" and "very poor record of access to legal representation" as well as "interminable delays in the court process."[77]

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73. Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989).

74. *To the Point: Marines Raid Hijacked Ship off Somalia*, WKCRW (Sept. 9, 2010), http://www.kcrw.com/news/programs/tp/tp100909the_run_on_kabul_ban.

75. Sarah Childress, *Pact With Kenya on Piracy Trials Gets First Test*, WALL ST. J., Feb. 17, 2009, at A8 (noting also that Kenya will not accept all cases, and it decides which cases it is willing to pursue).

76. *Kenya Seeks to Cancel Deals for Trying Somali Pirates*, AFP (Apr. 1, 2010), http://www.google.com/hostednews/afp/article/ALeqM5jDQgVLTDR4BjimFIUAs_1mFVk8OA.

77. *Rights Group Questions US Deal to Send Pirates to Kenya*, VOICE OF AMERICA (Feb. 13, 2009), http://www.voanews.com/english/archive/2009-02/2009-

The legal aid network Lawyers of the World, which is representing over forty of the captured pirates in Kenya, says that the agreements between Kenya and other nations and the EU violate the human rights of the suspects.[78] And German lawyers have filed a civil suit in Germany in support of the pirates held in Kenya, claiming that a fair trial is impossible in Kenya because there is no presumption of innocence.[79] In another suit, German lawyers argue that the German government is responsible for ensuring that the pirates receive proper representation in Kenya, suggesting Germany should pay for it because defendants in the African nation do not have the right to government-provided counsel, except in capital cases.[80]

All said and done, there are no international courts to try pirates; the different roles of national police forces and the military complicate the pursuit of pirates; procedural rights set standards for collection and custody of evidence against pirates that are difficult to meet on the high seas by naval personnel; and various rights—observed by democracies—prevent imprisonment, deportation, extradition, or delegation of trials to other nations. (While Kenya is a democracy, many observers have misgivings about the integrity of its justice system. Peter Chalk has observed, "the [Kenyan] court system is so inefficient and corrupt that the actual efficiency of these trials is very, very low. Today, I think only about 12 to 13 pirates have actually been successfully prosecuted of the ones that have been put on shore there."[81]) To reiterate, the thesis here advanced is not that the extended application of human rights to pirates is the only reason pirates are so often not confronted, detained, and

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02-13-voa43.cfm?CFID=263096949&CFTOKEN=12225224&jsessionid=6630520c6c29dd8d32fb533945714f95a2b7.

78. *Paris-based Group Says Accused Somali Pirates Denied Rights*, VOICE OF AMERICA (Aug. 27, 2009), http://www.voanews.com/english/2009-08-27-voa36.cfm.

79. Jeffrey White, *German Lawyers Launch Pirate Defense Team*, CHRISTIAN SCI. MONITOR (Apr. 15, 2009), http://www.csmonitor.com/2009/0416/p06s01-wogn.html.

80. Matthias Gebauer, *Attorneys File Suit in Germany on Behalf of Alleged Pirates*, SPIEGEL ONLINE INT'L (Apr. 15, 2009), http://www.spiegel.de/international/europe/0,1518,619103,00.html; *see also 2008 Human Rights Report: Kenya*, U.S. DEPARTMENT OF STATE (Feb. 25, 2009), http://www.state.gov/g/drl/rls/hrrpt/2008/af/119007.htm (stating that the vast majority of defendants in Kenya are tried without legal counsel, as they cannot afford representation).

81. *To the Point*, *supra* note 74.

prosecuted but that these legal considerations seem to be one significant reason piracy thrives.

V. CONCLUSION: BALANCING RIGHTS AND THE COMMON GOOD

Communitarians, especially responsive communitarians,[82] maintain that we face two strong normative claims: that of individual rights and that of the common good, of which public safety is the prime category. Neither is a priori privileged, and we constantly work to find the proper balance between these two claims. (Courts often proceed by referring to compelling public interest, which they take into account in addition to rights considerations.) Moreover, although rights advocates tend to frame their arguments in strong terms, as if any concession or reinterpretation of what rights entail or the common good demands are a violation, both claims have historically been modified and rebalanced as conditions change. Thus, the First Amendment right to free speech as now understood was largely fashioned in the 1920s and the federal right to privacy was forged only after 1965. After 9/11, the balance between rights and homeland security was modified during the Bush Administration and again recalibrated during the first year of the Obama Administration. In the UK, criminal suspects could be legally held only for forty-eight hours without charge; however, this was extended to up to twenty-eight days for terrorism suspects. Courts and legislatures draw on the fact that the rights themselves are often formulated in ways that suggest limitations and balancing (e.g. the Fourth Amendment of the U.S. Constitution reads "The right of the people to be secure . . . against *unreasonable* searches and

82. For more discussion of responsive communitarianism, see *The Communitarian Vision*, THE COMMUNITARIAN NETWORK, http://communitariannetwork.org/communitarian-vision/ (last visited November 26, 2010). To read the "Responsive Communitarian Platform," see *The Responsive Communitarian Platform*, THE COMMUNITARIAN NETWORK, http://communitariannetwork.org/about-communitarianism/responsive-communitarian-platform/ (last visited November 26, 2010). For the list of founding platform endorsers, see *Founding Endorsements*, THE COMMUNITARIAN NETWORK, http://communitariannetwork.org/about-communitarianism/responsive-communitarian-platform/founding-endorsers/ (last visited November 26, 2010). *See generally* AMITAI ETZIONI, MY BROTHER'S KEEPER 199–318 (2003) (recounting the launching of the The Communitarian Project).

seizures, shall not be violated . . . ."[83]), and in reference to changes in conditions, particularly relevant to the issue at hand is that after a wave of skyjacking in the early 1970s, the U.S. courts allowed the introduction of screening gates in airports, despite that fact that they constitute searches without individualized suspicion and without a warrant.[84] All this applies to the way pirates are treated. (The ways one decides which consideration is to take precedence—the common good or individual rights—or to what extent the two can be reconciled is a mater beyond the scope of this Essay.)[85]

The preceding discussion suggests that the times call for a reexamination of the ways pirates are treated. Few would disagree that they pose a serious threat to the peaceable navigation of the high seas. The level of threat has been rising over time, given that the "business" is very lucrative and the risks and costs imposed by law-enforcement authorities are rather small. This Essay seeks to point to the problem rather than offer a new interpretation of human rights and an explanation of the extent to which a rebalancing of rights and the common is called for. This work remains to be carried out.

Given that piracy has been considered for centuries a serious offense by most people and nations, given the relative ease with which pirates can be identified (compared, for instance, to terrorists, who pass themselves off as regular civilians), and given the growing harm pirates are inflicting, one would expect that dealing with this threat to the common good could be more readily treated than many others.

83. U.S. CONST. amend. IV (emphasis added).

84. United States v. Davis, 482 F.2d 893 (9th Cir. 1973).

85. For further discussion of this topic, see AMITAI ETZIONI, THE LIMITS OF PRIVACY (1999), and AMITAI ETZIONI, HOW PATRIOTIC IS THE PATRIOT ACT? (2004).

THE PLENARY POWER DOCTRINE AND THE CONSTITUTIONALITY OF IDEOLOGICAL EXCLUSIONS: AN HISTORICAL PERSPECTIVE

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I. INTRODUCTION

For over a century, it has been repeatedly but unsuccessfully argued that the First Amendment of the Constitution limits the federal government's plenary power to exclude or expel aliens from the United States.[1] Such arguments have persisted despite the Supreme Court having repeatedly determined that the First Amendment does not restrict such power.[2] Instead, the Court has upheld the federal government's plenary power to "forbid aliens or classes of aliens from coming within their borders, and expel aliens or classes of aliens from their territory" regardless of whether its justification is based upon ideological or association grounds.[3]

Numerous commentators, scholars, and attorneys have attacked this rationale by arguing that the Bill of Rights limits the federal government's power to exclude or expel aliens.[4] For instance, Karen Engle criticizes ideological and

1. *See* Negusie v. Holder, 129 S. Ct. 1159 (2009); Zadvydas v. Davis, 533 U.S. 678, 679 (2001); Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 498 (1999); Kleindienst v. Mandel, 408 U.S. 753, 769–70 (1972); Harisiades v. Shaughnessy, 342 U.S. 580, 592 (1952); Bridges v. Wixon, 326 U.S. 135, 160 (1945); U.S. *ex rel.* Turner v. Williams, 194 U.S. 279, 291 (1904); Am. Acad. of Religion v. Napolitano, 573 F.3d 115, 117 (2d Cir. 2009); Hernandez-Caballero v. U.S. Att'y Gen., 250 F. App'x. 275 (11th Cir. 2007); Bruno v. Albright, 197 F.3d 1153 (D.C. Cir. 1999); Am.-Arab Anti-Discrimination Comm. v. Thornburgh, 940 F.2d 445–46 *opinion amended and superseded on denial of reh'g*, 970 F.2d 501 (9th Cir. 1991); Rafeedie v. INS, 880 F.2d 506, 517 (D.C. Cir. 1989); Randall v. Meese, 854 F.2d 472 (D.C. Cir. 1988); Abourezk v. Reagan, 785 F.2d 1043, 1074–75 (D.C. Cir. 1986); Rafeedie v. INS, 795 F. Supp. 13 (D.D.C. 1992).

2. *Harisiades*, 342 U.S. at 592; *Turner*, 194 U.S. at 291.

3. *Turner*, 194 U.S. at 291.

4. *See* Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51 (1999); T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L. L. 862 (1989); Steven J. Burr, *Immigration and the First Amendment*, 73 CALIF. L. REV. 1889 (1985); Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59 (2004); Richard F. Hahn, *Constitutional Limits on the Power to Exclude Aliens*, 82 COLUM. L. REV. 957 (1982); Berta Esperanza Hernández-Truyol, *Nativism, Terrorism, and Human Rights—The Global Wrongs of* Reno v. American-Arab Anti-Discrimination Committee, 31 COLUM. HUM. RTS. L. REV. 521 (2000); Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833 (1997); Philip Monrad, *Ideological Exclusion, Plenary Power, and the PLO*, 77 CALIF. L. REV. 831 (1989); David Moyce, *Petitioning on Behalf of an Alien Spouse: Due Process Under the Immigration Laws*, 74 CALIF. L. REV. 1747, 1773–76 (1986);

association exclusion on the ground that it is impossible to separate bad aliens from good aliens on such grounds. She believes that the United States' power to "determine immigration policy does not mean that all state actions regarding immigration [should] necessarily go unchallenged."[5] Berta Esperanza Hernández-Truyol believes ideological exclusion not only violates the First Amendment but also constitutes a "myriad [of] human rights violations . . . [including] racial, religious, ethnic, and national discrimination, as well as discrimination in the applications and enjoyment of the rights to free speech and association."[6] Meanwhile, academics such as Steven R. Shapiro have argued that ideological and association exclusions "abridge" the "constitutional rights of American citizens."[7] He writes that "in a nation premised on the notion that sovereignty flows from the popular will and that the popular will is determined by political debate, ideological exclusions cannot be justified."[8]

Commentators, such as these, often place the blame of ideological and association exclusions on the Supreme Court's dicta in the *Chinese Exclusion Case*.[9] It is frequently argued that the Court "formulated the plenary power doctrine" without any supporting constitutional authority.[10] Most recently, Matthew J. Lindsay wrote an extensive piece asserting that the plenary power doctrine was "borne" in the late nineteenth century of "an urgent sense of national peril."[11] Academic scholar Peter J. Spiro describes the

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Stephen R. Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 HARV. L. REV. 930 (1987); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002); W. Aaron Vandiver, *Checking Ideas at the Border: Evaluating the Possible Renewal of Ideological Exclusion*, 55 EMORY L.J. 751 (2006); Note, *Constitutional Limitations on the Naturalization Power*, 80 YALE L.J. 769, 787–91 (1971).

5. Engle, *supra* note 4, at 65.

6. Hernández-Truyol, *supra* note 4, at 559.

7. Shapiro, *supra* note 4, at 942.

8. *Id.* at 944–45.

9. Chae Chan Ping v. United States, 130 U.S. 581 (1889). For criticism, see Akram, *supra* note 4, at 59, and James A. R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804, 823–29 (1983) (citing the *Chinese Exclusion Case* as when the Court first established that congressional authority to exclude aliens was plenary).

10. Vandiver, *supra* note 4, at 773–75.

11. Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1, 6

plenary power doctrine as "a rights-subverting constitutional anomaly" which has "long been relegated to a sort of constitutional hall of shame."[12] Meanwhile, Stephen Legomsky argues that the courts have based too much reliance upon early case precedent such as the *Chinese Exclusion Case*[13] and its nineteenth-century predecessors.[14] Legomsky asserts that the holdings and rationales for these cases provide no support for the plenary power doctrine.[15]

What all these commentators fail to address, however, is the legal and historical precedent supporting the plenary power doctrine. Not one of these commentators attempts to delve into the Anglo-American tradition or the early treatises on international law by which the plenary power doctrine was derived.[16] Instead, they attack the plenary power doctrine by asserting that the First Amendment prevents the federal government from conditioning entry or settlement on ideological grounds—all the while without having a firm historical or contextual grasp on the subject. Granted, one may argue that ideological exclusions are morally repugnant to the people that view this nation as being founded on liberty for all. However, the plenary power doctrine is firmly rooted in the Anglo-American legal tradition. It should be emphasized that the determination to expel or exclude foreigners, whether they have already

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(2010). Professor Lindsay correctly identifies that the principle of national "self-preservation" is what grants the federal government plenary authority over immigration. *Id.* at 31–46. However, Professor Lindsay incorrectly assumes this legal principle was created in the late nineteenth century. It existed well before then.

12. Spiro, *supra* note 4, at 340–41; *see also* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 118–38 (1996); Aleinikoff, *supra* note 4, at 862–71; Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984).

13. Chae Chan Ping, 130 U.S. at 581.

14. Fong Yue Ting v. United States, 149 U.S. 698 (1893); Nishimurra Ekiu v. United States, 142 U.S. 651 (1892).

15. S. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 199–218 (1987); *see also* Hahn, *supra* note 4, at 960–83; L. Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 858 (1987) (stating that the plenary power doctrine is subject to constitutional restraints); Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE. L.J. 545 (1990) (explaining the ultimate "failure" of the plenary power doctrine).

16. James Nafziger provides the most detailed attempt to examine this history from a legal perspective. However, Nafziger only briefly touches upon the Anglo-American heritage of the plenary power. Nafziger, *supra* note 9, at 804–47.

lawfully settled or even begun the process of naturalization, is a political question and not a vested right absent congressional statutory acquiescence.[17] The argument of moral repugnancy does not make exclusions based on association or ideological grounds unconstitutional. It is an issue that can only be placed into this nation's political discourse, where it has always and rightfully been.

Similar to other constitutional political questions, one must separate personal political beliefs from the law and history. Just as it may be argued that it is unconstitutional to exclude based upon ideological association, the same argument can be made for aliens that do not have sufficient property, are not properly educated, or have dangerous communicable diseases.[18] Nevertheless, we exclude individuals based upon all these factors. Furthermore, it may be argued that those convicted of crimes should not be excluded, for it violates their right to due process.[19] This

17. A recent article by James E. Pfander and Theresa R. Wardon asserts that the congressional plenary authority over immigration is limited in that Congress cannot prescribe retroactive legislation concerning naturalization and settlement to aliens that have lawfully settled. *See* James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of The Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 441 (2010). Pfander and Wardon argue,

> Congress was not given untrammeled power to regulate (immigration and) naturalization but was required to 'establish a uniform rule.' Embedded in this provision were norms of prospectivity, uniformity, and transparency: Congress was to act by public law, creating a framework within which executive and judicial officers would administer naturalization law. Congress was neither to change the rules that apply to resident aliens, lawfully present in the United States, nor to exercise case-by-case control of naturalization decisions.

Id. As will be shown below, this interpretation of congressional power over naturalization and its intimate relation to immigration and foreign affairs cannot survive. The Founders understood these powers as significant to national self-preservation.

18. For a discussion against excluding aliens according to such factors, see Note, *Constitutional Limitations on the Naturalization Power*, *supra* note 4, at 791–809, and Hahn, *supra* note 4, at 985–92.

19. As it stands today, the only due process afforded to aliens applying for entry or seeking lawful admission into the United States can be prescribed by Congress. *See* Landon v. Plasencia, 459 U.S. 21, (1982); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."). Due process also does not extend to aliens seeking admission at a port of entry with a valid immigrant visa or aliens that enter unlawfully because they do not have the "ties that go with permanent residence." *Landon*, 459 U.S. at 32. Alexander Aleinikoff, however, argues that such aliens should have due process rights. *See* Aleinikoff, *supra* note 4, at 867–68. For other commentary questioning due process

begets the question, "Which factors are excludable and who is to determine them?" The answer is simple: the factors are to be determined by this nation's elected federal representatives, including the President.[20]

The purpose of this study is to correct the century-old assertion that the plenary power to expel or exclude aliens is subject to any limitations, except the powers delegated between the Legislative and Executive Branches by the Constitution. In particular, this Article sets forth the well-established, and often forgotten, doctrine of allegiance, the Anglo-American legal precedent for ideological exclusion and expulsion, the inherent authority of nations as understood by early international law commentators, how the Founding Fathers understood these doctrines, and the reasons this power resides with the federal government. The evidence demonstrates that ideological exclusion and expulsion are constitutionally permissible and are political questions to be determined by the people through their federal representatives.

II. THE ANGLO ORIGINS OF IMMIGRATION LAW, PLENARY POWER, AND EXCLUSION BASED UPON IDEOLOGICAL AND ASSOCIATION GROUNDS

Legal commentators have asserted that the *Chinese Exclusion Case* plenary power doctrine is a judicial creation[21] or that the late nineteenth century perception of immigration law is fundamentally distinguishable from modern doctrine.[22] These commentators fail to adequately examine the Anglo and international origins of ideological and association exclusion. One of the most detailed legal commentaries concerning these Anglo origins comes from

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rights afforded to excludable aliens, see Ethan A. Klingsberg, *Penetrating the Entry Doctrine: Excludable Aliens' Constitutional Rights in Immigration Processes*, 98 YALE L.J. 639, 658 (1989); Mocye, *supra* note 4, at 1747, 1771–72; Note, *Constitutional Limitations on the Naturalization Power*, *supra* note 4, at 796 ("[A] resident alien's interest in the deportation process . . . should be considered fundamental.").

20. According to the commentators mentioned in this Article, the factors for exclusion should be limited by the provisions of the Constitution. There is no arguing that the Constitution limits the authority of the federal government, especially in its relation to citizens. However, there is no provision that expressly restricts the federal government regarding immigration.

21. *See, e.g.*, Akram, *supra* note 4, at 58–59; Vandiver, *supra* note 4, at 773–75.

22. *See, e.g.*, Nafziger, *supra* note 9, at 825–28.

James A. R. Nafziger, who concludes, "Before the late 19th century, there was little, in principle, to support the absolute exclusion of aliens."[23] He believes the historical record supports the concept of free migration and even cites to the Magna Charta, which protected the freedom of merchants to travel "in accordance with ancient and lawful customs."[24] Nafziger's commentary, however, distorts the historical record and also interprets the Magna Charta too liberally, for, as the history will show, it was subject to "lawful customs," or what was known as the Statutes of the Realm and the law of nations.

A. *Early Origins of the Plenary Power and the Doctrine of Allegiance*

The most prominent early international commentator on immigration law was Hugo Grotius (1583–1645).[25] Even today, his 1608 work, *The Rights of War and Peace*, gives great insight into the development of international law. Of particular interest to free migration advocates is Grotius's section on refugees, as he may have been the first to write on the subject in detail:

> [A] permanent residence ought not to be denied to foreigners who, expelled from their homes, are seeking a refuge, provided that they submit themselves to the established government and observe any regulations which are necessary in order to avoid strifes . . . . 'It is characteristic of barbarians to drive away strangers,' says Strabo, following Eratosthenes; and in this respect the Spartans failed to gain approval. In the opinion of Ambrose, also, those who keep foreigners out of their city are by no means worthy of approval.[26]

While much of the focus of this quote has been placed on Grotius stating that refugees should be granted asylum,[27]

23. *Id.* at 809.

24. *Id.* at 810 (quoting the MAGNA CARTA).

25. Hersch Louterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L. L. 1 (1946).

26. HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 201–02 (Francis W. Kelsey ed., 1925).

27. *See* Roman Boed, *The State of the Right of Asylum in International Law*, 5 DUKE J. COMP. & INT'L L. 1, 8 (1994); Eric Engle, *Universal Human Rights: A Generational History*, 12 ANN. SURV. INT'L & COMP. L. 219, 234 n.106 (2006); Luke

what is overlooked are the major preconditions Grotius identifies to such a grant: "provided that they submit themselves to the established government and observe any regulations which are necessary in order to avoid strifes."[28] This language is significant for two reasons. First, the language "submit themselves" is in reference to the ancient doctrine of allegiance which requires every entering alien to give temporary allegiance to the foreign jurisdiction. Second, this doctrine of allegiance is strengthened when Grotius states "observe any regulation." Emphasis should be placed on the word "any," for it illustrates that as early as the seventeenth century it was acknowledged that all aliens, refugees included, must comply with any laws respecting immigration in order to receive the legal and physical protections of the foreign jurisdiction in which they reside.

This interpretation of Grotius is affirmed when viewing his other sections discussing immigration. It illustrates that immigration was directly linked to a nation's right of self-preservation, foreign affairs, and intertwined with the doctrine of allegiance. For example, in discussing the receiving of foreigners, Grotius writes, "[T]here ought to be no doubt that such a person tacitly binds himself to do nothing against that government under which he seeks protection."[29] In another section, Grotius confirms that immigration is a matter of plenary authority and foreign relations when he describes the receiving of exiles as a matter of "friendship" between nations.[30]

Of course, Grotius did not invent the concept of plenary power over immigration or the doctrine of allegiance. They existed well prior to him. Regarding the Anglo origins, the strength of the historical evidence rests in England's Statutes of the Realm. From the inception of the Magna Charta to the early sixteenth century, the law generally did not require much of aliens.[31] However, in 1529, the doctrine

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T. Lee, *The Right to Compensation: Refugees and Countries of Asylum*, 80 AM. J. INT'L L. 532, 536 (1986); Nafziger, *supra* note 9, at 810–11; Matthew E. Price, *Politics or Humanitarianism? Recovering the Political Roots of Asylum*, 19 GEO. IMMIGR. L.J. 277, 292–96 (2004).

28. GROTIUS, *supra* note 26, at 201–02.

29. *Id.* at 857.

30. *Id.* at 819.

31. What these laws do reveal, however, is the legal distinctions between aliens and citizens. *See* 14 Ric. 2, c. 1 (1390) (Eng.) (requiring every alien "of what Degree

of alien allegiance was statutorily codified. It required aliens residing in London to:

> [T]ake their othe [of allegiance] and be sworne upon in the Comon Halle or metyng place of the said craftes, and there to receyve and take their othe and be sworne upon the Holy Evangelyst before the Mayster and Wardeyns of their said craft, to be faythfull and trewe to the Kyng our Soveraigne Lorde and his heires Kynges of England and to be obedyent to hym and them and his and their Lawes . . . .[32]

All aliens outside of London, while immune from taking the oath, were still bound by the doctrine of allegiance itself. Section 4 of the statute required every alien "to be faithfull and trew to us and our heyres Kynges of England, and to be obedyent to us and them and our and their Lawes and to all Actes Ordynaunces and Decrees made and confirmed by us and our Councell or by our Councell."[33]

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or Condition that he be, that bringeth any Merchandize into England, shall find sufficient Sureties before the Customers . . . to the Value of Half the said Merchandises so brought"); 14 Hen. 6, c. 7 (1435) (Eng.) (discussing the capture of the goods of alien friends); 31 Hen. 6, c. 4 (1452–53) (clarifying that the King's courts have jurisdiction and aliens have legal recourse for injuries done at sea); 14 & 15 Hen. 8, c. 2 (1523) (allowing the search of alien businesses in London for violations of the merchant laws); 22 Hen. 8, c. 8 (1530–31) (Eng.) (codifying the rule that aliens made denizens shall pay customs, tolls, and duties as before the change in their status); 32 Hen. 8, c. 14 (1540) (Eng.) (requiring aliens to ship all goods in English ships and imposing a duty if done by foreign ships); *see also* 2 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 473–74 (2d ed. 1966). Holdsworth notes,

> The growing commercial importance of England the need for putting some restraint upon the piratical propensity of Englishmen, and the inefficiency of the court of Admiralty, added to the Statute Book some laws directed to safeguarding the interests of alien friends . . . . An Act of 1435 was passed to regulate the thorny subject of the goods of alien friends upon enemies' ships. The statute recited that the immunity of such goods led to fraudulent practices, and therefore allowed the captors of such ships . . . to retain such goods. An Act of 1436 was passed to regulate certain abuses of some forms of safe conduct. In 1439 alien friends were prohibited from loading their goods in an enemy's ship under penalty of forfeiture, unless the ship had a safe conduct. It is to these statutes that we must look for the germs of that part of the law of England which is directed to the enforcement of international obligations, and the regulation of the rights of foreigners. Up till the last century it was a very meager branch of English law; and this is due to the fact that it was a branch of law which fell outside the purview of the ordinary courts.

HOLDSWORTH, *supra*, at 473–74.

32. 21 Hen. 8, c. 16, § 1 (1529) (Eng.).

33. *Id.* § 4.

In 1540, Parliament passed another statute addressing the allegiance of aliens. It was passed because an

> infinite n[umber] of Straungs and aliens of foren countries and nations whiche daily doo increase and multiplie within his Graces Realme and Dominions in excessive nombres, to the greate detriment hinderaunce losse and empovishment of his Graces naturall true lieges and subjects of this his Realme and to the greate decay of the same . . . .[34]

Obedience was required not only of aliens but of denizens as well. The statute stipulated that letters of denization would be granted as long as the denizen "shalbe bounde and obedient by and unto all the forsaid act . . . and estatutes of this Realme."[35] Regarding all other alien classes, the statute required "ev[er]y alien and straungier borne out of the Kinges obe[dia]nce, not being denizen . . . [to be] bounden by and unto the lawes and statutis of this realme."[36]

Throughout this period, the sovereign possessed virtually unchecked plenary power over foreigners and foreign trade.[37] William Holdsworth describes the development of the plenary power of that era as follows:

> As the controller of foreign affairs [the crown] had by virtue of the prerogative and by statute powers to enforce any treaties which it pleased to make; and these treaties often dealt with the conditions under which foreign trade could be carried on. . . . [M]edieval statutes recognized that a large discretion must be left to the crown in these matters. It was an idea which came naturally to an age which accepted the root principle of the mercantile system that all trade should be organized with a view to the maintenance of national power; and the claims made by the crown naturally grew larger as, with the rise of the

34. 32 Hen. 8, c. 16, § 1 (1540) (Eng.). According to Francis Bacon, the statute was passed because Parliament found that aliens "did eate the Englishmen out of trade, and that they entertained no Apprentizes, but of their owne Nation." FRANCIS BACON, THREE SPEECHES OF THE RIGHT HONORABLE, SIR FRANCIS BACON KNIGHT 19 (1641).

35. 32 Hen. 8, c. 16, § 1 (1540) (Eng.).

36. *Id.* § 3. The plenary power to grant all privileges to aliens was vested with Parliament and the King. The statute stated, "it shalbe the Kinges moste gratiouse pleasure to graunte to any suche alyen any speciall liberties or privileges more or otherwise than is conteyned in the said estatutis." *Id.* § 2.

37. 4 HOLDSWORTH, *supra* note 31, at 335.

> modern state, trade rivalry tended to become simply a phase of national rivalry.[38]

Also, at this time it was well-established that aliens were subject to rules of law which differed from the common law. Aliens could not claim the rights and liberties of the English subject, and the government was free to treat them as it pleased.[39] This power was exhibited in a 1557 statute during the reign of Phillip and Mary—4 & 5 P. & M., c. 6. It proclaimed that in order to ensure the sovereign had "suretie and preserva[ti]on" of the realm:

> That all Frenchemen, and all and every other pson and psons . . . was under the Frenche Kinges Obeisance, not being Denizens, (other then suche as the King and Quenes Highnes...speciallye licence limit and appointe to remaine within this Realme,) shall departe out of this Realme and out and from the Dominions and Territories of the same, ther to remaine and continue without returne into this Realme, during the time and continuance of the Warres . . . .[40]

The statute is significant because it was the first to exclude aliens based upon their nationality. It did, however, provide an exception to "suche Aliens and Strangers" whom the sovereign "shall licence to remain and tarrie in this Realme."[41] Similar to past precedent, aliens were required to be bound by the doctrine of allegiance.[42]

Although the legal premise of 4 & 5 P. & M., c. 6 was exclusion based upon nationality, its underlying purpose was the exclusion of dangerous Catholics.[43] Therefore, French nationals were being excluded on two grounds—as alien enemies and for their ideological religious beliefs. Of course, the exclusion of alien enemies was common practice.

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38. *Id.* at 336.
39. *Id.* at 335.
40. 4 & 5 P. & M., c. 6, § 1 (1557–58) (Eng.).
41. *Id.* § 2.
42. *Id.*; *see also* 32 Hen. 8, c. 16, § 1 (1540) (Eng.); 21 Hen. 8, c. 16, § 1 (1529) (Eng.) (stating that aliens should swear allegiance to the king).
43. *See* BACON, *supra* note 34, at 20–21 (discussing the long standing fear that Catholic France sought to subdue Protestant England).

The statutes of the realm distinguished between alien friends and alien enemies on a regular basis.[44]

Expulsion based upon ideological grounds, however, had never been statutorily codified. Certainly, the government could expel or exclude individuals that it deemed dangerous. To expel an entire class of persons because their ideological beliefs were deemed dangerous to the nation, however, first came to legal prominence with 4 & 5 P. & M., c. 6. It would be the basis of future exclusions, expulsions, and rules of naturalization. For instance, in the early seventeenth century, when the fear of Catholic plots to overthrow the government was heightened, Parliament restricted naturalization to individuals who "have receaved the Sacrament of the Lordes Supper wthin one Moneth next before any Bill exhibited for that Purpose; and also shall take the Oath of Supremacy and the Oath of Allegiance in the Parliament Howse."[45] In other words, not only did naturalizing foreigners have to take an oath of allegiance but they also had to be of the Protestant faith.

The entire basis of England's early immigration and naturalization laws were intertwined with the doctrine of allegiance. When the King's Bench decided *Calvin's Case* it was determined that the "'bond of allegiance,'" said Lord Ellesmere, "'of which we dispute is *vinculum fidei*; it bindeth the soul and conscience of every subject severally and respectively, to be faithful and obedient to the king.'"[46] The effect that the doctrine of allegiance had on aliens was that it prescribed the legal structure by which they were naturalized and permitted to reside in the realm.[47] As Holdsworth observes, the entire development of immigration

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44. 2 HOLDSWORTH, *supra* note 31, at 474; *see also* 14 Hen. 6, c. 7 (1435) (Eng.); 31 Hen. 6, c. 4 (1452–53) (Eng.); 22 Hen. 8, c. 8 (1530–31) (Eng.).

45. 7 Jac. 1, c. 2 (1609–10) (Eng.).

46. 9 HOLDSWORTH, *supra* note 31, at 82. Edward Coke described *Calvin's Case* as follows:

> And all Aliens that are within the Realm of England, and whose Sovereigns are in amity with the king of England, are within the protection of the king, and do owe a local obedience to the king, (are *homes* within this act) and if they commit High Treason against the king, they shall be punished as Traytors; but otherwise it is of an Enemy, whereof you may read at large . . . .

3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 4 (4th ed. 1669).

47. 9 HOLDSWORTH, *supra* note 31, at 83.

law was "centered round the doctrine of allegiance, and of the rules which defined the position of the alien friend."[48]

Returning to *Calvin's Case*, the King's Bench addressed the doctrine of allegiance concerning the rights of aliens. The case presented the challenging of an alien juror because he was born out of the king's allegiance. It did not matter that the alien had lived his entire life in England and had sworn allegiance to the king, for it was determined, "an alien be sworn in the leet or elsewhere, that does not make him a liege subject of the king, for neither the steward of a lord nor any one else, save the king himself, is able to convert an alien into a subject."[49]

The development of the doctrine of allegiance in immigration matters would reach its height during the seventeenth century. In 1641, Francis Bacon stated that the "priviledge of *Naturalization*, followeth *Allegeance*, and that *allegeance* followeth the *Kingdome*."[50] Citing Sir Thomas Littleton's 1481 treatise *On Tenures*,[51] Bacon defined an alien as a person "which is born out of the allegeance of our *Lord the King*."[52] There were two degrees of aliens—alien friends and alien enemies. An alien friend was defined as a person "borne under the obeisance of such a *King* or *State*, as is confederate with the *King* of *England*, or at least not in war with him."[53] However, even an alien friend "may be an *Enemy*," therefore to this "person the Law allotteth . . . [a] benefit" that is "transitory."[54]

During the seventeenth century, differentiating between subjects and aliens, strangers, or denizens remained a

48. *Id.* at 72.

49. *Id.* at 92.

50. BACON, *supra* note 34, at 15. There was debate as to whether an alien's allegiance was due to the sovereign, to Parliament, or to the kingdom itself. Bacon describes this debate, writing:

> [F]or some said that allegeance hath respect to the Law, some to the Crowne, some to the Kingdome, some to the body politique of the King, so there is confusion of tongues amongst them, as it commonly commeth to passe in opinions, that have their foundations in subtilty, and imagination of mans wit, and not in the ground of nature.

Id. at 16.

51. For a modern copy, see LITTLETON'S TENURES IN ENGLISH (Eugene Wambaugh ed., 1908).

52. BACON, *supra* note 34, at 37.

53. *Id.* at 11.

54. *Id.* at 11–12.

prominent practice. The legality of this differentiation rested with allegiance. For instance, the *Acts of the Interregnum* reveal that "every Alien and Stranger born out of the Kings obeysance, as well as Denizens" had to pay "a proportion double" to subjects.[55] Allegiance, however, was not limited to taxes. It also appeared in an ordinance restricting aliens from inhabiting the counties of Norfolk, Suffolk, Essex, Cambridge, Hertford, and Huntington. The ordinance stipulated "that no stranger shall come in, or inhabit within the town of Cambridge or the Isle of Ely, without approbation . . . upon certificate of his or their good affections to the King and Parliament, and also that they bring [this] certificate under four[] Deputy-Lieutenants hands."[56]

The doctrine of allegiance also appeared in Interregnum ordinances concerning trade and commerce. In a 1644 ordinance, it was stated that in order for "Forreigners, and Strangers" to receive "incouragement for Trade, and commerce within the City of London and other Ports" they must "keep their fidelity to the King and Parliament" and pay the "customes and discharg[e] such duties as are due and accustomed."[57] Coupled with the doctrine of allegiance, England's entire immigration policy centered on the benefits that encouraging foreigners could afford trade, commerce, and wealth. The general philosophy was that foreigners would bring their commerce and individual wealth into England, thereby increasing the overall riches of the kingdom. Statutes that supported immigration were enacted in order to encourage trade. As Holdsworth has rightfully observed, aliens received statutory rights and privileges because "law which denies any rights to aliens will discourage trade."[58]

Individuals like Daniel Defoe supported immigration because of this very point. He thought the "Wealth and Trade of England would be greatly increased" by a general

55. For examples, see ACTS AND ORDINANCES OF THE INTERREGNUM, 1642–1660, at 85–100, 531–53 (1911).

56. *Id.* at 242–45.

57. *Id.* at 498–501.

58. 9 HOLDSWORTH, *supra* note 31, at 94.

naturalization of foreigners.[59] He viewed an increase of foreigners as raising the landed gentries' rent profits, providing "a greater consumption of the Native Product[s]," and bringing an increase of tax revenue.[60] Not to mention, Defoe saw an influx of foreigners as contributing to the security of the nation as well. The more foreigners that were naturalized increased the pool of men from which the government could impress into service.[61] Meanwhile, in his 1693 tract entitled *A New Discourse of Trade*, Josiah Child also supported immigration because it would "tend to the advancement of Trade, and [i]ncrease . . . the value of the Lands of this Kingdom."[62] Childs was cognizant of the criticism that foreigners came to England poor and destitute. He defended against such arguments, stating that "many [foreigners] have brought hither very good Estates, and hundreds more would do the like, and settle here for their Lives . . . if they had the same Freedom and Security here as they have in *Holland* and *Italy*."[63]

Of course, not everyone viewed the admission of aliens, foreigners, and strangers as beneficial to trade. This is evidenced by a dozen instances of refusal by Parliament to pass a general immigration or naturalization bill from the Restoration to the early eighteenth century.[64] A short 1662 tract entitled *Reasons Against the General Naturalization of Aliens* argued that the wealth and prosperity of England would be disadvantaged should Parliament pass a new naturalization act.[65] The anonymous author felt that

59. DANIEL DEFOE, SOME SEASONABLE QUERIES, ON THE THIRD HEAD, VIZ. A GENERAL NATURALIZATION 1 (1697) [hereinafter DEFOE, SOME SEASONABLE QUERIES]. For a brief survey of Daniel Defoe's political and economic writings supporting immigration, see Daniel Statt, *Daniel Defoe and Immigration*, 24 EIGHTEENTH-CENTURY STUDIES 293, 293–313 (1991). *See also* DANIEL DEFOE, GIVING ALMS NO CHARITY (1704); DANIEL DEFOE, LEX TALIONIS, OR, AN ENQUIRY INTO THE MOST PROPER WAYS TO PREVENT THE PERSECUTION OF THE PROTESTANTS IN FRANCE (1698).

60. DEFOE, SOME SEASONABLE QUERIES, *supra* note 59, at 1, 2.

61. *Id.*

62. JOSIAH CHILD, A NEW DISCOURSE OF TRADE, WHEREIN IS RECOMMENDED SEVERAL WEIGHTY POINTS RELATING TO THE COMPANIES OF MERCHANTS 122 (1693).

63. *Id.* at 125. For other support, see AN HUMBLE ADDRESS WITH SOME PROPOSALS FOR THE FUTURE PREVENTING OF THE DECREASE OF THE INHABITANTS OF THIS REALM (1677); THE GRAND CONCERN OF ENGLAND EXPLAINED (1673).

64. *See* Statt, *supra* note 59, at 295; Daniel Statt, *The City of London and the Controversy Over Immigration, 1660–1772*, 33 HIST. J. 45, 45–61 (1990).

65. REASONS AGAINST THE GENERAL NATURALIZATION OF ALIENS 1 (1662).

"advancing aliens" would "impoverish[] the Native Subjects."[66] English merchants would sustain losses in their exports, and the England's markets would be flooded with merchandise thereby causing local merchants to lose valuable profits.[67]

Other seventeenth-century political tracts made similar observations. The 1680 *The History of Naturalization* stated, "*Aliens* [are] ruinous to *English* Trade and [the] *English* Merchant" for "the English Merchants had many Forei[g]n Commissions very advantageous to them, which these *Aliens* now enjoy."[68] A 1690 tract entitled *A Brief and Summary Narrative of the Mischiefs and Inconveniences ... Occassioned by Naturalizing of Aliens* argued that the aliens had caused the rise of imports to the point that "this Nation cannot consume all the Commodities Imported, which will occasion the price to fall."[69] A 1694 publication of Sir John Knight's speech against naturalization quoted him as stating that immigration hurts English manufactures because aliens drive down domestic wages, thus preventing poor Englishmen from "support[ing] their Families by their honest and painful Labour and Industry."[70] Knight was for "send[ing] the Foreigners back" because "then the Money will be found circulating at Home, in such *Englishmens* Hands."[71]

In addition to the argument that foreigners had a negative impact on commerce and trade, it was frequently asserted that foreigners should not be naturalized or permitted to settle due to allegiance conflicts between one's nation of

66. *Id.*

67. *Id.*

68. THE HISTORY OF NATURALIZATION WITH SOME REMARQUES UPON THE EFFECTS THEREOF, IN RESPECT TO THE RELIGION, TRADE AND SAFETY OF HIS MAJESTIES DOMINIONS 2 (1680).

69. A BRIEF AND SUMMARY NARRATIVE OF THE MANY MISCHIEFS AND INCONVENIENCES IN FORMER TIMES AS WELL AS OF LATE YEARS, OCCASSIONED BY THE NATURALIZING OF ALIENS 1 (1690).

70. THE SPEECH OF SIR JOHN KNIGHT OF BRISTOL, AGAINST THE BILL FOR A GENERAL NATURALIZATION IN 1693, at 8 (1694). For other seventeenth century tracts on aliens, see SUNDRY CONSIDERATIONS TOUCHING NATURALIZATION OF ALIENS: WHEREBY THE ALLEGED ADVANTAGES THEREBY ARE CONFUTED, AND THE CONTRARY MISCHIEFS THEREOF ARE DETECTED AND DISCOVERED (1695), and A SUPPLEMENT TO SUNDRY REASONS AGAINST A GENERAL NATURALIZATION OF ALIENS (1696).

71. THE SPEECH OF SIR JOHN KNIGHT, *supra* note 70, at 5.

origin and England. For example, in the 1695 tract *Sundry Considerations Touching Naturalization of Aliens*, it was argued that the "Safety of States and Kingdomes is of too great" importance "to practice experiments" of immigration and naturalization.[72] The tract queried, "What if Wars should arise between this Kingdom, and those Kingdoms from which the great resort of Aliens should come?"[73] The answer was "can any man reasonably think that they would not have respect to their Native Countries . . . or can we think they should wholly be distinct of their Allegiance . . . . [I]f not, then we have so many Enemies Incorporated to us, who may quickly . . . ruin our Peace and Kingdom."[74]

In the tract *The History of Naturalization*, it was argued that merchant aliens were "dangerous to the Government" because they "will not have their Affections changed, nor their Alliances extinguished by Naturalization."[75] The tract elaborated on this point, stating foreigners, "like Summer Birds when they have filled their Pockets, or if trouble or War arise, they will not forget their Fathers Land" which will be to the "great inconvenience to His Majesty and His *Natural-born Subjects*."[76]

Even Daniel Defoe, who supported naturalization and immigration on commercial grounds,[77] referenced the significance of the doctrine of allegiance in admitting foreigners that supported the ideological beliefs of that nation. Defoe was not for encouraging all foreigners, but only "*Foreign Protestants*," especially those who "hazarded their Lives to save our Liberties" during the 1688–1689 Glorious Revolution.[78] He rationalized that the "strenghth of England augmented by such a considerable Accession of zealous Protestants" would "be obliged to defend our Rights and Liberties, as their own."[79]

72. SUNDRY CONSIDERATIONS TOUCHING NATURALIZATION OF ALIENS, *supra* note 70, at 14.

73. *Id.* at 7.

74. *Id.*

75. THE HISTORY OF NATURALIZATION, *supra* note 68, at 2.

76. *Id.* at 3.

77. Statt, *supra* note 59, at 297–304.

78. DEFOE, SOME SEASONABLE QUERIES, *supra* note 59, at 3.

79. *Id.*

To truly understand seventeenth-century England, it should be emphasized that the Protestant religion was the ideological identity of English society. It was intimately intertwined with the lives, liberties, and property of English subjects. In other words, it was the basis of government itself. Similar to how today's Americans view the identity of the United States as being intertwined with the ideologies of democracy, individual freedom, and federalism, English subjects in the seventeenth and eighteenth centuries intertwined their ideological identity with the Protestant religion. This is significant because the history of seventeenth- and eighteenth-century England shows that the political branches saw it as their duty to protect that identity from foreigners whose ideals may conflict with its own. In short, it was within the power of the political branches of government to exclude or expel noncitizens whose ideological beliefs conflicted with the basis of English society.

In the late-seventeenth century, exclusion based on the grounds of ideological conflict may have been at its peak. In one political tract, it was argued that the increase of non-Protestant foreigners caused "Divisions in Religion."[80] It was important that the identity of the nation, the "Protestant Religion," be "kept pure and undefiled."[81] Meanwhile, in another political tract it was argued that mingling "Men of all Religions" in government, society, and employments would be a "hazard and destruction not only of the Protestants, but of the Christian Religion it self."[82]

Certainly not everyone agreed with the premise of ideological exclusion or requiring foreigners to take the Protestant sacrament. In the 1697 tract entitled *An Essay Concerning the Powers of the Magistrates and the Rights of Mankind in Matters of Religion*, Matthew Tindal saw such restrictions as tending to "discourage the Loyalty and Affection" of foreigners and impacting commerce.[83] What is

80. A BRIEF AND SUMMARY NARRATIVE OF THE MANY MISCHIEFS, *supra* note 69, at 1.

81. *Id.*

82. SUNDRY CONSIDERATIONS TOUCHING NATURALIZATION OF ALIENS, *supra* note 70, at 11.

83. MATTHEW TINDAL, AN ESSAY CONCERNING THE POWER OF THE MAGISTRATE, AND THE RIGHTS OF MANKIND IN THE MATTERS OF RELIGION 169, 169–76 (1697).

significant from Tindal's dissenting voice, however, is that ideological exclusions did exist and were in practice.

B. *The Immigration Experiment of Queen Anne, 1709–1711*

After the Restoration in 1660, only a few immigrants were naturalized, granted letters of denization, or were permitted to establish settlement in England.[84] However, in 1709, a Whig-dominated Parliament sought to promote immigration in the hopes of repopulating England and increasing commerce.[85] Following the advice of such economists as Josiah Child, Josiah Tucker, and John Houghton, it was believed that immigrants would be the answer to England's economic woes.[86] Thus, Parliament and Queen Anne put into force 7 Anne c. 5, which echoed this purpose and stated:

> Whereas the Increase of People is a Means of advancing the Wealth and Strength of a Nation And whereas many Strangers of the Protestant or Reformed Religion out of a due Consideration of the happy Constitution of Government of this Realm would be induced to transport themselves and their Estates into this Kingdom if they might be made Partakers of the Advantages and Privileges which the natural born Subjects thereof do enjoy. . . .[87]

Although the bill was welcomed to promote commerce,[88] it came with an ideological condition. In Parliament, Mr. Compton would only support the bill "should there be a clause interested in it for obliging foreigners, as should be willing to enjoy the benefit of it, to receive the sacrament."[89] Thus, the requirement that naturalized foreigners receive "the Sacrament of the Lords Supper in some Protestant or reformed Congregation within this Kingdom of Great Britain" was placed within the bill.[90] In addition to the

84. Statt, *supra* note 64, at 46.

85. *Id.* at 47–48.

86. *Id.* at 48.

87. 7 Anne c. 5, § 1 (1708) (Eng.).

88. The economic influences in passing the bill cannot be stressed enough. The City of London supported the bill because it was believed Protestant refugees would bring two million sterling and their estates which could be inherited and transferred to England. *See* 6 WILLIAM COBBETT, THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 782–83 (1810).

89. *Id.* at 780.

90. 7 Anne c. 5, § 2 (1708) (Eng.).

Protestant-ideological requirement, foreigners were required to take the oath of allegiance, given the concern that even foreign Protestants "owe allegiance to their respective princes, and retain a fondness for their native countries."[91]

Despite these restrictions, 7 Anne c. 5 never achieved its objective of "advancing the Wealth and Strength of a Nation" and its provisions were short lived.[92] Instead of attracting wealthy foreign Protestants, it attracted an estimated 10,000 poor Palatines. These Palatines had to be supported by government grants and private charity, thereby financially burdening the nation. Furthermore, the influx of poor foreigners caused friction between poor English natives and their foreign counterparts.[93] This explains why the 1711 repeal of the statute, 10 Anne, c. 9, stated: "[W]hereas divers Mischiefs and Inconveniences have been found by Experience to follow from the same to the Discouragement of the natural born Subjects of this Kingdom and to the Detriment of the Trade and Wealth there of . . . ."[94]

The House of Commons displayed similar feelings when it considered passing 10 Anne, c. 9. It was stated:

> That the inviting and bringing over into this kingdom the poor Palatines, of all religions, at the public expence, was an extravagant and unreasonable charge to the kingdom, and a scandalous misapplication of the public money, tending to increase and oppression of the poor of this kingdom, and of dangerous consequence to the constitution in church and state.[95]

C. *The French Revolution, Ideological Exclusions, and the Precursor to the Alien and Sedition Acts*

91. 6 COBBETT, *supra* note 88, at 780.

92. 10 Anne, c. 9 (1711) (Eng.).

93. H.T. Dickinson, *The Poor Palatines and the Parties*, 82 ENG. HIST. REV. 464, 474 (1967). Much of friction probably rested with financial assistance the foreigners were receiving. For instance, Queen Anne had employed several hundred to build a canal and tend to the royal gardens. *Id.* at 476. In addition to this, the ministry offered any parish a bounty of £5 for every Palatine received. Most parishes responded that they already had to deal with their own poor inhabitants and could not take on others. *Id.*

94. 10 Anne, c. 9 (1711) (Eng.).

95. 6 COBBETT, *supra* note 88, at 1000.

In 1793, Parliament passed an alien bill to protect England from the ideological beliefs of the French Revolution.[96] What is particularly interesting about the alien bill is that it may have been a legislative model for the 1798 Alien and Sedition Acts, for the justifications were based upon the same principles—allegiance and the right of self-preservation. As noted above, commentator James A. R. Nafziger has argued that before the nineteenth century "there was little, in principle, to support the absolute exclusion of aliens."[97] Meanwhile, other commentators place this same assertion in a First Amendment paradigm by arguing that expulsion or exclusion cannot be based on ideological grounds.[98] These assumptions, however, are based on a minute examination of Anglo-American history and law.

The legal sources of the period up to 1792 all attest to the legality of plenary power doctrine, ideological exclusions, and the doctrine of allegiance. William Holdsworth provides the best legal summary leading up to 1793, writing:

> As we might expect, this wide prerogative of controlling the movements of aliens was exercised in the sixteenth century. Its existence was not questioned either then, or in the course of the constitutional controversies of the first half of the seventeenth century. In these circumstances there can be no doubt that Jeffreys, C.J., was warranted in saying in 1684, "I conceive the King had an absolute power to forbid foreigners whether merchants or others, from coming within his dominions, both in times of war and in times of peace, according to his royal will and pleasure; and therefore gave safe-conducts to merchants, strangers, to come in, at all ages, and at his pleasure commanded them out again." In 1705 Northey, the attorney-general, said that the Crown had power to exclude aliens; in 1771 the secretary of state directed that no Jews should be allowed to enter England except under certain conditions. Blackstone said that aliens "were liable to be sent home whenever the King sees occasion"; . . . during the greater

96. E.S. Roscoe, *Aliens in Great Britain*, 16 TRANSACTIONS OF THE GROTIUS SOC'Y 65, 66 (1930).

97. Nafziger, *supra* note 9, at 809.

98. *See supra* note 4. These commentators and scholars have argued that the Bill of Rights limits the federal government's power to exclude or expel aliens.

> part of the eighteenth century, there appear to be very few instances in which the Crown used its prerogative either to exclude or to expel aliens; and, when, at the end of the century, it was thought desirable to exclude aliens, statutory powers were got. In the third place, these statutes were passed to exclude aliens who, it was thought, might spread in England the ideas of the French Revolution. . . . [S]ince 1793, if the government wished to exclude aliens, it has had recourse to the Legislature. It is clear that, whether or not the Crown had power to exclude, this power is in effect superseded by the statutes which now regulate that power. In the second place, whether or not the King has the power to exclude, the alien excluded cannot, by taking legal proceedings, assert a right to enter the country. He is not a British subject, and he is not an alien resident in this country. Therefore any measures taken by the Crown to exclude him cannot give rise to any proceedings in an English Court because they are acts of state. . . . The better opinion would seem to be that the Crown has no general power to expel an alien; but that it may have a power to expel if an alien enters the country in contravention of a statute, or perhaps of a royal prohibition to enter, or if the Crown has this power by the law of a particular colony.[99]

In summation, Holdsworth was stating that the authority of the English government over immigration matters was unquestionably plenary despite liberty charters such as the Magna Charta, 1689 Declaration of Rights, and the Act of Settlement. The only major debate over immigration matters concerned whether Parliament or the Crown had the absolute authority to exclude or expel aliens. What Holdsworth makes clear is that by 1793 the power over immigration had a concurrent structure. While this distribution of power is significant in determining the legality of an individual's exclusion or expulsion, what is of importance for this study is that the plenary power doctrine, ideological exclusion, and the doctrine of allegiance were all in full force and unquestioned.

English legal treatises of the eighteenth century illuminate this fact. For example, in John Comyns's *A Digest of the Laws of England*, the requirement that foreigners

99. 10 HOLDSWORTH, *supra* note 31, 395–98.

declare their allegiance by submitting to the laws is clarified when it states, "By the st. 32 H. 8. 16. s. 9. every alien shall be subject to the laws."[100] Comyns also confirms the existence of the ideological aspects of immigration and naturalization, writing that "[b]y the st. 7 Jac. 2. no person shall be naturalized, unless he hath received the sacrament within a month before the bill exhibited, and take the oaths of supremacy and allegiance in the parliament house."[101] Of course, Comyns was not the only commentator to do so.

Wyndham Beawes's *Lex Mercatoria Rediviva* also discusses the legal framework of immigration and naturalization law. Of interest is his analysis of the doctrine of allegiance as applying to Englishmen that settle in a foreign country. Beawes wrote, "If an *Englishman* shall go beyond Sea, and shall there swear Allegiance to any *foreign Prince* or *State*, he shall be esteemed an Alien, and shall pay the same position as they; but if he returns and lives in *England*, he shall be restored to his *Liberties*."[102] In Matthew Bacon's *A New Abridgement of the Law*, the doctrine of allegiance is discussed in further detail. Bacon wrote:

> An Alien is one born in a strange Country and different Society, to which he is presumed to have a natural and necessary Allegiance; and therefore the Policy of our Constitution has established several Laws relating to such a one; the Reasons whereof are, that every Man is presumed to bear Faith and Love to that Prince and Country where first he received Protection during his Infancy; and that one Prince might not settle Spies in another's Country; but chiefly that the Rents and Revenues of one Country might not be drawn to the Subjects of another.[103]

Even William Blackstone discussed the importance of the doctrine of allegiance and the legal requirement that all foreigners must submit to a nation's laws as a requirement

100. 1 JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 561 (Anthony Hammond ed., 5th ed. 1824); Comyns distinguishes between alien friends, alien enemies, and allegiance. *Id.* at 552, 560.

101. 1 COMYNS, *supra* note 100, at 555.

102. WYNDHAM BEAWES, LEX MERCATORIA REDIVIVA: OR, THE MERCHANT'S DIRECTORY 277 (6th ed. 1773).

103. 1 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 76 (6th ed. 1793).

to enter or settle. He writes that allegiance "both express and implied, is the duty of all the king's subjects" as is the case with aliens.[104] He defines an alien as "one who is born out of the king's dominions, or allegiance."[105] Regarding the plenary power of government over foreign affairs and immigration, Blackstone writes,

> [B]y the law of nations no member of one society has a right to intrude into another. And therefore Puffendorf very justly resolves, that it is left in the power of all states to take such measures about the admission of strangers, as they think convenient. . . . Great tenderness is shown by our laws, not only to foreigners in distress . . . but with regard also to the admission of strangers who come spontaneously. For so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under the king's protection; though liable to be sent home whenever the king sees occasion.[106]

What Blackstone's *Commentaries* makes abundantly clear is that immigration is a privilege, not a right. While he admits that the English statutes were generous to foreigners entering the realm, he conditions their entry and settling on "behav[ing] peaceably."[107] Furthermore, Blackstone confirms that the sovereign authority has discretion to send foreigners home at any time.[108]

Perhaps the most influential commentator on immigration law was Emer De Vattel. He was not of English origin, but Vattel's work provides historians and legal commentators with an international context of immigration law, especially with respect to Western civilization. While his works were not translated into English until 1787, Benjamin Franklin's correspondence proves that Vattel's *Law of Nations* significantly impacted the legal thought of immigration law in England and the American colonies as early as 1775. In a December 9, 1775 letter to Charles Dumas, Franklin wrote,

104. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 359 (1765).

105. *Id.* at 361.

106. *Id.* at 251–52.

107. *Id.* at 252.

108. *Id.*

> I am much obliged by the kind present you have made us of your edition of *Vattel.* It came to us in good season, when the circumstances of a rising state make it necessary frequently to consult the law of nations. Accordingly that copy which I kept (after depositing one in our own public library here, and sending the other to the college of Massachusett's Bay, as you directed) has been continually in the hands of the members of our congress, now sitting, who are much pleased with your notes and preface, and have entertained a high and just esteem for their author.[109]

Vattel undoubtedly influenced the late-eighteenth-century understanding of immigration and naturalization—such as who may obtain a country's rights, privileges, and immunities.[110] First and foremost, Vattel viewed the admission of aliens as a privilege, not a right.[111] In exchange for permission to "settle and stay," aliens were "bound to the society by their residence . . . subject to the laws of the state . . . and . . . obliged to defend it, because it grants them protection."[112] These allegiances were required even though a permitted alien did "not participate in all the rights of citizens."[113] In other words, the law of nations made it clear that lawful aliens were viewed as "citizens of an inferior order, and . . . united to the society, without participating in all its advantages."[114]

If lawful aliens were "citizens of an inferior order," this begets the question: What rights, privileges, and immunities, if any, are granted to aliens who do not prescribe their allegiance to the laws? According to Vattel, the key to the answer rests as to whether an alien had *settled.* Aliens must first be permitted to *settle* before they may obtain the protection of the country and its laws. To accomplish this requirement, the alien must establish "a

109. BENJAMIN FRANKLIN, MEMOIRS OF BENJAMIN FRANKLIN 297 (1834).

110. *See generally* Prentiss v. Barton, 19 F. Cas. 1276, 1277 (C.C.D. Va. 1819) (No. 11,284). John Marshall would even cite to Vattel when he defined "domicil of origin." *Id.*

111. "The inhabitants, as distinguished from citizens, are foreigners, who are permitted to settle and stay in the country." EMER DE VATTEL, THE LAW OF NATIONS § 213 (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008).

112. *Id.*

113. *Id.*

114. *Id.*

fixed residence in any place with an intention of always staying there."[115] While one may view Vattel's analysis as a broad allowance for any person to immigrate to any country in order to qualify, he makes it clear that a "man does not . . . establish his settlement . . . unless he makes sufficiently known his intention of fixing there, either tacitly, or by an express declaration."[116]

In other words, eighteenth-century international precedent required aliens to inform the government of their intent to *settle*. This is a legal premise that has survived throughout the world, even today. Most importantly, it was a legal premise that Parliament would include in their 1793 Alien Bill[117] and the American Founding Fathers would include in their first laws on naturalization.[118] In fact, in 1822, the Committee of the Judiciary would reiterate this premise, stating that to "dispense with [the declaration of the intent to *settle*] is to commit a breach in the established system, and to make residence, without declared intention to become a citizen, sufficient to entitle a person to admission" into the United States.[119]

Aliens that did not comport to a nation's laws of *settlement*, according to Vattel, were *vagrants*—the eighteenth-century equivalent of what we refer today as "illegal" or "unlawful" aliens. They are individuals that "have no settlement."[120] "[F]or to settle for ever in a nation," wrote Vattel, "is to become a member of it, at least as a

115. *Id.* § 218.

116. *Id.*

117. 33 Geo. 3, c. 4 (1793) (Eng.).

118. The first law to establish a uniform rule of naturalization required the alien to show proof he resided in the United States for two years, had settled in a state where the court was located for at least one year, and to make "proof to the satisfaction of such court, that he is a person of good character, and taking the oath . . . to support the Constitution of the United States" to be "considered as a citizen of the United States." An Act to establish an Uniform Rule of Naturalization, ch. 3, 1 Stat. 103–04 (1790). The 1802 Naturalization Act similarly required aliens announce their intent to settle at least three years before the time applying to be admitted to become a citizen of the United States. An Act to establish an Uniform Rule of Naturalization, and to repeal the acts heretofore passed on the subject, ch. 28, 2 Stat. 153–54 (1802).

119. REPORT OF THE COMMITTEE ON THE JUDICIARY UPON THE SUBJECT OF ADMITTING ALIENS TO THE RIGHTS OF CITIZENSHIP WHO RESIDED WITHIN THE UNITED STATES ONE YEAR PRECEDING THE DECLARATION OF THE LAW WAR WITH GREAT BRITAIN (March 18, 1822).

120. VATTEL, *supra* note 111, § 219.

perpetual inhabitant, if not with all the privileges of a citizen."[121] Therefore, as Vattel makes clear, the law of nations required aliens to *settle* in order to obtain the "privileges of a citizen." This is not to say that *vagrants* did not have any rights, privileges, or immunities.[122] They were entitled to legal due process,[123] protection over their person,[124] and to maintain their personal property.[125]

However, *vagrants* were not necessarily entitled to any other protections unless the law of the nation expressly grants them.[126] In reference to aliens, as a matter of law, they are only granted full protection upon legal entry or what Vattel describes as the "tacit condition, that [they] be subject to the laws."[127] This includes laws "which have no relation to the title of citizen, or of the subject of the state"—the rules of naturalization and entry.[128] Aliens may be subjected to these extra requirements as a condition to the enjoyment of a nation's rights and privileges because, as Vattel states, "the public safety, the rights of the nation . . . necessarily require" it.[129] In fact, aliens were not only required to submit to the laws of a nation but, Vattel writes, they "ought to assist [the nation] upon occasion, and contribute to its defence, as far as is consistent with [their] duty as [a] citizen" of the nation wherein they reside.[130] In

121. *Id.*

122. *Id.* During the 1790 debates over the rules of naturalization, James Jackson hoped to see the "title of a citizen of America as highly venerated and respected as was that of a citizen of old Rome." Furthermore, Jackson was of the opinion, "that rather than have the common class of vagrants, paupers and other outcasts of Europe, that we had better be as we are, and trust to the natural increase of our population for inhabitants." 1 ANNALS OF CONG. 1114 (1790).

123. VATTEL, *supra* note 111, § 103.

124. "The state . . . cannot arrogate to herself any power over the person of a foreigner, who, though he has entered her territory, has not become her subject." *Id.* § 108.

125. "The property of an individual does not cease to belong to him on account of his being in a foreign country; it still constitutes a part of the aggregate wealth of his nation." *Id.* § 109.

126. These protections can be found in our federal and state constitutions or by legislation passed by Congress, the states, and localities. However, not even through the treaty power may aliens or foreigners be granted new or greater rights, privileges, and immunities thacn citizens of the United States.

127. VATTEL, *supra* note 111, § 101.

128. *Id.*

129. *Id.*

130. *Id.* § 105. Throughout nineteenth-century America, it was common practice that aliens were liable to do service in the militia, but this would end at the beginning of the twentieth century. *See* 2 JAMES KENT, COMMENTARIES ON

short, Vattel's *Law of Nations* is significant because it shows how the immigration laws were viewed in the eighteenth century. They were powers that were only limited by statute and had been traditionally bestowed with the sovereign government.[131]

This brings us to the 1792 Parliament debates over the Alien Bill. Upon the Bill's second reading, Lord Grenville immediately affirmed the government's plenary power over immigration and addressed the doctrine of allegiance:

> The law ... had always made a marked distinction between natural-born subjects and aliens .... The former owed a constant [allegiance], the latter only a local and transitory allegiance to the crown, and, on this account, the situation of both was, in the eye of the law, extremely different. It appeared to be part of the prerogative of the crown to forbid foreigners to enter or reside within the realm.[132]

Like Grotius and Blackstone, Grenville agreed that asylum should be offered to Protestant refugees that have been expelled from their country.[133] However, he was sure to point out that asylum was a governmental allowance—not a right—for Grenville believed that the "safety of the state was not to be sacrificed to hospitality; and whatever was necessary to that safety, was not to be blamed."[134] Grenville hoped to protect England from the ideological principles of the French Revolution,[135] and he was not alone. Lord

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AMERICAN LAW 74 (1873). In the United States today, federal statute protects non-immigrant aliens from registering with the Selective Service. *See* 50 U.S.C. App. § 453 (2006).

131. 1 BLACKSTONE, *supra* note 104, at 362.

132. 30 WILLIAM COBBETT, THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 156 (1817).

133. The Earl of Lauderdale sympathized with emigrant refugees, stating:

> "The first description of emigrants mentioned by the noble lord were entitled to our utmost compassion, and even delicacy. Driven from other countries, they had come to this in hopes of being able to live in inoffensive retirement, and keep their names, their rank, and their misfortunes unknown to the world, till their native country should deem it safe to receive them."

Id. at 159.

134. *Id.* at 157.

135. *Id.* at 158 (stating "that when anarchy was substituted in the room of government in France, some men of the most abominable principles, had, in different parts of that country, worked themselves into situations of power. ...

Stormont described the Alien Bill as a "measure of self-defence."[136] Secretary Dundas was concerned that an "influx of foriengers [that] had come from a country which had lately been the scene of very extraordinary transactions; where their constitution had been overthrown, and acts of the most dreadful enormity had been perpetrated"[137] were dangerous and considered the Bill "necessary to the safety of the state."[138] Meanwhile, Edmund Burke gave his "most cordial support" for the Bill because it is "calculated to keep out of England those murderous atheists, who would pull down church and state; religion and God; morality and happiness."[139]

What is interesting about Burke's speech concerning the Alien Bill is his reference to immigration and naturalization being a matter foreign policy. He believed that the "reciprocity of good dispositions between the people of two nations . . . was a serious fact[or] which deserved to be attended to" in considering the Alien Bill.[140] Burke, however, was not the first to make this argument. The 1695 tract entitled *Sundry Considerations Touching Upon the Naturalization of Aliens* had argued against inviting foreigners because of lack of reciprocity between nations. It stated, "We have never have the advantage to invite the English into the Foreign Parts of *Europe* or *Asia*, as they will have to invite them hither."[141]

Of course, not everyone agreed with the Alien Bill. The Earl of Wycombe preferred extending the "benefits of our constitution" rather than restricting them.[142] He saw "no ground for any alarm from disaffection to the constitution."[143] Meanwhile, Mr. Taylor was concerned whether the expulsion and exclusion of aliens in the Bill would be extended to British subjects, thereby repealing the

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People of that kind had been sent to England in the hope that they might be able to raise insurrection, and overthrow government.").

136. *Id.* at 160.

137. *Id.* at 174.

138. *Id.* at 176.

139. *Id.* at 188.

140. *Id.* at 185.

141. SUNDRY CONSIDERATIONS TOUCHING NATURALIZATION OF ALIENS, *supra* note 70, at 13.

142. 30 COBBETT, *supra* note 132, at 195.

143. *Id.* at 195–96.

Habeas Corpus Act.[144] He was also concerned that the Bill "violated the rights of aliens" because it "entirely left them in the power of the king."[145]

The power of the Crown over the exclusion and expelling of aliens was always a matter of some debate, but the majority seemed to side with the Crown's prerogative. For instance, Mr. Jenkinson cited Blackstone, stating, "that the king had an undoubted right to order any alien to depart this realm out of his own will and pleasure."[146] Mr. Fox agreed, stating the "prerogative of the crown to send foreigners out of the kingdom . . . ought not to remain in doubt."[147] Meanwhile, Mr. Hardinge was of the opinion that the Sovereign "had, by law, the right of sending aliens out of the kingdom for the public safety."[148] And if the Sovereign did not have this power, Hardinge thought the Alien Bill even more necessary to protect the nation.[149]

In the end, the Alien Bill passed. Mr. Fox supported the bill because he feared the "propagation of French opinions in this country."[150] Mr. Hardinge viewed the bill as a "necessary evil because, without an indefinite power over aliens of all descriptions, the mischievous could never be separated from the good."[151] Lastly, Mr. Pitt threw in his support because he could see a scenario where Jacobins would carry out a similar overthrow of government in England.[152] He viewed the Jacobin philosophy as "setting in defiance all regular authority" that has been "sanctioned by the laws of other countries."[153] In other words, the Jacobin ideology of spreading anarchy was seen as a violation of the law of nations.[154]

144. *Id.* at 194.
145. *Id.* at 195.
146. *Id.* at 206.
147. *Id.* at 226.
148. *Id.* at 203.
149. *Id.*
150. *Id.* at 220.
151. *Id.* at 202.
152. *Id.* at 230.
153. *Id.* at 233.
154. *Id.*

III. IMMIGRATION LAW, THE PLENARY POWER, AND EXCLUSION BASED UPON ASSOCIATION AND IDEOLOGICAL GROUNDS IN THE EARLY REPUBLIC

It is improperly assumed by contemporary legal commentators that the Founding Fathers viewed the international and Anglo tradition respecting the rights, privileges, and immunities of foreigners differently.[155] These commentators believe that the Bill of Rights, especially the First and Fifth Amendments respectively, restrict congressional authority to exclude or expel foreigners. Their argument rests on one important fact—that the Constitution does not expressly grant the federal government the power to regulate immigration.[156] While legal commentators generally do not argue that the power over immigration rests with the federal government, they believe the lack of an affirmative constitutional clause restricts immigration laws by the provisions in the Bill of Rights. A look into the historical record of the Early Republic reveals that these beliefs are unsupported, especially in regards to the First Amendment restricting ideological and association exclusions or expulsions.

The problem with these contemporary legal commentators' interpretation of the First Amendment restricting the exclusion and expulsion of foreigners is that they merely gloss over the history of the Early Republic as if it is insignificant. For instance, James A. R. Nafziger writes, "A laissez faire policy of unrestricted admissions prevailed for nearly a hundred years, with the exception of the notorious Alien and Sedition Acts of 1798."[157] From Nafziger's statement, one would assume that the Founding Fathers did not understand the law of nations respecting immigration, strangers, and foreigners. One may also assume that the 1798 Alien and Sedition Acts was nothing more than a

155. *See* Brandon E. Davis, *America's Immigration Crisis: Examining the Necessity of Comprehensive Immigration Reform*, 54 LOY. L. REV. 353, 354 (2004); Aubrey Glover, *Terrorism: Aliens' Freedom of Speech and Association Under Attack in the United States*, 41 DUQ. L. REV. 363, 368–69 (2003); Berta Esperanza Hernandez-Truyol, *Natives, Newcomers and Nativism: A Human Rights Model for the Twenty-First Century*, 23 FORDHAM URB. L.J. 1075, 1118 (1996); Lupe S. Salinas, *Deportations, Removals and the 1996 Immigration Acts: A Modern Look at the Ex Post Facto Clause*, 22 B.U. INT'L L.J. 246, 306 (2004).

156. *See supra* notes 4, 19 and accompanying text.

157. Nafziger, *supra* note 9, at 835.

fleeting partisan aberration in the development of the federal government's authority to regulate immigration.[158] To the average reader of these recent commentaries, one would assume the Alien and Sedition Acts were nothing more than a mistake and do not have any value in understanding the scope of the federal government's immigration powers. Assumptions like these, however, are unwarranted.

A. *The United States Constitution, the Law of Nations, and the Plenary Power Doctrine*

It is frequently argued that the plenary power doctrine should be reexamined because the Constitution does not expressly grant the political branches plenary authority over immigration.[159] These arguments have little, if any, historical merit. In 1829, constitutional commentator William Rawle wrote, "Whoever visits or resides among us, comes under the knowledge that he is liable, by the law of nations, to be sent off"[160] should the binds of the doctrine of allegiance be violated.[161] It was well-established by the Framers that the plenary power doctrine was derived from the law of nations and is essential to a nation's right of self-

158. Most commentators supporting the First Amendment restriction on immigration law do not even mention the Alien and Sedition Acts in passing, but those that do merely gloss over the Alien and Sedition Acts as "notorious" without examining their constitutional, philosophical, and international underpinnings. *See* Akram, *supra* note 4, at 756; Vandiver, *supra* note 4, at 755.

159. *See, e.g.*, Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories & the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 81–82, 158–163 (2002) ("There is also little reason to believe that the Framers contemplated creating a federal immigration power."); Natsu Taylor Saito, *Asserting Plenary Power Over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427, 430 (2002) ("Nothing in the Constitution explicitly gives the government such [plenary] power.").

160. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 100 (1829).

161. The doctrine of allegiance was alive and well in early Republic thought, and a fact of which William Rawle took notice. *See id.* at 90–101. Moreover, in George Wythe's reported cases it makes mention of *Calvin's Case*, which was based upon the doctrine of allegiance as it respects foreigners. *See* GEORGE WYTHE, DECISIONS OF CASES IN VIRGINIA, BY THE HIGH COURT OF CHANCERY, WITH REMARKS UPON DECREES BY THE COURT OF APPEALS, REVERSING SOME OF THOSE DECISIONS 138–42 (1795).

preservation.[162] To the contrary of contemporary legal commentators, the consensus among Early American historians is that the Constitution was adopted to correct the problems that the Articles of Confederation posed in relation to foreign policy and immigration.[163] For instance, historian Andrew C. Lenner writes that the law of nations was "an inherent attribute of sovereignty" and "constituted a vital source of federal power."[164] The law of nations was significant because the Founders realized "Americans had to convince Europe that they were capable of effectively employing military force, enforcing their commercial sanctions, and keeping their promises (i.e., treaties)."[165]

Indeed, well before the drafting of the Constitution, it is documented that the Founding Fathers were acutely aware of the tenets of international law.[166] In drafting the Declaration of Independence, the Founders were faced with prescribing to the law of nations in order to obtain an alliance with France.[167] Throughout the Revolutionary War, the Founders were forced to adopt articles of war that mirrored those of European nations.[168] Furthermore, the Founders were familiar with the law of nations when they

162. Kansas v. Colorado, 206 U.S. 46, 57 (1907) ("Self-preservation is the highest right and duty of a Nation"); United States *ex rel.* Turner v. Williams, 194 U.S. 279, 290 (1904). In *Turner*, the Court stated,

> [R]ested on the accepted principle of international law, that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe . . . .

Turner, 194 U.S. at 290.

163. DANIEL GEORGE LANG, FOREIGN POLICY IN THE EARLY REPUBLIC: THE LAW OF NATIONS AND THE BALANCE OF POWER 80–86 (1985); PETER ONUF & NICHOLAS ONUF, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776–1814, at 113–44 (1993); Andrew Lenner, *Separate Spheres: Republican Constitutionalism in the Federalist Era*, 41 AMER. J. LEGAL HIST. 254, 253–56 (1997).

164. Lenner, *supra* note 163, at 256.

165. *Id.*

166. PATRICK J. CHARLES, IRRECONCILABLE GRIEVANCES: THE EVENTS THAT SHAPED THE DECLARATION OF INDEPENDENCE 229–335 (2008).

167. *Id.*

168. *See* PATRICK J. CHARLES, THE SECOND AMENDMENT: THE INTENT AND ITS INTERPRETATION BY THE STATES AND THE SUPREME COURT 114–30 (2009) (discussing how the Founders had to dispense with their dissatisfaction with European rules of martial law in order to defeat the British); BARON DE STUBEN, REGULATIONS FOR THE ORDER AND DISCIPLINE OF THE TROOPS OF THE UNITED STATES (Joseph Riling ed. 1966).

entered into the 1783 Treaty of Paris, which even addressed immigration matters when it distinguished between "real British subjects"[169] and American citizens based on the doctrine of allegiance.[170]

By the summer of 1787, however, the members of the Constitutional Convention were aware of the failure of the existing system under the Articles of Confederation.[171] Despite the 1783 Treaty of Paris and the Articles, England and other foreign nations were able to frustrate the United States' diplomatic relations.[172] Equally, the disparity between the laws of the respective states respecting the rights of citizenship was an influential factor in dispensing with the Articles of Confederation.[173] As early as April 1787, James Madison had written to George Washington about the importance of the federal government "fixing the terms of and forms of naturalization."[174] Madison believed "it was a power that was 'absolutely necessary' to be placed with the federal government in order to avert the states from 'harass[ing] each other with rival and spiteful measures' and to prevent 'the aggressions of interested majorities on the rights of minorities and of individuals.'"[175] The North Carolina Constitutional Convention supported such plenary power as important to avoid "disagreeable controversies with foreign nations" and as a "means of preserving the peace and tranquility of the Union."[176] It was well known by the founding generation that the "encroachments of some states on the rights of others, and of all on those of the Confederacy, [on the rules of immigration and citizenship]

169. Treaty of Paris, U.S.-Gr. Brit., art. 5, Sept. 3, 1783.

170. James H. Kettner, *The Development of American Citizenship in the Revolutionary Era: The Idea of Volitional Allegiance*, 18 AMER. J. LEGAL HIST. 208, 241 (1974).

171. GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC 1789–1815, at 15 (2009).

172. ONUF & ONUF, *supra* note 163, at 94–95.

173. Kettner, *supra* note 170, at 224.

174. JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 593 (Gaillard Hunt & James Scott eds., 1920).

175. Brief for Amicus Curiae Immigration Reform Law Institute in Support of Respondent at 22, Flores-Villar v. United States, No. 09-5801 (U.S. petition for certiorari filed Aug. 3, 2009) (quoting MADISON, *supra* note 174, at 593–94).

176. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 19 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 2d ed. 1907).

are incontestable proofs" of the weakness of the Articles of Confederation.[177]

These issues were elaborated during the 1787 Constitutional Convention. Madison supported the Naturalization Clause because he viewed it as the power to "fix different periods of residence."[178] However, Madison's views were not shared by all. Many were concerned with the effect the granting of such power would have on foreigners who were already residing in the United States by the permission of the respective states.[179] These aliens had already established residency under the belief they would be permitted to remain and be admitted as citizens under state laws.[180] Roger Sherman addressed this concern, stating that "[t]he United States have not invited foreigners, nor pledged their faith that they should enjoy equal privileges with native citizens."[181] It was up to Congress to "make any discriminations [it] may judge requisite."[182]

James Madison agreed with this understanding of the Constitution's Naturalization Clause. He proclaimed that the "states alone are bound" to the consequences of their former naturalization laws, not the United States.[183] This did not mean that the states would not ultimately impact the nation's naturalization laws, for each state had stake in the Union. The states were parties to the Constitution, took part in passing legislation, and even had the power to offer amendments. More importantly, Madison felt if the states did not like the option of violating the "faith pledged to" foreigners, they could reject this provision of the

177. *Id.* at 20; *see also* RAWLE, *supra* note 160, at 85; ST. GEORGE TUCKER, A VIEW OF THE CONSTITUTION WITH SELECTED WRITINGS 197–98 (1999).

178. 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 176, at 398.

179. *Id.* at 412–13.

180. For instance, James Wilson was concerned that Pennsylvania had pledged to grant citizenship on two years residence. Wilson never denied the federal government would have the power to supersede this naturalization law. However, he hoped that the federal government would "maintain the faith thus pledged to her citizens of foreign birth" by appealing to the law of nations. Wilson thought to retract this promise would "deter" future foreigners from wanting to emigrate. *Id.* at 414.

181. *Id.* at 412–13.

182. *Id.* at 413.

183. *Id.*

Constitution altogether.[184] However, this did not happen and the Naturalization Clause was one of the least debated provisions of the Constitution.

James E. Pfander and Theresa R. Wardon paint a much different picture of the history of the Constitution, the Naturalization Clause, and the Framers' views on congressional authority over immigration. They assert that the legislative history of the United States' first naturalization laws provides that the Framers did not intend to "conceive of congressional power" that was "unbridled."[185] They argue that the "so-called plenary power doctrine"[186] is limited in that immigrants have vested rights upon lawfully settling, writing:

> [T]he Framers of the Constitution and the members of Congress who applied its terms in the early years were strongly committed to norms of prospectivity, uniformity, and transparency. Congress can change the rules, on this account, but must respect the reliance interests of those who have established a residence in the United States and have complied with the rules in place at the time of their arrival.[187]

Pfander and Wardon's argument rests on two flawed historical assumptions. First, they assume because Congress did not pass retroactive legislation concerning naturalization in the Early Republic that this forecloses Congress from passing retroactive legislation to aliens who have "established lawful residence in the United States" today.[188] Second, they qualify this restraint on their inaccurate reading of the word "establish" in the Naturalization Clause.[189] Pfander and Wardon believe that the Framers' use of the word "establish" in defining congressional power over naturalization "conveys a distinctive message of relative permanence and prospectivity" that prevents retroactive legislation.[190] To

184. *Id.*
185. Pfander & Wardon, *supra* note 17, at 370.
186. *Id.* at 413.
187. *Id.* at 370.
188. *Id.* at 413.
189. *Id.* at 385–93.
190. *Id.* at 388.

support this claim they urge that the Constitution's use of "establish" in the preamble and congressional power to "ordain and establish" the federal Judiciary "suggests a degree of permanence."[191]

This interpretation of congressional power over naturalization, and the plenary power doctrine altogether, does not comport with the Framers' intent in adopting the Naturalization Clause or their understanding of the law of nations. As to the former, the word "establish" was used to signify unfettered authority over naturalization and the granting of rights included in United States citizenship. Alexander Hamilton's notes from the 1787 Constitutional Convention unequivocally confirm this. Hamilton viewed congressional power over naturalization and the rules of citizenship as necessary to protect American government. He scribbled in his notes on the Convention, "The right of determining the rule of naturalization will then leave a discretion to the [federal] Legislature on this subject which will answer every purpose."[192] Hamilton later confirmed congressional plenary authority over naturalization at the 1788 New York Convention.[193] In the discussion over the federal government's power to tax, Hamilton argued that the federal government's power to tax should be similar to "that of Naturalization That by Construction would give an Exclusive Right."[194]

Hamilton's most expansive treatment concerning immigration, naturalization, and citizenship would come in 1802 under a string of numbered editorials entitled *The Examination*. They show that immigration and naturalization were issues of federal policy that could be changed at the will of the "common consent," which did not concern constitutional restraints such as prospectivity or retroactivity.[195] For instance, in *The Examination No. VII*, Hamilton questioned Jefferson's policy of abolishing all

191. *Id.* at 388–89.

192. 4 THE PAPERS OF ALEXANDER HAMILTON 234 (Harold C. Syrett ed., 1962).

193. 5 *id.* at 126.

194. *Id.* at 127.

195. WASHINGTON FEDERALIST (Washington, DC), January 15, 1802, at 2, col. 3; *see also* 25 THE PAPERS OF ALEXANDER HAMILTON 491–95 (Harold C. Syrett ed., 1977).

restrictions on naturalization and immigration.[196] He felt such a policy contradicted the social contract established by the Constitution and would lead to the destruction of American principles of government. He wrote:

> The impolicy of admitting foreigners to an immediate and unreserved participation in the right of suffrage, or in the sovereignty of a Republic, is as much a received axiom as any thing in the science of politics, and is verified by the experience of all ages. Among other instances, it is known, that hardly any thing contributed more to the downfall of Rome, than her precipitate communication of the privileges of citizenship to the inhabitants of Italy at large.[197]

In *The Examination No. VIII*, Hamilton again qualified that the "admission of foreigners" was a national political issue dependent upon a multitude of public policy considerations, writing:

> The safety of a republic depends essentially on the energy of a common National sentiment; on a uniformity of principles and habits; on the exemption of the citizens from foreign bias, and prejudice; and on that love of country which will almost invariably be found to be closely connected with birth, education, and family.[198]

To Hamilton, the first naturalization laws were "merely a temporary measure adopted under peculiar circumstances."[199] He stressed that the "situation is now changed."[200] The old policy of mass immigration was beginning to "change and corrupt the national spirit," to "divide the community and to distract our councils, by promoting in different classes, different predilections in favour of particular foreign nations," and "compromise the

196. 25 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 195, at 491–95.

197. *Id.* at 494.

198. NEWPORT MERCURY (Newport, RI), January 26, 1802, at 1, col. 3; *see also* 25 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 195, at 495–97. For more on Hamilton's opinion on immigration, naturalization, and the right of self-preservation, see THE REPUBLICAN OR ANTI-DEMOCRAT (Baltimore, MD), February 17, 1802, pg. 2 cols. 1–3 (The Examination No. IX); THE PAPERS OF ALEXANDER HAMILTON, *supra* note 195, at 500–06.

199. 25 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 195, at 497.

200. *Id.* at 496.

interests of our own country in favor of another."[201] Hamilton was not advocating for closing off immigration or citizenship.[202] He was merely stating that liberal immigration and naturalization policies were proper at America's infant stages. However, as of 1802, Hamilton knew that a revision of the naturalization laws needed to be adopted "between closing the door altogether and throwing it entirely open."[203] The laws must "enable aliens to get rid of foreign and acquire American attachments; to learn the principles and imbibe the spirit of our government; and to admit of a probability at least of their feeling a real interest in our affairs."[204]

Just as Hamilton had expressed his opinion as to the "Exclusive Right" granted in the Naturalization Clause,[205] James Madison similarly interpreted the clause as prescribing unfettered congressional authority over the privileges of citizenship and naturalization. According to Madison in The Federalist No. 42, the problem with the Articles of Confederation was not just with different rules of naturalization, which in turn granted "all the rights of citizenship."[206] The "inconsistent" state laws were as equally "obnoxious" concerning the "privileges of residence."[207] Clearly understanding the law of nations as it existed in the late-eighteenth century and how the differentiating state rules of immigration and naturalization impacted international affairs, Madison knew the United States had been fortunate in not causing an international incident.[208] He wrote, "We owe it to mere casualty, that very serious embarrassments on this subject have been hitherto escaped."[209]

Madison's sentiments on congressional plenary authority in these areas of law can also be found in his personal

201. *Id.*
202. *See id.* at 497.
203. *Id.*
204. *Id.*
205. 5 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 192, at 126.
206. THE FEDERALIST NO. 42 (James Madison).
207. *Id.*
208. *Id.*; *see also* THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 176, at 19 (discussing the Naturalization Clause as necessary to prevent "disagreeable controversies with foreign nations.").
209. THE FEDERALIST NO. 42 (James Madison).

papers where he defined the different "qualities of a citizen" and an alien.[210] He elaborated on some "general principles" of naturalization law, including the "established maxim that birth is a criterion of allegiance" and that place of birth "is the most certain criterion" and "is what applies in the United States."[211] What is particularly significant about Madison's understanding of the Naturalization Clause is that he interpreted the power broadly so Congress may prescribe class distinctions concerning the rules of citizenship. For instance, during the 1794–1795 debates over a new naturalization bill, Madison supported a proposal making a "distinction" for "one class of emigrants over another, as to the length of time before they would be admitt[ed] citizens."[212] Madison made a similar distinction in 1819. Addressing the fact that some alien classes fostered firmer allegiance ties to the United States than other classes, he wrote: "I have been led to think it worthy of consideration whether our law of naturalization might not be so varied as to communicate the rights of Citizens by degrees, and in that way preclude the abuses committed by [different classes of aliens.]"[213]

While Madison knew that these "restrictions would be felt it is true by meritorious individuals, of whom [he] could name some . . . this always happens in precautionary regulations for the general good."[214] Thus, to Madison the words "establish" and "uniform" were to be interpreted broadly, not restrictively as Pfander and Wardon claim.

The early constitutional commentators were all in concurrence with this interpretation of the Naturalization Clause. St. George Tucker listed congressional power to prescribe the terms of citizenship as being "exclusively granted to the federal government."[215] William Rawle understood the rules of naturalization under the paradigm of allegiance by conditioning residence on allegiances as

210. 12 THE PAPERS OF JAMES MADISON 179 (Robert A. Rutland ed., 1979).

211. *Id.* at 179.

212. 15 THE PAPERS OF JAMES MADISON 432 (Thomas A. Mason, Robert A. Rutland, & Jeanne K. Sisson, eds., 1985).

213. 8 THE WRITINGS OF JAMES MADISON 425 (Galliard Hunt ed., 1908).

214. *Id.*

215. TUCKER, *supra* note 177, at 129, 131.

defined by the federal government.[216] As Rawle articulated it, since naturalization is the "mode of acquiring the right" of citizenship and "is the factitious substitution of legal form for actual birth," individuals born outside the United States owe due allegiance to rules of naturalization.[217]

Justice Joseph Story similarly stated that Congress has plenary power to regulate naturalization and citizenship. He wrote that the naturalization power "must be exclusive; for a concurrent power in the states would bring back all the evils and embarrassments, which the uniform rule of the constitution was designed to remedy."[218] He went on to write that the use of the language *establish*, which exists in the Naturalization Clause, must be given "the liberal interpretation of the clause."[219] Story used the Congressional power to *establish* post offices and post roads as an example. The power to *establish* these, wrote Story, has been interpreted by some as merely a power to define "where post-offices shall be kept" and "designate, or point out, what roads shall be mail-roads, and the right of passage."[220] Such an interpretation, however, "has never been understood to be limited."[221] Instead, he wrote that it has "constantly had to the more expanded sense of the word."[222]

Not even the works of James Wilson, whom Pfander and Wardon cite as supporting their interpretation of the word "establish,"[223] supports a limited interpretation of the Naturalization Clause. In one of his many lectures on the law delivered at the University of Pennsylvania, Wilson distinguished the rules concerning citizens and aliens.[224] Citing to the works of Blackstone, Bacon, and Coke throughout his analysis, Wilson acknowledged that late-eighteenth-century public policy "liberally" granted aliens

216. For discussion *see* RAWLE, *supra* note 160, at 90–98.

217. *Id.* at 86. Allegiance must begin "with his residence among us" and will only be rendered "perpetual by his naturalization." *Id.* at 94.

218. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1099 (1833).

219. *Id.* § 554.

220. *Id.* § 553.

221. *Id.* § 554.

222. *Id.*

223. Pfander & Wardon, *supra* note 17, at 389 n. 129, 391.

224. 2 COLLECTED WORKS OF JAMES WILSON 1038–52 (Kermit L. Hall & Mark David Hall eds., 2007).

the "private rights and privileges, of our country."[225] However, Wilson qualifies that only foreigners "of good character" could be admitted, "for numbers without virtue are not our object."[226]

The "good character" of an individual or class of individuals is a determination that can only be made by the federal government through the uniform rules of naturalization and a determination that may retroactively change according to national interests. Pfander and Wardon's argument that Congress cannot retroactively change such rules conflicts with the entire purpose of the naturalization process—the acquiring of allegiance on the conditions prescribed by "We the people" through our representatives. As will be shown in the next section, such an attempt to limit this enumerated constitutional power would strip the federal government of its right of self-preservation and ultimately make the Necessary and Proper Clause nugatory. However, for the purposes of this section, it is worth noting that there is no substantiating evidence that the Framers sought to make each naturalization law prospective. The text, language, and conditions prescribed in the early naturalization laws were based on public policy and international considerations, not an interpretation of the Constitution.

In fact, the jurisprudence of three members of the first United States Supreme Court confirms that the founding generation was well informed of the "law of nations" concerning the rights of aliens and rules of citizenship. In 1790, Chief Justice John Jay delivered a charge to the grand jury on the importance of the "law of nations" in our constitutional jurisprudence: "We had become a nation—as such we were responsible to others for the observance of the *law of nations*; and as our national concerns were to be regulated by *national laws*, national tribunals became necessary for the interpretation and execution of them both."[227]

225. *Id.* at 1051.

226. *Id.*

227. JOHN JAY, THE CHARGE OF CHIEF JUSTICE JAY TO THE GRAND JURIES OF THE EASTERN CIRCUIT 7 (1790) (emphasis added).

On November 23, 1798, Associate Justice William Cushing delivered a charge to a grand jury defending the Alien Act of 1798.[228] The Act gave the Executive authority to expel any alien deemed dangerous to the public safety.[229] Cushing began his charge by reminding the people that matters effecting international relations are left "to our representatives in Congress assembled" where "the constitution has lodged" such "power and discretion."[230] He further stated that the Bill of Rights was never intended to take away these powers inherent to national sovereignty, such as the removal of aliens, and that Congress had the authority "to make all necessary and proper laws for that purpose."[231] Cushing elaborated on the "due process" afforded aliens until they obtain the rights of citizenship:

> Can it be imagined, that the supreme authority of government . . . has no power to . . . remove aliens who belong to, and owe allegiance to a foreign state . . . . But it is suggested, that aliens cannot be touched in such case without the intervention of a jury, because it is provided in the 7th article of the amendments to the constitution . . .and in the 8th article of amendments . . . . There is no doubt but that any alien permitted to reside among us, committing any crime against the municipal laws of the country, is to be tried in the common way, by jury. But that no way touches the present case [of a nation's power to remove aliens].[232]

Fellow Associate Justice James Iredell similarly defended the Alien Act of 1798 in a charge to a grand jury delivered in Philadelphia. Touching upon every alien's right to residence or settlement in the United States, Iredell stated that the "law of nations undoubtedly is, when an alien goes into a foreign country, he goes under either an express or implied safe conduct."[233] A nation's "liberalty" concerning

228. The Honorable Judge Cushing, *A Charge Delivered to the Federal Grand Jury for the District of Virginia, on the 23d Nov. 1798: By the Honorable Judge Cushing, published by request of the Grand Jury*, THE EASTERN HERALD AND GAZETTE OF MAINE, January 21, 1799, Vol. XV.

229. Act of June 25, 1798, ch. 58, 1 Stat. 570, 571 (1798).

230. Cushing, *supra* note 230, at 1, cols. 2–3.

231. *Id.* at 2, col. 2.

232. *Id.*

233. CLAYPOOLE'S DAILY ADVERTISER (Philadelphia, PA), May 16, 1799, at 2, col. 2.

immigration was moot, for "it is always understood that the government may order away any alien whose stay is deemed incompatible with the safety of the country."[234] The same rule applied to those aliens who put their "faith in government" that they would be granted the privilege of citizenship.[235] Iredell elaborated:

> [T]here are certain conditions, without which no alien can ever be admitted, if he stay ever so long; and one is . . . he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same. If his conduct be different, he is no object of the naturalization law at all, and consequently no implied compact was made with him . . . . Besides, any alien coming to this country must or ought to know, that this being an independent nation, it has all the rights concerning the removal of aliens which belong by the law of nations to any other; that while he remains in the country in the character of an alien, he can claim no other privilege than such as an alien is entitled to, and consequently, whatever risque he may incur in that capacity is incurred voluntarily, with the hope that in due time by his unexceptionable conduct, he may become a citizen of the United States.[236]

Thus, looking at the historical evidence in its entirety, it is difficult to ascertain where Pfander and Wardon gain support for their argument that the Founders adhered to "norms of prospectivity . . . on constitutional grounds" in drafting the early naturalization laws.[237] If the 1790 naturalization debates reveal anything, it is the political and international nature of the issue. The politics of naturalization primarily concerned wealth and the advancement of commerce. Madison addressed this point when he described the naturalization laws as the means to "increase the wealth and strength of the community."[238]

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234. *Id.*

235. *See* Daniel G. Iles, *With a Little Help from my Friends: The Federal Government's Reliance on Cooperation from the States in Enforcing Immigration Policy*, 31 WASH. UNIV. J.L. & POL'Y 193, 201–02 (2009).

236. CLAYPOOLE'S DAILY ADVERTISER (Philadelphia, PA), May 16, 1799, at 2, cols. 3–4.

237. Pfander & Wardon, *supra* note 17, at 393.

238. 1 ANNALS OF CONG. 1150 (1790).

What the debates also reveal is that the drafters were well aware that immigration and naturalization were matters of national sovereignty and international law. Congressman Thomas Hartley addressed the international nature of the issue stating the current policy of "the old nations of Europe has drawn a line between citizens and aliens" that has existed "since the foundation of the Roman Empire."[239] Congressman John Page acknowledged the international nature of the issue, but hoped the United States would deviate by allowing a "more liberal system ought to prevail."[240] Theodore Sedgwick was concerned with admitting too many foreigners because they might deteriorate American republicanism.[241] Meanwhile, James Jackson viewed congressional authority over immigration and naturalization as akin to that of Parliament. Using Blackstone's *Commentaries*, Jackson determined that the Constitution supports "progressive and probational naturalization."[242]

The 1794–1795 debates do not deviate from the understanding that immigration and naturalization law were a political consideration. Naturalization, citizenship, and the privileges of residence were all legal and political issues that were based on the doctrine of allegiance.[243] Such laws could always be changed and modified upon the consent of a congressional majority. For instance, a 1798 congressional committee saw no problems in recommending that the naturalization laws be amended to require a "longer residence" to obtain citizenship and establish further "precautions against the promiscuous reception and residence of aliens."[244] Nothing in the Committee Report can be construed as limiting the establishment of such laws on the premise of prospectivity.

A March 14, 1800 committee report illustrates this perfectly. It shows that principles of prospectivity were never intended to apply to the plenary power doctrine.

239. *Id.* at 1148.
240. *Id.*
241. *Id.* at 1117.
242. *Id.* at 1119.
243. 4 ANNALS OF CONG. 1005, 1053 (1793–95).
244. 1 AMERICAN STATE PAPERS: MISCELLANEOUS 180 (1834).

According to the report, a group of aliens sought to obtain relief by securing the "rights they would have received had they made the declaration required by" the Naturalization Act of 1795.[245] The committee refused to interpret the naturalization laws as having a prospective affect, writing that "nothing . . . can warrant a deviation from the general rule."[246] The Committee thought the amendments to the naturalization laws "to be founded on fair and just principles" because the federal government has the power to make laws that are "safe or prudent . . . to repose that confidence in [aliens] which it must place in its own citizens."[247]

Therefore, Pfander and Wardon's interpretation of the Naturalization Clause simply cannot survive. As shown above, the Naturalization Clause was drafted to ensure that the rules of immigration and naturalization would apply uniformly in the broad and liberal sense—to prevent the states from "harass[ing] each other with rival and spiteful measures."[248] More importantly, it was intimately tied into the foreign affairs power and meant to prevent international incidents. As James Madison wrote to George Washington, federal "terms and forms of naturalization" were necessary to prevent the States from "violat[ing] treaties and the law of nations."[249] "Without this defensive power" being vested to the federal government, Madison feared that "every positive power" granted to it would be "evaded & defeated."[250] To be precise, parts of the Constitution were drafted to incorporate the law of nations as was understood by Congress. As historians Peter and Nicholas Onuf write, the federal Constitution was drafted so that the "American states . . . would be governed by a perfected law of nations"[251]—a law of nations that was to be controlled by the plenary power of the political branches.

245. *Id.* at 208.
246. *Id.*
247. *Id.*
248. MADISON, *supra* note 174, at 593.
249. *Id.*
250. *Id.*
251. ONUF & ONUF, *supra* note 163, at 136–37.

B. *The Alien Act of 1798 and an Originalist Understanding of the Plenary Power Doctrine*

Despite frequent characterization as "notorious,"[252] the debates, political discourse, and print culture respecting the Alien and Sedition Acts provide great insight to the founding generation's view of immigration law in the constructs of the Constitution and the law of nations.[253] The historical evidence reveals that both Federalists and Republicans supported the Constitution as essential to America's progression in the international sphere.[254] Not to mention, the international legal thought of commentators such as S.F. von Puffendorf, Hugo Grotius, Emmerich de Vattel, William Blackstone, and others were prominent among the founding generation.[255]

In 1792, Edmund Randolph wrote how the Constitution did not change the "doctrine of alienage" for it "sprang" from the law of nations and is a "disability that must be born with man."[256] For evidence that the law of nations and the Constitution were seen as intertwined, one needs to look no further than the text of the Constitution itself. Article I, Section 8 prescribes that Congress has the power to "define" the "Offences against the Law of Nations."[257] However, the first Chief Justice of the Supreme Court, John Jay, would argue the law of nations applied absent this textual affirmation. In a 1793 charge to a grand jury delivered in Richmond, Virginia, Jay classified the "laws of the United States . . . under three heads or descriptions":

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252. Nafziger, *supra* note 9, at 835. *See generally* WOOD, *supra* note 171 (describing Alien and Sedition Acts as a justified mistake); Cleveland, *supra* note 159, at 84–98.

253. *See generally* LANG, *supra* note 163 (discussing the significance of the law of nations as impacting the framework and intent of the Constitution).

254. *See* Lenner, *supra* note 163, at 255–56.

255. *Id.* at 254, 259; *see* JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870, at 188 (1978); ONUF & ONUF, *supra* note 163, at 138; Kettner, *supra* note 170, at 219; Andrew C. Lenner, *John Taylor and the Origins of American Federalism*, 17 J. EARLY REPUBLIC 406, 408 (1997). *See generally* THOMAS EVANS, AN ADDRESS TO THE PEOPLE OF VIRGINIA, RESPECTING THE ALIEN & SEDITION LAWS (Richmond, Davis, 1798); OBSERVATIONS ON THE ALIEN & SEDITION LAWS OF THE UNITED STATES (Washington, PA, Colerick, 1799); ST. GEORGE TUCKER, A LETTER TO A MEMBER OF CONGRESS RESPECTING THE ALIEN AND SEDITION LAWS (Richmond, 1799).

256. 27 THE PAPERS OF THOMAS JEFFERSON 826 (John Catanzariti ed., 1997).

257. U.S. CONST. art I, § 8.

> "1st. All treaties made under the authority of the United States.
> 2d. The laws of nations.
> 3d. The constitution and statutes of the United States."[258]

Relying on Vattel, the "celebrated writer on the law of nations,"[259] Jay stated the law of nations consists of "those laws by which nations are bound to regulate their conduct towards each other" and "those duties, as well as rights, which spring from the relation of nation to nation."[260] These laws undoubtedly included every nation's right over aliens. Jay elaborated on this point, writing:

> The respect which every nation owes to itself imposes a duty on its government to cause all its laws to be respected and obeyed; and that not only by its proper citizens, but also by those strangers who may visit and occasionally reside within its territories. There is no principle better established, than that all strangers admitted into a country are, during their residence, subject to the laws of it; and if they violate the laws, they are to be punished according to the laws . . . to maintain order and safety.[261]

Although Chief Justice Jay viewed the power over aliens as an inherent right of national sovereignty through the law of nations, many eighteenth-century commentators relied on Article I, Section 8 of the Constitution. In fact, it would be this provision that was most often cited to support congressional authority to prescribe the rules of immigration in the Alien Act of 1798.[262] Other constitutional provisions that were used to support the constitutionality of the Alien and Sedition Acts include the Necessary and Proper Clause,[263] Commerce Clause,[264] Naturalization Clause,[265]

258. CITY GAZETTE AND DAILY ADVERTISER (Charleston, SC), August 14, 1793, at 2, col. 1.

259. *Id.* at 2, col. 2.

260. *Id.* at 2, col. 1.

261. *Id.* at 2, col. 3.

262. *See* 1 AMERICAN STATE PAPERS MISCELLANEOUS 180 (1834); AN ADDRESS OF THE MINORITY OF THE VIRGINIA LEGISLATURE TO THE PEOPLE OF THAT STATE 8 (Richmond, 1799); EVANS, *supra* note 256, at 18.

263. 8 ANNALS OF CONG. 1974 (1798); 1 AMERICAN STATE PAPERS: MISCELLANEOUS 180 (1834); COMMUNICATIONS FROM SEVERAL STATES, ON THE RESOLUTIONS OF THE LEGISLATURE OF VIRGINIA 11 (Richmond, 1800); EVANS, *supra* note 256, at 17–19.

and congressional power to provide for the common defense and general welfare.[266] However, the most powerful argument was the right of federal government to invoke and protect its right of self-preservation.[267] The preamble of the Constitution conveys the right of self-preservation, stating:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[268]

This sovereign right of self-preservation was universally recognized by the international legal treatises of the eighteenth century, to which the political pamphlets concerning the Alien and Sedition Acts all attest. In the pamphlet entitled *An Address to the People of Virginia, Respecting the Alien and Sedition Laws*, Thomas Evans believed in the constitutionality of the Alien Act on the grounds that it "attain[ed] the most important of all political ends, the *preservation of our national existence.*"[269] He believed this power was properly vested with the President by the "laws of nations, which were pre-existent, and were therefore recognized as of existing obligation by the

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264. 8 ANNALS OF CONG. 1974 (1798); OBSERVATIONS ON THE ALIEN & SEDITION LAWS OF THE UNITED STATES, *supra* note 256, at 20–25.

265. 8 ANNALS OF CONG. 2020 (1798); EVANS, *supra* note 256, at 24–25; THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 176, at 441.

266. 8 ANNALS OF CONG. 1790, 1974, 1981, 1986 (1798); 1 AMERICAN STATE PAPERS MISCELLANEOUS 180, 182 (1834); REPORTS OF THE COMMITTEE IN CONGRESS TO WHOM WERE REFERRED CERTAIN MEMORIALS AND PETITIONS COMPLAINING OF THE ACTS OF CONGRESS, CONCERNING THE ALIEN AND SEDITION LAWS 3 (Richmond, Va., Nicolson, 1799); AN ADDRESS OF THE MINORITY OF THE VIRGINIA LEGISLATURE, *supra* note 263 at 6–10; CHARLES LEE, DEFENCE OF THE ALIEN AND SEDITION LAWS 5–7 (Philadelphia, Fenno, 1798); THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 176, at 441; EVANS, *supra* note 256, at 28; OBSERVATIONS ON THE ALIEN & SEDITION LAWS OF THE UNITED STATES, *supra* note 256, at 21–25.

267. This right can be traced back to Hugo Grotius and gained prominence during the 1642 English Civil War, the 1688–89 Glorious Revolution, and was used as a justification for the American Revolution. Patrick J. Charles, *The Right of Self-Preservation and Resistance: A True Legal and Historical Understanding of the Anglo-American Right to Arms*, 2010 CARDOZO L. REV. DE NOVO 18, 26–27 (2010); *see also* 8 ANNALS OF CONG. 1984, 1986–87 (1798); EVANS, *supra* note 256, at 15; AN ADDRESS OF THE MINORITY OF THE VIRGINIA LEGISLATURE, *supra* note 263, at 11; OBSERVATIONS ON THE ALIEN & SEDITION LAWS OF THE UNITED STATES, *supra* note 256, at 6, 9, 13.

268. U.S. CONST. pmbl.

269. EVANS, *supra* note 256, at 15.

constitution."[270] Evans did not see anything "more dangerous to our *self-preservation* as a nation . . . than to have in the bosom of our country the materials of an hostile army."[271]

Of course, sovereignty and self-preservation were intertwined, for one could not exercise the latter without the former, and the former could not remain without the latter. This is why Charles Lee wrote, "There can be no complete sovereignty without the power of removing aliens; and the exercise of such a power is inseperably incident to the *nation*."[272] Similarly, in the pamphlet entitled *Observations on the Alien & Sedition Laws of the United States*, an anonymous author defended a nation's exercise of the right to self-preservation in reference to "Law concerning Aliens."[273] Paraphrasing Vattel, the pamphlet reads:

> The sovereign may forbid the entrance of his territory, either in general to every stranger, or, in a particular case, to certain persons, or on account of certain affairs, according as he may find it most for the advantage of the state . . . . But even in countries where every stranger may enter freely, the sovereign is supposed to allow them access, only upon the tacit condition that they will be subject to the laws—to the general laws made to maintain good order, and which have no relation to the title of citizen or subject of the state. *The public safety and the rights of the nation necessarily suppose this condition*, and the stranger tacitly submits to it, as soon as he enters the country, and he cannot presume upon having access upon any other footing.[274]

Similar self-preservation arguments in favor of the Alien and Sedition Acts can be found in documents such as *An Address of the Minority of the Virginia Legislature*, which stated, "Government is instituted and preserved for the general happiness and safety; the people therefore are interested in its preservation, and have a right to adopt measures for its security, as well against secret plots as open

270. *Id.* at 16.
271. *Id.* at 19.
272. LEE, *supra* note 267, at 8–9.
273. OBSERVATIONS ON THE ALIEN & SEDITION LAWS OF THE UNITED STATES, *supra* note 256, at 9.
274. *Id.* at 10.

hostility."[275] The Massachusetts Legislature argued that Congress has "not only the right [of self-preservation], but [is] bound to protect [the nation] against internal as well as external foes."[276]

The House debates of the Alien Act itself reveal more of the same. Harrison Gray Otis argued that the Constitution "might as well have never been made" if the federal government cannot exercise authority which is "necessary to its existence."[277] John Wilkes Kittera could not see how there was opposition to the exercise of the power to expel and exclude aliens on ideological or association grounds because the "power proposed . . . is exercised by every Government upon earth, whether despotic or democratic."[278] Kittera argued that if every man has the right to turn away individuals "dangerous to the peace and welfare of his family" that is was absurd to believe the federal government could not exercise similar discretion.[279] Samuel Dana also made a self-preservation argument, stating, "There is one power . . . inherent and common in every form of Government . . . which is the power of preserving itself."[280] Meanwhile, William Gordon stated the power to expel and exclude foreigners for self-preservation was the "very existence of Government" itself. He knew the "sovereign power of every nation possesses it; it is a power possessed by Government to protect itself; and, in his opinion, ought now to be exercised."[281]

Perhaps the most telling analysis of the right of "self-preservation" and the constitutionality of congressional plenary authority over aliens was from a Pennsylvania judge named Alexander Addison. In his analysis on the Alien Act of 1798, he wrote that Congress may "receive [aliens], and admit them to become citizens; or may reject them, or

275. AN ADDRESS OF THE MINORITY OF THE VIRGINIA LEGISLATURE, *supra* note 263, at 11.

276. REPORTS OF THE COMMITTEE IN CONGRESS, *supra* note 267, at 12.

277. 8 ANNALS OF CONG. 1987 (1798).

278. *Id.* at 2016.

279. *Id.*

280. *Id.* at 1969–70.

281. *Id.* at 1983–84.

remove them, before they become citizens."[282] Addison argued that the "power over aliens is to be measured, not by internal and municipal law, but by external and national law."[283] He emphasized that congressional power over aliens is not judged by how it "affects . . . the people of the United States, parties and subjects to the constitution; but foreign governments, whose subjects the aliens are."[284] Citing Vattel's *Law of Nations*, Addison knew that "every government must be [the] sole judge of what is necessary to be done, for its own safety or advantage, within its own territory."[285] To be precise, only the law of nations bound Congress in determining whether laws respecting aliens were permissible.[286] Addison elaborated on this point:

> Nothing appears from the constitution, that can shew [sic], that the people of the United States meant to deny their own government any right, which, by the law of nations, any other sovereignty enjoys with respect to foreign nations: and the alien law affects only foreign nations. The limits of power of any government, towards its own subjects, were never meant to be applied as limits of power of that government towards the subjects of other governments. And the question, whether a government conducts itself well towards a subject of another government, is not a question of municipal, but of national law: it cannot arise between the subject of another government and the government of which he complains, but between this and his own government.[287]

282. ALEXANDER ADDISON, ON THE ALIEN ACT: A CHARGE TO THE GRAND JURIES OF THE COUNTRY COURTS OF THE FIFTH CIRCUIT OF THE STATE OF PENNSYLVANIA 11 (John Colerick ed., 1799).

283. ALEXANDER ADDISON, ANALYSIS OF THE REPORT OF THE COMMITTEE OF THE VIRGINIA ASSEMBLY 21 (Philadelphia, 1800).

284. *Id.*

285. ADDISON, *supra* note 282, at 2.

286. *See id.* at 3 ("[T]he Constitution leaves aliens, as in other countries, to the protection of the general principles of the law of nations, or of the particular provisions of treaties made between the United States, and the government whose subjects or citizens the aliens severally are."); *see also id.* at 11 ("The people of the United States therein limit the power of their government over themselves; but lay no restraint on the power of their government over aliens."). For more on Alexander Addison and the Sedition Act, see Norman L. Rosenberg, *Alexander Addison and the Pennsylvania Origins of Federalist First-Amendment Thought*, 108 PA. MAG. HIST. & BIOGRAPHY 399 (1984).

287. ADDISON, *supra* note 283, at 26.

Addison's arguments in support of the Alien and Sedition Acts were so compelling that George Washington wrote to John Marshall that its contents were "flashed conviction as clear as the Sun in its Meridian brightness."[288] Washington similarly wrote to his nephew, Bushrod Washington, that Addison's writings would "produce conviction on the minds" of the opposition.[289] Lastly, Washington wrote to Addison himself of the "good example" he had set by acquainting the people with the "proper understanding" of the "Laws & principles of their Government."[290]

John Marshall agreed with Washington's sentiments and described Addison's work as "well written" and wished that "other publications on the same subject could be more generally read . . . to make some impression on the mass of the people."[291] Whether Marshall viewed the Alien Act as constitutional has been the subject of some debate.[292] When he was running for Congress, he was asked the questions, "Are you an advocate for the alien and sedition bills? or [sic], in the event of your election, will you use your influence to obtain a repeal of those laws?"[293] Marshall replied:

> I am not an advocate for the alien and sedition bills: had I been in congress when they passed, I should, unless my judgment could have been changed, certainly have opposed them. Yet, I do not think them fraught with all those mischiefs which many gentlemen ascribe to them. I should have opposed them, because I think them useless; and because they are calculated to create, unnecessarily, discontents and jealousies at a time when our very existence, as a nation, may depend on our union—I believe that these laws, had they been opposed on these principles by a man, not suspected of intending to destroy the government, or of being hostile to it, would never been

288. 3 THE PAPERS OF JOHN MARSHALL 531 (William C. Stinchcombe et al. eds., 1979).

289. 3 THE PAPERS OF GEORGE WASHINGTON: RETIREMENT SERIES 303 (W.W. Abbot & Edward G. Lengel eds., 1999).

290. *Id.* at 407. For more on George Washington and the Alien and Sedition Acts, see Marshall Smelter, *George Washington and the Alien and Sedition Acts*, 59 AM. HIST. REV. 322 (1954).

291. 4 THE PAPERS OF JOHN MARSHALL 3 (Charles T. Cullen & Leslie Tobias eds., 1984).

292. *See* Kurt. T. Lash & Alicia Harrison, *Minority Report: John Marshall and the Defense of the Alien and Sedition Acts*, 68 OHIO ST. L.J. 435, 500–03 (2007).

293. 3 THE PAPERS OF JOHN MARSHALL, *supra* note 288, at 503.

> enacted. With respect to their repeal, the effort will be made before I can become a member of congress. If it succeeds, there will be an end of the business—if it failes, I shall, on the question of renewing the effort, should I be chosen to represent the district, obey the voice of my constituents.[294]

Here, Marshall makes no reference to the Alien and Sedition Acts being unconstitutional. He simply stresses the historic fact that party politics have superseded the best interests of the Republic.[295] However, it can be assumed that he supported the Alien Act as a proper exercise of the Constitution's Necessary and Proper Clause. The best evidence of this is Marshall's incorporation of Addison's analysis of the clause in two of his opinions—*United States v. Fisher*[296] and *McCulloch v. Maryland*.[297] This legal influence has been seemingly ignored by historians and legal scholars,[298] but it is clear and convincing, for Addison was the only pre-Marshall commentator to use the phrase "choice of means" in describing the Necessary and Proper Clause.

Addison wrote that the Alien Act was constitutional, because Congress has "discretion of the choice of means, necessary or proper, for executing their powers."[299] He asserted that the "power over the end implies a power over the means; and a power to make laws, for carrying any power into execution."[300] Not only was Marshall familiar with Addison's work,[301] but in his 1805 opinion in *United States v. Fisher*, Marshall paraphrased Addison writing, "Congress must possess the choice of means, and must be

294. *Id.* at 505–06.

295. *Id*; *see also* 4 THE PAPERS OF JOHN MARSHALL, *supra* note 291, at 3–4 (discussing that no matter the bill at issue, the Republicans "would have been attacked with equal virulence" and that the issue was "men who will hold power by any means rather than not hold it; & who would prefer a dissolution of the union to the continuance of an administration not of their own party.").

296. 6 U.S. 358 (1805).

297. 17 U.S. 316 (1819).

298. Most scholars attribute the influence to Alexander Hamilton's *Arguments for the Creation of a National Bank*. *See e.g.*, Samuel R. Olken, *Chief Justice John Marshall and the Course of American Constitutional History*, 33 J. MARSHALL L. REV. 743, 769–70 (2000). There is little doubting this argument influenced Marshall in *McCulloch*, but Hamilton never used the language "choice of means." Only Addison used this language.

299. ADDISON, *supra* note 284, at 39.

300. *Id.*

301. 3 THE PAPERS OF JOHN MARSHALL, *supra* note 288, at 505–06.

empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution."[302]

It should be emphasized that during the Alien Act debates, neither Federalists nor Republicans had qualms with whether the expulsion and exclusion of foreigners was constitutional. The disagreement was over where the power to expel and exclude "alien friends" rested.[303] Generally, Republicans did not deny that government had a right to expel and exclude foreigners as it sees fit. The thrust of their argument rested with the belief, as Albert Gallatin stated it, that Congress "has not the power to remove alien friends, [and] it cannot be inferred" because "[n]o facts had appeared . . . which require these arbitrary means to be employed against them."[304]

Not even James Madison, who disfavored the Alien Act, argued that the removal of aliens—friend or enemy—was unconstitutional but rather that "alien friends" were under concurrent federal and state jurisdiction.[305] In fact, Madison was one of the strongest proponents for applying federal power over the law of nations and the doctrine of allegiance. In 1789, he wrote that "[i]t is an established maxim that birth is a criterion of allegiance."[306] Madison even adhered to the international principle that in order to be protected by a foreign government, "it is established that allegiance shall first be due to the whole nation."[307]

Where Madison disagreed with the Federalists was that he thought it improper to subject alien friends to

302. United States v. Fisher, 6 U.S. 358, 298 (1805).

303. *See* TUCKER, *supra* note 256, at 10; Lenner, *supra* note 256, at 413.

304. 8 ANNALS OF CONG. 1980 (1798). Republican John Taylor viewed the right of self-preservation as being with the respective states. Lenner, *supra* note 256, at 406. Certainly, the Founding Fathers believed that the states retained the right of self-preservation within their respective borders or should the federal government usurp the sanctions of society. Charles, *supra* note 268, at 57–59. However, immigration is an issue that affected the entire Union, and the law of nations had always placed the power of admitting foreigners in the hands of the national government. The Founding Fathers understood this when they drafted the Constitution. Lenner, *supra* note 256, at 407–09.

305. THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 176, at 546–60; *see also* Lenner, *supra* note 163, at 267 ("Republican opposition to Federalist measures, it should again be stressed, was neither doctrinaire nor opportunistic, but rooted in principled disagreements over federalism and state sovereignty.").

306. 12 THE PAPERS OF JAMES MADISON, *supra* note 210, at 179.

307. *Id.* at 180.

"banishment by an arbitrary and unusual process, either under the one government or the other."[308] In other words, Madison felt that the power to expel an "alien friend" rested with the state and municipal governments respectively. It was within each state or municipal government's due process protections to determine whether an "alien friend" was dangerous. This was essentially the entire basis of the state sovereignty argument.[309] Throughout the debates and tracts, Republicans argued that "alien friends" suspected of being dangerous to government were entitled to a trial by jury as prescribed in the state or municipality in which the "alien friend" resided.[310]

The problem with Madison and the Republicans' argument was that a state or municipal government only had the power to expel an alien from its own jurisdiction, not from the United States. Harrison Gray Otis addressed the fallacy of the Republicans' argument by stating that he could not see how state and municipal governments could have such power when they do not possess the authority over "peace and war, negotiations with foreign countries, the general peace and welfare of the United States . . . [and making] measures preparatory to the national defence."[311] Most importantly, for the Constitution to place such a power within the states would only displace dangerous aliens from one sub-national territory to another. Otis stated that dangerous aliens "stamped with infamy in their own country, and plotting treasons against ours, may [still] remain in some part of the . . . United States, while Congress has not the power to get rid of them until all the states concur in the same object."[312] Robert Goodloe Harper agreed with Otis because he did not see how the states can make such a determination, when they do not have "any

308. THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 176, at 559.

309. Harrison Gray Otis correctly summed up the entire basis of the Republicans' argument, stating, "[A]ll these objections . . . [are] founded on the right of a trial by jury." 8 ANNALS OF CONG. 2018 (1798).

310. 8 ANNALS OF CONG. 1789–92 (1798); TUCKER, *supra* note 256, at 15, 18, 20. It is interesting that none of the Republicans argued that "alien enemies" should be afforded due process protection. In fact, St. George Tucker expressly stated that "alien enemies" do not enjoy it. TUCKER, *supra* note 256, at 18.

311. 8 ANNALS OF CONG. 1986 (1798).

312. *Id.* at 1987.

knowledge of what relates to our foreign relations, or the common defence of the Union."[313]

Not even the staunchest opponents of the Alien Act argued that the expulsion or exclusion of foreigners, who subscribed to the radical Jacobin ideology, violated the Constitution or the First Amendment.[314] This is especially telling, because the Alien Act and Sedition Act were often opposed together in the political tracts of the period. Repeatedly, opponents of the Sedition Act argued that it violated the protections afforded in the First Amendment, [315] and rightfully so. However, the Alien Act, which expelled and excluded foreigners on the basis of association and political ideology, was never viewed as a violation of the First Amendment. Thus, under an originalist approach, there exists a substantially stronger argument that the founding generation viewed the politics of expulsion and exclusion as unique and distinct from the First Amendment freedoms.

IV. *KLIENDIENST V. MANDEL*, THE FIRST AMENDMENT, IDEOLOGICAL EXCLUSIONS, AND THE PLENARY POWER DOCTRINE—SETTING THE RECORD STRAIGHT

Despite the well-established positions of the plenary power doctrine, in both law[316] and history, legal commentators have continued to argue that congressional

313. *Id.* at 1990.

314. James Ogilvie, one such opponent, made arguments similar to those in early eighteenth-century England pamphlets. He viewed the Alien and Sedition Acts as laws that would prevent "many unhappy & virtuous foreigners from emigrating to America and adding to our strength, and respectability, and resourses." JAMES OGILVIE, A SPEECH DELIVERED IN ESSEX COUNTY 4 (Richmond, Va., Jones & Dixon, 1798). He also viewed the laws as impeding commerce, agriculture, and the arts. *Id.* at 4.

315. *See generally* REPORTS OF THE COMMITTEE IN CONGRESS, *supra* note 267; TUCKER, *supra* note 256.

316. *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950) ("It is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of government to exclude a given alien."); United States *ex rel.* John Turner, 194 U.S. 279, 291 (1904) ("[It is] essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe); *see also* Denmore v. Kim, 538 U.S. 510, 521–22 (2003); Reno v. Flores, 507 U.S. 292, 305–06 (1993); Kleindienst v. Mandel, 408 U.S. 753, 765–66 (1972); Graham v. Richardson, 403 U.S. 365, 377 (1971); Galvan v. Press, 347 U.S. 522, 530 (1954); Harisiades v. Shaughnessy, 342, U.S. 580, 588–89 (1952); Chuoco Tiaco v. Forbes, 228 U.S. 549, 556–57 (1913); Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).

authority over immigration should be limited by the First Amendment and other constitutional provisions.[317] In making this argument, commentators often look to the Supreme Court holding in *Kliendienst v. Mandel*.[318] For instance, Susan M. Akram reads *Mandel* as inferring that the First Amendment can limit the plenary power doctrine.[319] Akram writes that "the Supreme Court would review and independently judge the validity of the Executive's decisions concerning rights of aliens where freedom of speech and association are implicated even in cases of excludable aliens."[320] Akram asserts that the Supreme Court would do this because the *Mandel* Court rejected the government's argument that the Attorney General's decisions on admission should be subject to complete defeasance. Meanwhile, Hiroshi Motomura reads *Mandel* in a more limited context, stating the decision only "suggest[s] some outer limits to executive discretion that might not apply to direct congressional decisions."[321]

Commentators such as Vandiver and Monrad, however, read the *Mandel* decision liberally and assume too much.[322] A careful reading of *Mandel* does not even dent the chains that bind the plenary power doctrine. If anything, the decision affirms it, for the Court held the "plenary congressional power to make policies and rules for the exclusion of aliens has long been firmly established."[323] Furthermore, the Court's analysis of the First Amendment was not the ground upon which the case was decided. This is supported in two portions of the majority opinion. First, the Court opened its analysis, stating, "Recognition that First Amendment rights are implicated . . . is not dispositive of our inquiry here."[324] Second, in summarizing the holding, the Court stated, "What First Amendment or other grounds may be available for attacking the exercise of discretion for

317. *See supra* notes 4, 15, 19.
318. *Mandel*, 408 U.S. at 753.
319. Akram, *supra* note 4, at 59.
320. *Id.*
321. Motomura, *supra* note 15, at 581.
322. *See* Monrad, *supra* note 4, at 867–73; Vandiver, *supra* note 4, at 765–66;.
323. *Mandel*, 408 U.S. at 769–70.
324. *Id.* at 765.

which no justification whatsoever is advanced is a question we neither address nor decide in this case."[325]

Despite the fact that *Mandel* affirmed the plenary power doctrine, some appellate courts have improperly applied the decision to analyze the sufficiency of immigration statutes under either the First Amendment or a modified rational basis test. It needs to be stressed that the *Mandel* Court was only reviewing whether the Executive Branch properly carried out the statutory powers granted by Congress. In particular, the question presented was whether a waiver procedure, provided in the statute, permitted the temporary admittance of a foreigner that was excluded on ideological grounds.[326] In its analysis, the Court never questioned congressional authority to exclude or expel foreigners from the United States, including removal on associational or ideological grounds. In fact, the Court refused to address the issue because it was conceded by the parties that "Congress could enact a blanket prohibition against entry of all aliens falling into" a class prescribed by statute, and that "First Amendment rights could not override that decision."[327]

The only manner in which the First Amendment was implicated in the *Mandel* decision was as the means by which a group of American citizens were given standing to challenge the statute in question.[328] The primary plaintiff in the case was Ernest E. Mandel, a professional journalist from Belgium who described himself as a "revolutionary Marxist."[329] Mandel had been admitted to the United States twice before. However, unbeknown to Mandel, both times he was admitted in the United States it was at the Attorney General's discretion. This admission was discretionary because the Immigration and Nationality Act of 1952 contained an ideological exclusion provision excluding aliens "who write or publish . . . [the] governmental doctrines of world communism."[330]

325. *Id.* at 770.

326. *Id.* at 755, 767.

327. *Id.* at 767.

328. *Id.* at 759–65.

329. *Id.* at 756 (citing E. MANDEL, REVOLUTIONARY STRATEGY IN THE IMPERIALIST COUNTRIES (1969)).

330. *Id.* at 755–56 (citing 8 U.S.C. § 1182(G)(v) (2006)).

Given the fact that Mandel was not present within the territorial United States at the time he was refused entry, he did not have standing to bring a claim. It is here that the First Amendment was implicated in the case, for a group of university professors joined the complaint alleging violations of their freedom of speech.[331] To be precise, the professors alleged that by refusing Mandel's entry into the United States, the federal government had denied them the First Amendment freedom to hear Mandel's "views and engage him in a free and open academic exchange."[332] Thus, the First Amendment was not implicated as to whether an alien may be refused entry on ideological grounds but whether this exclusion violated the rights of United States citizens.

In *Mandel*, the Supreme Court, however, refused to "balance First Amendment rights against governmental regulatory interests."[333] Many subsequent appellate courts have limited their interpretation of *Mandel* to U.S. citizens' standing to file sue. In *Abourezk v. Reagan*, the appellants had standing because they were United States citizens claiming that the exclusion of James Abourezk violated their First Amendment rights.[334] The District of Columbia Court of Appeals affirmed the validity of association or ideological exclusions, stating that "[n]othing in our analysis inhibits the State Department from using a group affiliation to deny visas to members of terrorist groups, or organized crime syndicates" so long as the "organizations [are] specifically proscribed by the Act."[335] The court, despite having no issue with Congress' ability to impose restraints, did have concerns regarding the Executive Branch's use of that power. The court elaborated on this point, stating:

> The Executive has broad discretion over the admission and exclusion of aliens, but that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in

331. *Id.* at 759–60.
332. *Id.*
333. *Id.* at 765.
334. 785 F.2d 1043, 1047–49 (D.C. Cir. 1986).
335. *Id.* at 1058 n.18.

> cases properly before them, to say where those statutory and constitutional boundaries lie.[336]

One may interpret the court's reference to "constitutional limitations" to include the Bill of Rights; however, an interpretation takes the court's decision out of context. The "constitutional limitations" on the power to admit, expel, and exclude foreigners clearly refers to the distribution of powers between the Legislative and Executive branches of government.[337] In *Bustamante v. Mukasey*,[338] the Court of Appeals for the Ninth Circuit conveyed a similar limited interpretation of *Mandel*, stating that the courts may only review the exclusion of an alien on First Amendment grounds when it "implicates the constitutional rights of American citizens."[339] The Ninth Circuit went on to affirm that "Congress has plenary power to make policies and rules for the exclusion of aliens."[340] However, when a "U.S. citizen raise[s] a constitutional challenge" to a foreigner's exclusion by the Executive Branch, it is within the court's power to determine whether such exclusion is "facially legitimate" under the constraints of the Executive authority granted by Congress.[341]

However, not every appellate court has taken the proper limited interpretation of *Mandel*. For instance, while the First Circuit Court of Appeals accurately identified the standing requirement in *Mandel*, it improperly assumed the Supreme Court's holding was a form of First Amendment review.[342] The court held that, under *Mandel*, it can examine "the possibility of impairment of United States citizens' First Amendment rights through the exclusion of the alien."[343] The court went on to hold that First Amendment review

336. *Id.* at 1061.

337. *See* INS v. Chadha, 462 U.S. 919, 941–42 (1983) (requiring Congress to choose "a constitutionally permissible means of implementing" its plenary power).

338. 531 F.3d 1059 (9th Cir. 2008).

339. *Id.* at 1061.

340. *Id.*

341. *Id.* at 1062. For other appellate courts that have interpreted Mandel properly, see Detroit Free Press v. Ashcroft, 303 F.3d 681, 687 (6th Cir. 2002); Gonzalez v. Reno, 212 F.3d 1338, 1354 n.23 (11th Cir. 2000); Garcia v. INS, 7 F.3d 1320, 1327 (7th Cir. 1993); Joseph v. INS, 1993 U.S. App. LEXIS 11773 (4th Cir. 1993).

342. Adams v. Baker, 909 F.2d 643 (1st Cir. 1990).

343. *Id.* at 647.

required a "facially legitimate and bona fide reason" standard.[344] Where exactly the First Circuit obtained this standard of review in *Mandel* is uncertain.

Of course, the First Circuit Court of Appeals is not the only circuit to misconstrue *Mandel* in this fashion. In *American Academy of Religion v. Napolitano*, the Second Circuit similarly held that *Mandel* permits a "limited judicial review of First Amendment claims" because the "First Amendment requires at least some judicial review of the discretionary decision of the Attorney General to waive admissibility."[345] These cases take *Mandel* out of context. The Supreme Court only held that the First Amendment provides citizens with the requisite Article III standing for their case to be reviewed. At no point did the *Mandel* Court state that its opinion was to be construed as a First Amendment analysis or a standard of review for immigration statutes. Instead, the Court in *Mandel* held that whatever "First Amendment or other grounds may be available for attacking [the] exercise of discretion for which no justification whatsoever is advanced is a question we neither address nor decide in this case."[346]

Another common mistake made by appellate courts in interpreting *Mandel* is the assertion that congressional immigration legislation is subject to a modified rational basis review. As shown above, in *Bustamante* the Ninth Circuit accurately applied *Mandel* in determining whether the Executive Branch properly exercised its statutory authority.[347] However, just three years earlier in *Padilla-Padilla v. Gonzales*, the Ninth Circuit inaccurately applied *Mandel's* "facially legitimate and bona fide reason" standard to Congress.[348] The *Padilla-Padilla* court held that "so long as Congress legislates with 'a facially legitimate and bona fide reason' the courts will neither look beyond the exercise

344. *Id.* at 649. It is of note that the First Circuit had properly applied the *Mandel* standard just two years prior. *See* Allende v. Schultz, 845 F.2d 1111, 1114–16 (1st Cir. 1998).

345. Am. Acad. Of Religion v. Napolitano, 573 F.3d 115, 124–25 (2d Cir. 2009). It is important to note that neither *American Academy of Religion* nor *Adams* was petitioned for certiorari to the Supreme Court.

346. Kleindienst v. Mandel, 408 U.S. 753, 770 (1972).

347. Bustamante v. Mukasey, 531 F.3d 1059, 1062 (9th Cir. 2008).

348. 463 F.3d 972, 979 (9th Cir. 2006).

of that discretion, nor test it by balancing its justification.'"[349]

Such language attempts to subvert the Supreme Court's repeated affirmation of the plenary power doctrine and seemingly places immigration statutes under a modified rational basis test. The District of Columbia Court of Appeals took this approach in *Miller v. Christopher*, when it used the "facially legitimate and bona fide reason" test to determine whether immigration statute 8 U.S.C. § 1409 was constitutional.[350] Acting upon its immigration power to prescribe who is a United States citizen when born outside the territorial United States, Congress drafted § 1409 to provide different standards of citizenship for children born overseas if only one of the parents was a citizen.[351] In writing its opinion, the Court of Appeals for the District of Columbia made sure to acknowledge "Congress's plenary authority to prescribe rules for the admission and exclusion of aliens."[352] However, the court improperly examined whether Congress had a "facially legitimate and bona fide reason" for adopting § 1409.[353]

In *Kamara v. Attorney General of the United States*, the Court of Appeals for the Third Circuit similarly applied the fictional "facially legitimate and bona fide reason" standard to determine the constitutionality of immigration statutes.[354]

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349. *Id.* (quoting Fiallo v. Bell, 430 U.S. 787, 794–95 (1977)).

350. 96 F.3d 1467, 1470–71 (D.C. Cir. 1996). The Supreme Court granted certiorari in this case; however, it did not apply the "facially legitimate and bona fide reason" standard. *See* Miller v. Albright, 523 U.S. 420 (1998).

351. The Supreme Court has never answered this constitutional question, *see* Tuan Anh Nguyen v. INS, 533 U.S. 53 (2001), but there is no evidence that the drafters of the Fourteenth Amendment intended to apply to the Equal Protection Clause to congressional plenary authority over the rules of naturalization. *See* 36 CONG. GLOBE 498 (1866) ("[W]e have a right to exclude . . . people . . . from becoming citizens, if we so choose."); *id.* at 1266 ("I am inclined to think . . . that the word 'naturalization' may very properly, so far as legislative purposes are concerned, be construed in a larger and more liberal sense"); *id.* at 1832.

> It is an exercise of authority which belongs to every sovereign Power, and is essentially a subject of national jurisdiction. The whole power over citizenship is intrusted to the national Government, which can make citizens of any foreign people as an exercise of sovereignty, or under the power, "to establish a uniform rule of naturalization."

Id. at 1832.

352. Miller, 96 F.3d at 1470 (quoting Kleindienst v. Mandel, 408 U.S. 753, 770 (1972)).

353. *Id.* at 1471.

354. 420 F.3d 202, 217 (3d Cir. 2005).

Like the *Miller* court, the Third Circuit identified the significance of the plenary power doctrine,[355] yet misapplied *Mandel* when it asserted that the Supreme Court "has applied a very lenient 'facially legitimate and bona fide reason standard' to constitutional challenges of immigration statutes."[356] Other appellate decisions have also misconstrued *Mandel* in this light,[357] but these decisions should be ignored by future courts. As shown above, the *Mandel* decision stood for nothing more than determining whether the Executive Branch properly exercised its authority granted by Congress. Thus, to extend *Mandel's* language to challenge the plenary power doctrine is to turn the decision on its head, for neither the Founding Fathers, the law of nations, or the Supreme Court has ever prescribed to the rule that congressional plenary authority over the admittance and settling of foreigners is restricted by the individual freedoms in the Constitution.

V. CONCLUSION

The history shows that the authority to admit, expel, and exclude foreigners is a political matter that is solely subject to the determination of the political branches as a means of self-preservation—an interpretation of the Constitution that the Supreme Court has always understood.[358] The fact that citizens, advocacy groups, or attorneys may personally believe that certain foreigners are being denied First Amendment freedoms by being excluded on association or ideological grounds is irrelevant. It is a well-established

355. *Id.*

356. *Id.*

357. *See* Leal Rodriguez v. INS, 990 F.2d 939, 951 (7th Cir. 1993); Azizi v. Thornburgh, 908 F.2d 1130, 1133 n.2 (2d Cir. 1990); Anetekhai v. INS, 876 F.2d 1218, 1222 n.7 (5th Cir. 1989).

358. *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950) ("[It] is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of government to exclude a given alien."); United States *ex rel.* Turner, 194 U.S. 279, 291 (1904) ("[It is] essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."); *see also* Demore v. Kim, 538 U.S. 510, 521–22 (2003); Reno v. Flores, 507 U.S. 292, 305–06 (1993); Kleindienst v. Mandel, 408 U.S. 753, 765–66 (1972); Graham v. Richardson, 403 U.S. 365, 377 (1971); Galvan v. Press, 347 U.S. 522, 530 (1954); Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952); Tiaco v. Forbes, 228 U.S. 549, 556–77 (1913); Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).

tenet of the law of nations that the danger or threat foreigners pose is a determination to be made by the political branches of government based upon such factors as the doctrine of allegiance, and not by a court absent express authority through statute or treaty.[359] As Sir Francis Bacon states, even an alien friend "may be an *[e]nemy*," therefore to this "person the [l]aw allotteth . . . [a] benefit" that is "transitory" at the discretion of the sovereign government.[360]

Under *Mandel*, there is no denying that the courts may review the statutory authority that Congress grants the Executive Branch in excluding foreigners on association or ideological grounds. Such review, however, has not changed the plenary power doctrine one iota, for the Supreme Court has consistently held that Congress has plenary authority to exclude or expel foreigners on any grounds.[361] Exclusion is not limited by the First Amendment's right to freedom of religion, association, or political beliefs. Congress has the power to exclude foreigners regarding a broad range of associational and ideological grounds, including anarchism, totalitarianism, communism, and terrorism. Generally, exclusions have not been based solely on a religious faith. This may change, however, for the twenty-first century has seen an expansion of politically active religious sects whose ideological purposes include the overthrow of democracy. Whether such religious exclusions will occur is unknown, but what is certain is that the plenary power doctrine has no bounds in order to achieve the congressional authority of self-preservation.

359. *See* Tuan Anh Nguyen v. INS, 533 U.S. 53, 67 (2001) (requiring that when determining an individual's "ties and allegiances, it is for Congress, not this Court, to make that determination").

360. BACON, *supra* note 34, at 11–12.

361. *See supra* note 358.

WITNESS FOR THE DEFENSE: THE COMPULSORY PROCESS CLAUSE AS A LIMIT ON EXTRATERRITORIAL CRIMINAL JURISDICTION

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I. INTRODUCTION

In the winter of 1769, the British Parliament responded to unrest in the colonies with a stern rebuke to the inhabitants of Massachusetts Bay: their "daring insults offered to his Majesty's authority" smacked of treason and those thought responsible were to be brought to England for trial.[1]

When the news reached American shores, the protest was swift. The Virginia House of Burgesses was in session and promptly resolved that "sending . . . Persons, to Places beyond the Sea, to be tried, is highly derogatory of the Rights of *British* subjects; as thereby the . . . Liberty of summoning and producing Witnesses on such Trial, will be taken away from the Party accused."[2] The resolution passed unanimously and was soon adopted in the other colonies.[3]

The Framers were mindful of this injustice when they drafted the Sixth Amendment. Justice Story reports in his *Commentaries on the Constitution* that a motivating concern behind the Sixth Amendment was that a "trial in a distant State or territory might subject the party . . . to the inability of procuring the proper witnesses to establish his innocence."[4] Though Story quickly assured the reader that "[t]here is little danger, indeed, that Congress would ever exert their power in such an oppressive and unjustifiable a manner,"[5] recent developments suggest this confidence was misplaced.

Congress is increasingly criminalizing activities occurring entirely beyond our borders without sufficient attention to the Sixth Amendment promise that "in all criminal prosecutions, the accused shall" have "compulsory process for obtaining witnesses in his favor."[6] It is not clear that

1. William Wirt Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59, 63 (1944).

2. *Id.* at 64 (internal quotation marks omitted).

3. EDWARD CHANNING, A STUDENT'S HISTORY OF THE UNITED STATES 128 (3d. ed. 1917).

4. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 658 (1987).

5. *Id.*

6. U.S. CONST. amend. VI.

such laws are constitutional given that the witnesses to the alleged crime are virtually guaranteed to be abroad, beyond the reach of U.S. courts' criminal process.

Without a great deal of analysis, the lower federal courts have generally held that the right to compulsory process extends only so far as the process power of the court and consequently no constitutional violation occurs simply by virtue of the fact that a defense witness is beyond that power.[7]

But the principal case cited for this proposition considered a very different context: *United States v. Greco*[8] involved a prosecution for trafficking in stolen property. Much of the activity occurred in the United States, but the items were initially stolen in Canada. At trial, the defendant made no request for a particular Canadian witness and raised the issue generally and for the first time only on appeal.[9]

There is a great difference between a prosecution under a statute generally applied to activity inside the U.S., where one element of the criminal enterprise happens to occur outside the United States, and a prosecution under a criminal statute having the purpose and intent of punishing conduct that occurred wholly beyond our borders. An almost certain consequence of such an extraterritorial criminal statute is that key defense witnesses will lie beyond the reach of American court process. Where this jurisdictional fact is inevitable, rather than incidental, it should not serve to excuse the government's Sixth Amendment obligations.

In an earlier period, the hesitancy of legislatures and courts to exercise extraterritorial personal and subject matter jurisdiction forestalled this problem. Since World War II, that reluctance has eroded particularly with respect to universal jurisdiction for narcotics, terrorism, and human-rights related crimes. Thus far, courts have declared the Fifth Amendment the primary limit on Congress's power in this context.[10] However, the malleable standards of due

7. Email from Charles Doyle, Senior Specialist, Am. Law Div., Cong. Research Serv., to author (July 12, 2008) (on file with author).

8. 298 F.2d 247, 251 (2d Cir. 1962).

9. *Id.* at 251.

10. *See e.g.* Brian A. Lichter, *The Offences Clause, Due Process, and the Extraterritorial Reach of Federal Criminal Law in Narco-Terrorism Prosecutions*, 103 NW. U. L. REV. 1929, 1940 (2009).

process have not checked the legislature's increasingly aggressive assertions of extraterritorial criminal jurisdiction, usually because the targeted activity is found to have some effect on the U.S. or to be universally condemned.

Part II of this Article examines the early history of the Compulsory Process Clause. Part III distinguishes case law such as *Greco* limiting the right's application and scope. Part IV surveys the increasing number of federal laws which criminalize extraterritorial conduct and details the failure of due process analysis to halt this expansion. Part V anticipates the argument that the contemporaneous drafting of the Sixth Amendment and the Piracies and Felonies Clause indicates the Framers did not believe the requirements of compulsory process precluded assertions of extraterritorial criminal jurisdiction. Part V details how Congress and the Executive have magnified the inequity through Mutual Legal Assistance Treaties (MLATs), which aid prosecutors but not defendants in gathering evidence abroad.

II. HISTORICAL BACKGROUND OF THE COMPULSORY PROCESS CLAUSE

Though it seems axiomatic that the criminal defendant should have access and opportunity to refute the government's case, it was not always so.[11] As late as the sixteenth century, English defendants were not permitted to call witnesses, even if they were present in the courtroom and prepared to testify.[12]

A prominent example of the rule was Sir Nicholas Throckmorton's 1554 trial at Guildhall for alleged involvement in the Wyatt Rebellion against Queen Mary. The court refused to permit Throckmorton to call a Mr. Fitzwilliams who was in the audience and would have vouched for Throckmorton's innocence. According to the *State Trials* report, he protested, "[W]hy be ye not so well

11. The main source for the following historical survey is Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 83 (1974).

12. *Id.* at 83.

contented to hear truth for me, as untruth against me?"[13] Throckmorton's prosecutors were so relentless that the jury was imprisoned and fined for failing to return a guilty verdict.[14]

The reason for the rule is unknown. Some speculate it was deemed unseemly to permit witnesses to offer sworn testimony against the Crown; while to admit unsworn testimony would be pointless because not carrying the penalty of perjury, it would not be believed.[15] Others suggest the rule was a vestige of an earlier time when "the jurors themselves were considered the sole 'witnesses' to the facts, and simply failed to adjust to reflect the new role of the jury as a trier of evidence presented by others."[16] This latter theory of evolutionary lag is supported by the fact that Parliament soon relaxed the rule by acts of 1589 and 1606, and the rule was all but eliminated by the middle of the seventeenth century.[17]

This development was an important but incomplete victory for the accused. Defense witnesses might no longer be barred, but common law courts still declined to exercise their coercive power to compel witnesses' appearance.[18] Common law courts had perfected their subpoena power by 1562 and even before that had authority to arrest witnesses and bind them over for trial[19]—a power federal courts still enjoy in the form of material witness warrants.[20] Nevertheless, the *State Trials* reports offer stark examples of courts refusing to exercise these powers to produce defense witnesses.[21]

Notable was the 1678 trial of William Ireland, who was charged as a conspirator in the pretended "Popish Plot" to assassinate Charles II. Throughout his trial at Old Bailey,

13. *Id.* at 83 n.40 (quoting *Trial of Nicholas Throckmorton*, *in* 1 COMPLETE COLLECTION OF STATE TRIALS 884–85 (T. Howell ed., 1816) (internal quotation marks omitted).

14. *Id.*

15. *Id.* at 83.

16. *Id.* at 84.

17. *Id.*

18. Westen, *supra* note 11, at 85.

19. *Id.* at 84–85.

20. 18 U.S.C. § 3144 (2006) (providing that "a judicial officer may order the arrest" of a person whose "testimony . . . is material in a criminal proceeding").

21. Westen, *supra* note 11, at 84–85.

Ireland bitterly complained that even though "a hundred or more" could confirm his alibi, he "had no time allowed [him] to bring in . . . witnesses, so that [he] could have none, but only those that came in by chance."[22] Witnesses did not appear voluntarily, and the court declined to summon them. Ireland was then found guilty and executed. It was subsequently discovered that not only was Ireland innocent and his alibi authentic but the very existence of an assassination plot was a fabrication.[23]

These trials arose out of one of the most tumultuous periods in British history and taught English jurists the wisdom of the Golden Rule.[24] During the seventeenth century, one faction after another rose to power and persecuted its enemies only to be overthrown and subjected to the very abuses it had perpetrated on its predecessors.[25] It began with the Royalists who supported Charles I. They fell to Cromwell and the Puritans, who were displaced in turn by the Restored Stuarts.[26] The Stuarts lasted until 1688 when William of Orange overthrew the Catholic James II.[27] Thus, by the time of the Glorious Revolution, "Englishmen of every class and belief had experienced injustice in the criminal courts . . . thus [all were] eager [for] reform."[28]

Accordingly, in 1695, Parliament relented and allowed defendants charged with treason the same access to court process for "compel[ling] their witnesses to appear for them . . . as is usually granted to compel witnesses to appear against them."[29] By the time of the American Revolution, the rule had expanded to provide compulsory process in felony cases as well. Blackstone's authoritative *Commentaries on the Laws of England*, published in 1765, averred that "in all cases of treason and felony . . . [the defendant] shall have the

22. Thomas Pickering & John Grove, *Trial of William Ireland, in* COBBET'S COMPLETE COLLECTION OF STATE TRIALS 79, 137, 142 (T. Howell ed., 1810).

23. Westen, *supra* note 11, at 85 n.51.

24. "[T]hat law of all men *quod tibi fieri non vis, alteri ne feceris* [What you do not want done to you, do not do to another]." THOMAS HOBBES, LEVIATHAN 114 (BiblioBazaar 2008) (1651).

25. Westen, *supra* note 11, at 88.

26. *Id.*

27. *Id.*

28. *Id.*

29. Treason Act. 1695, 7 & 8 Will. 3, c. 3, §§ 1, 7 (1695) (Eng.); *see also* Westen, *supra* note 11, at 90 n.73.

same compulsive process to bring in his witnesses *for* him, as was usual to compel their appearance *against* him."[30]

This struggle for compulsory process was familiar both to the framers and the general public thanks to histories and inexpensive pamphlets available throughout the colonies.[31] Particularly significant was the ten volume 1765 edition of Salmon's *State Trials* which detailed the great treason prosecutions, including those of Nicholas Throckmorton and William Ireland.[32] Many copies of the treatise were privately owned, and it was available at public libraries across America, including the one in Philadelphia used by the Framers.[33]

But collective memory was not their only source. The colonists had experienced associated injustices firsthand. In 1769, in response to unrest in the colonies, Parliament debated a proposal authorizing Americans charged with treason to be transferred to England for trial.[34] The Virginia House of Burgesses howled in protest. They immediately passed a series of resolutions condemning it as "highly derogatory of the Rights of *British* subjects; as thereby the . . . Liberty of summoning and producing Witnesses on such Trial, will be taken away from the Party accused."[35] They also prepared a petition to King George, dated May 17, 1769, beseeching him to disapprove of the "unconstitutional and illegal Mode, recommended to your Majesty, of seizing and carrying beyond Sea, the Inhabitants of America, suspected of any Crime; and of trying such Persons in . . . a distant Land, . . . where no Witness can be found to testify his Innocence."[36] Peyton Randolph, speaker of the House of Burgesses, circulated copies of the resolutions to the assemblies of the other colonies who "responded heartily" in

30. 4 WILLIAM BLACKSTONE, COMMENTARIES *354; *see also* Westen, *supra* note 11, at 90.

31. Westen, *supra* note 11, at 94.

32. *Id.*

33. *Id.*

34. Blume, *supra* note 1, at 63–64.

35. JOURNALS OF THE HOUSE OF BURGESSES, 1766–1769, at 214 (John P. Kennedy ed., 1906); *see also* Blume, *supra* note 1, at 64.

36. JOURNALS OF THE HOUSE OF BURGESSES, *supra* note 35, at 215–16; *see also* Blume, *supra* note 1, at 64–65.

approving them.[37] The wound festered until the American Revolution when the Declaration of Independence enumerated among its grievances against the King that he assented to legislation "for transporting us beyond Seas to be tried for pretended offences."[38]

The newly independent colonies were determined not to perpetuate the abuse. Between 1776 and 1783, each of the Thirteen Colonies declared independence and established its own government. Nine of them specifically provided in their founding documents for the defendant's right to produce witnesses in his favor.[39] Maryland's explicitly guaranteed the defendant the right to "have process for his witnesses."[40]

Some ratifying states insisted that the federal constitution contain similar safeguards. Four proposed amendments enshrining the defendant's right to present witnesses. Virginia, Pennsylvania, and North Carolina, echoing language from various state constitutions, urged the defendant be guaranteed the right "to call for evidence . . . in his favor."[41] Although New York was not one of the nine with analogous state law protections, it proposed more aggressive language promising the defendant "the means of producing his [w]itnesses."[42] Thus, the states were split on whether the amendment should focus on compelling the appearance of defense witnesses or merely permitting them to testify.

The decision fell to James Madison who drafted much of the Bill of Rights.[43] With the exception of the Compulsory Process Clause, his draft for the Sixth Amendment was almost identical to an amendment Virginia had suggested in ratifying the Constitution.[44] However, on the right to defense witnesses, Madison deviated from Virginia's proposal and focused instead on the subpoena power that

37. J. THOMAS SCHARF, HISTORY OF MARYLAND FROM THE EARLIEST PERIOD TO THE PRESENT DAY 116 (1879).

38. THE DECLARATION OF INDEPENDENCE para. 21 (U.S. 1776).

39. Westen, *supra* note 11, at 94–95.

40. MD. CONST., DEC OF RTS. Art. XIX (1776); *see also* Westen, *supra* note 11, at 95.

41. 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 248 (1971); *see also* Westen, *supra* note 11, at 96.

42. Schwartz, *supra* note 41; *see also* Westen, *supra* note 11, at 96.

43. Westen, *supra* note 11, at 96.

44. *Id.* at 97.

New York had.[45] In a unique formulation, he guaranteed the defendant the "right . . . to have a compulsory process for obtaining witnesses in his favor."[46]

On June 8, 1789, the proposed Bill of Rights was introduced in the House and referred to committee.[47] In the two and a half years of recorded debate that followed before the requisite number of states ratified it, the Compulsory Process Clause surfaced only once.[48] Representative Burke of South Carolina proposed to guarantee a continuance of the trial if the subpoenas for defense witnesses were not served.[49] The amendment was rejected as superfluous because the courts could be relied upon to require a continuance where necessary to preserve the substantive right as drafted.[50] Ultimately, the only change to Madison's original draft was that that the article "a" was removed so that the accused enjoyed a right to "have compulsory process" rather than to "have *a* compulsory process."[51]

Scholars debate what significance to attach to Madison's precise language. Professor Peter Westen, who undertook an exhaustive study of the Compulsory Process Clause's history, goes to some length to demonstrate that Madison had not "intended to confine the defendant to the subpoena power" but rather more broadly to provide a right to "present evidence on an equal basis with the prosecution."[52] For purposes of this Article, it suffices to observe that even according to the most parsimonious reading of the Clause, the purpose and intent of the Framers was to guarantee the defendant process power to compel the attendance of favorable witnesses.

III. PRECEDENT REGARDING ITS APPLICATION ABROAD

At the outset, it is worth noting that the Constitution's venue provisions appear to protect the same interests as the Compulsory Process Clause. Indeed, Justice Story, in

45. *Id.*
46. *Id.* at 98 n.115.
47. *Id.*
48. *Id.*
49. *Id.* at 98.
50. *Id.*
51. *Id.* at 98 n.115.
52. *Id.* at 99.

Commentaries on the Constitution, explains the "object" of the Sixth Amendment's Venue Clause is "to secure the party accused from being dragged to a trial in some distant state, away from . . . witnesses, . . . and thus to be subjected . . . perhaps even to the inability of procuring the proper witnesses to establish his innocence."[53] The critical difference is that, on its face, the Compulsory Process Clause admits of no exceptions whereas the Venue Clauses do.

The Sixth Amendment's Venue Clause guarantees defendants in "all criminal prosecutions" the right to an impartial jury trial in "the State and district wherein the crime shall have been committed," but it qualifies that with "which district shall have been previously ascertained by law."[54] Similarly, Article III states, "The Trial of all Crimes, . . . shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."[55] Congress's power to define the district means that the Venue Clauses are no bar to proscribing criminal activity occurring wholly extraterritorially provided Congress also sets venue for such crimes inside the United States. Congress did exactly that with 18 U.S.C. § 3238, which sets venue for extraterritorial offenses in the district where the offender is "arrested or . . . first brought" or failing that in the District of Columbia.[56] This statute resolves the venue issues but does nothing to clear the constitutional hurdle of compulsory process for defendants charged with extraterritorial crimes. That was left to the courts.

The principle case courts cite to brush aside compulsory process concerns in the context of extraterritorial crimes is *United States v. Greco*. The defendant there was charged with receiving stolen Canadian securities and transporting them to a conspirator in New York. At trial, Greco made no application to bring witnesses from Canada and no motion to take testimony abroad. Rather on appeal, he argued his compulsory process rights were violated because an

53. STORY, *supra* note 4, at 658.
54. U.S. CONST. amend. VI.
55. *Id.* art. III, § 2, cl. 3.
56. 18 U.S.C. § 3238 (2006).

"essential element of the crimes charged was the theft which occurred in Canada and he did not have an absolute right to compel the attendance of Canadian witnesses on this issue."[57] The court summarily rejected his argument on the grounds that "the Sixth Amendment can give the right to compulsory process only where it is within the power of the federal government to provide it."[58]

The appellate court cited no authority for this proposition relying instead on its own reasoning that were it not so "any defendant could forestall trial simply by specifying that a certain person living where he could not be forced to come to this country was required as a witness in his favor."[59] This argument is persuasive provided a substantive element of the crime occurred inside the United States. But where the proscribed conduct occurs entirely outside the United States, protecting compulsory process rights means only that the prosecution cannot proceed in the U.S., which has no substantive nexus to the crime. This is hardly an absurd result. In fact, in that context, a contrary rule denying applicability of compulsory process has the perverse consequence of permitting the government to shed its Sixth Amendment obligations precisely when its interest in the case is weakest.

It is also worth noting that the *Greco* analysis was extremely brief. The entire opinion was only five pages of which just seven sentences were devoted to the compulsory process claim. Moreover, three of those sentences focused on the defendant's failure to name at trial "what witnesses, if any, he would have liked to bring to this country."[60] Nor did the court seem entirely confident in its pronouncement on the reach of compulsory process since it did not conclude with it, falling back instead on its earlier suggestion of forfeiture: "The fact that appellant could not compel the attendance of an unnamed witness for whom he never asked did not deprive him of any constitutional right."[61]

57. United States v. Greco, 298 F.2d 247, 251 (2d Cir. 1962).
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*

Subsequent courts have relied on the *Greco* holding without addressing the influence of these contextual factors. A prominent example is the widely publicized prosecution of Zacarias Moussaoui, the so-called twentieth hijacker. He was charged under a series of terrorism related statutes for which the government sought the death penalty. In pretrial motions, Moussaoui sought to compel the Bush Administration to produce certain enemy combatants in military custody for deposition. The *New York Times* editorial page echoed the call, accusing the government of "attempting to trample" Moussaoui's compulsory process rights by denying him the opportunity to question Ramzi bin al-Shibh, who figured "prominently in Mr. Moussaoui's indictment, and . . . could provide evidence that could assist . . . in his defense."[62] The district court agreed and the government appealed.[63]

The Fourth Circuit began its analysis by citing *Greco* for the proposition that "[t]he compulsory process right is circumscribed . . . by the ability of the district court to obtain the presence of a witness through service of process."[64] Since the "process power of the district court does not extend to foreign nationals abroad," were the witnesses not in U.S. custody, the court would have agreed with the Bush Administration that "Moussaoui clearly would have no claim under the Sixth Amendment."[65] "'[I]t is well established,'" the court continued, "'that convictions are not unconstitutional under the Sixth Amendment even though the United States courts lack power to subpoena witnesses, (other than American citizens) from foreign countries.'"[66] Nevertheless, this was not the controlling principle here because the witnesses were not beyond the process power of the district court, which could have issued a testimonial writ to their military custodian.[67]

62. Editorial, *The Trial of Zacarias Moussaoui*, N.Y. TIMES, July 28, 2003, at A16.

63. United States v. Moussaoui, 382 F.3d 453, 458 (4th Cir. 2004).

64. *Id.* at 463.

65. *Id.* at 463–64.

66. *Id.* at 464 (quoting United States v. Zabaneh, 837 F.2d 1249, 1259–60 (5th Cir. 1988)).

67. *Id.*

Notice, the court immediately conceded the general validity of the *Greco* holding and turned its attention to the narrow question of whether witnesses in military custody are beyond the reach of a district court's process. A more thorough analysis might have acknowledged that in contrast to the unsympathetic defendant in *Greco*, who raised an issue generally and for the first time on appeal, Moussaoui was making a pretrial demand for specific witnesses likely possessing relevant information.

In *U.S. v. Zabaneh*,[68] a South American grower faced drug importation charges stemming from a "single shipment of marihuana from the country of Belize to Texas."[69] On appeal, the defendant argued that he was "denied his Sixth Amendment right to compulsory process" concerning witnesses he sought in Belize.[70] After noting the question "is one of first impression in the Fifth Circuit," the court disposed of the claim in a single sentence with a citation to *Greco*.[71]

Again, the court moved too fast. Unlike the defendant in *Greco*, the penal statute under which Zabaneh was convicted explicitly "provided for extra-territorial application."[72] In *Greco*, the defendant had delivered the stolen Canadian bonds to an accomplice in New York and was prosecuted under two statutes, one of which prohibited receiving stolen goods "that have crossed a United States boundary."[73] The other prohibited transporting such goods in "interstate or foreign commerce" meaning commerce between a foreign country and the United States.[74] By contrast, Zabaneh's charges included a violation of then 21 U.S.C § 955a, which stated specifically that it "is intended to reach acts of possession, manufacture, or distribution committed outside the territorial jurisdiction of the United States."[75]

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68. 837 F.2d 1249 (5th Cir. 1988).

69. *Id.* at 1251.

70. *Id.* at 1259.

71. *Id.* at 1259–60.

72. *Id.* at 1259.

73. United States v. Greco, 298 F.2d 247, 248 (2d Cir. 1962) (citing 18 U.S.C. § 2314 (1961) (current version at 18 U.S.C. § 2314 (2006))).

74. *Id.* (citing 18 U.S.C. § 371 (1948) (current version at 18 U.S.C. § 371 (2006))).

75. Pub. L. No. 96-350, 94 Stat. 1159, 1160 (codified as amended at 46 U.S.C. § 70503(b) (2006)).

There is a great difference between a prosecution under a statute generally applied to activity inside the U.S., where one element of the criminal enterprise happens to occur outside the United States, and a prosecution under a criminal statute having the purpose and intent of punishing conduct that occurred wholly beyond our borders. An almost certain consequence of such an extraterritorial criminal statute is that key defense witnesses will lie beyond the reach of American court process. Where this jurisdictional fact is inevitable, rather than incidental, it is tantamount to the prosecution deliberately sending a witness beyond the jurisdictional reach of a court's compulsory process, which the case law clearly prohibits.

The *Zabaneh* court failed to explore this distinction even though a case it cited alongside *Greco* would have provided the perfect platform. The court in that case, *U.S. v. Wolfson*,[76] acknowledged that no Sixth Amendment violation results from the "mere fact" that a foreign witness lies beyond court process. "However," it continued, "it is clear that the Sixth Amendment's right to compulsory process is violated by the prosecution deliberately sending a witness beyond the jurisdictional reach of a court's compulsory process."[77] *Zabaneh* only cited *Wolfson* for the first proposition, for which it is not even an independent source of authority, since it too cited *Greco*.[78] The *Zabaneh* court never considered where on the spectrum between incidental and deliberate the inability to procure defense witnesses lies when it is an inevitable result of extraterritorial criminal legislation.

That said, the conduct at issue in *Zabaneh* did not occur wholly beyond U.S. borders. The smuggler's aircraft landed in Texas laden with drugs.[79] Most of the counts on which Zabaneh was convicted relied on statutes specifically requiring an intent to import narcotics into U.S. territory or waters.[80] Thus, even though one of the statutes on its face would allow extraterritorial application, even without any

76. 322 F. Supp. 798, 819 (D. Del. 1971).
77. *Id.*
78. United States v. Zabaneh, 837 F.2d 1249, 1259–60 (5th Cir. 1988).
79. *Id.* at 1251.
80. *Id.* at 1252.

substantive nexus to the United States, as applied, nexus was there.

Such is not the case with respect to the latest wave of extraterritorial criminal legislation targeting narcotics-, terrorism-, and human-rights-related crimes, even when they have no connection to the United States.

IV. INCREASED EXTRATERRITORIAL CRIMINAL LEGISLATION AND THE FAILURE OF DUE PROCESS

The last half century has brought a "modern boom of far-reaching legislation extending ambitiously our laws to conduct occurring literally around the globe."[81] Courts consider the Fifth Amendment to be the primary limit on Congress's power in this context, but the malleable standards of due process have not checked this expansion, usually because the targeted activity is found to have some effect on the U.S. or to be universally condemned.[82]

In this changing environment, the Compulsory Process Clause may prove a better shelter for defendants than the traditional refuge of due process. While the requirements of due process can vary with the status and location of the defendant, the right to compulsory process applies in "all" criminal prosecutions and confers a right on "the accused" without discriminating between citizen, alien, or enemy combatant.[83] In addition, the weaker the proscribed conduct's American nexus, the less persuasive the *Greco* rationale becomes.

Whatever its limits, the Constitution undeniably confers some authority on Congress to proscribe extraterritorial misconduct.[84] For example, Article 1, Section 8 gives it the power to "define and punish Piracies and Felonies

81. Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law,* 48 HARV. INT'L L.J. 121, 159 (2007).

82. *Id.* at 163.

83. U.S. CONST. amend. VI.

84. "It is beyond doubt that, as a general proposition, Congress has the authority to 'enforce its laws beyond the territorial boundaries of the United States.'" United States v. Yousef, 327 F.3d 56, 86 (2d Cir. 2003) (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)).

committed on the high Seas, and Offences against the Law of Nations."[85]

The Eleventh Circuit relied on the Piracies and Felonies Clause to uphold the Maritime Drug Law Enforcement Act (MDLEA), which "was specifically enacted to punish drug trafficking on the high seas."[86] The MDLEA prohibits manufacture, distribution, or possession with intent to do so aboard any ship subject to the jurisdiction of the United States or within its "customs waters."[87] Those terms are very broadly defined. A vessel without nationality found anywhere in the world is deemed subject to U.S. jurisdiction, and vessels under foreign flags in international waters are nevertheless deemed within U.S. customs waters if any treaty allows U.S. authorities to board them.[88] In the particular case, the defendant was found in international waters off the coast of Ecuador.[89]

Congress has also resorted to the Foreign Commerce Clause as well as its enumerated and implied powers over foreign and military affairs including its authority to make "Rules concerning Captures on Land and Water" and for "Regulation of the land and naval Forces."[90] In 2006, the PROTECT Act, which made it a crime to travel to a foreign country and engage in a commercial sex act with a minor, was upheld on Foreign Commerce Clause grounds.[91]

Courts' due process analysis of these and other extraterritorial criminal statutes has taken one of two forms.[92] The Ninth and Second Circuits regard the central

85. U.S. CONST. art. I, § 8, cl. 10; *see* discussion of the Piracies and Felonies Clause *infra* Part V. "The high seas lie seaward of the territorial sea," defined as the three mile belt of sea measured from the low water mark." United States v. Rubies, 612 F.2d 397, 402 n.2 (9th Cir. 1979). However, "in 1996, Congress extended the 'territorial sea' for purposes of federal criminal jurisdiction to . . . twelve miles" consistent with a 1988 Presidential proclamation. Robert D. Peltz & Lawrence W. Kaye, *The Long Reach of U.S. Law Over Crimes Occurring on the High Seas,* 20 U.S.F. MAR. L.J. 199, 213 (2008).

86. United States. v. Estupinan, 453 F.3d 1336, 1338 (11th Cir. 2006).

87. 46 U.S.C. §§ 70501–07 (2006).

88. *Id.*

89. *Estupinan*, 453 F.3d at 1337.

90. U.S. CONST. art. I, § 8, cl. 3, cl. 11, cl. 14; *see also* CHARLES DOYLE, CONG. RESEARCH SERV., 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 1–3 (2010).

91. United States v. Clark, 435 F.3d 1100, 1116–17 (9th Cir. 2006).

92. DOYLE, *supra* note 90, at 4–6; Colangelo, *supra* note 81, at 162–63.

question as one of nexus. This issue arose in *U.S. v. Yousef*.[93] The defendant was convicted on various charges including the bombing of a Philippine Airlines jet in route from Manila to Japan, which was said to be a practice run in a larger conspiracy to blow up U.S. airliners in Southeast Asia.[94] Yousef was a noncitizen who had been forcibly transferred to the United States from Pakistan to face separate charges stemming from the first World Trade Center bombing.[95] On appeal, Yousef and his codefendants argued that their "prosecution in the United States was fundamentally unfair because of their difficulty in obtaining evidence and assistance from overseas."[96] After noting that it was a question of first impression in the Second Circuit, the court concurred with the Ninth Circuit's conclusion that in order for the extraterritorial application of a federal criminal statute to be consistent "'with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair.'"[97] Applying this standard, the court found no due process violation because the Philippine Airlines bombing was a "test run in furtherance" of a conspiracy whose "substantial intended effect" was to "inflict injury on this country and its people and influence American foreign policy."[98]

The Fifth Circuit has approached the due process problem as one of notice. In the context of a foreign national's prosecution for conspiracy to traffic drugs to Europe aboard a foreign vessel in international waters, it found that "'where the flag nation has consented,' . . . due process does not require a nexus for the MDLEA's extraterritorial application."[99] The court added that the First and Third Circuits too "have rejected a nexus requirement."[100] While

93. 327 F.3d 56 (2d Cir. 2003).

94. *Id.* at 79.

95. *Id.* at 82.

96. *Id.* at 111.

97. *Id.* at 111 (quoting United States v. Davis, 905 F.2d 245, 248–49 (9th Cir. 1990)).

98. *Id.* at 112.

99. United States v. Suerte, 291 F.3d 366, 372 (5th Cir. 2002) (quoting 46 U.S.C. app. § 1903(c)(1)(C) (2002) (current version at 46 U.S.C.A § 70502(c)(1)(C) (West 2010))).

100. *Id.* at 370.

due process does require that extraterritorial application of criminal law "be neither arbitrary nor fundamentally unfair," the MDLEA satisfies that criteria because "[t]hose subject to its reach are on notice."[101] How so? Congress has found that "'trafficking in controlled substances aboard vessels . . . is a serious *international* problem and is *universally* condemned.'"[102]

Whether the issue is one of nexus or notice, a 2007 article reports that "courts have thus far refrained from striking down the application of federal criminal law to foreign actors abroad on Fifth Amendment due process grounds."[103] Nevertheless, its author fears that even under the current weak tests, "some misguided court . . . might . . . reject an extraterritorial application of federal legislation to a deserving defendant" especially as prosecutions increase in light of the aggressive U.S. stance against terrorism around the world.[104] Accordingly, he proposes "a due process test that incorporates" international law principles of "universal jurisdiction," which he explains provides the U.S. with a "virtually unconstrained legal basis from which to extend its criminal laws to dangerous extraterritorial conduct like acts of terrorism."[105] "The premise of universal jurisdiction is that a state 'may exercise jurisdiction to define and punish certain offenses recognized by the community of nations as of universal concern,' . . . even where no other recognized basis of jurisdiction is present."[106] Because the proscription of universal crimes "is not just one of national law, but also of a pre-existing and universally applicable international law, the accused cannot claim to be shielded [by due process] from the application of a prohibition to which he is already

101. *Id.* at 377.

102. *Id.* at 377 (quoting 46 U.S.C. app. § 1902 (current version at 46 U.S.C.A § 70501 (West 2010))); *see also* United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3rd Cir. 1993) ("Inasmuch as the trafficking of narcotics is condemned universally by law-abiding nations, we see no reason to conclude that it is 'fundamentally unfair' for Congress to provide for the punishment of persons apprehended with narcotics on the high seas.").

103. Colangelo, *supra* note 81, at 163.

104. *Id.* at 163.

105. *Id.* at 124, 188.

106. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 n.7 (D.C. Cir. 1984) (quoting RESTATEMENT OF THE LAW OF FOREIGN RELATIONS (REVISED) § 404 (Tentative Draft No. 2, 1981)).

and always subject."[107]

Perhaps with this rationale in mind, Congress has been eagerly expanding the reach of federal criminal law. The most aggressive examples are those asserting some form of universal jurisdiction. There are various statutes, many implementing treaties that apply to conduct having absolutely no connection to the United States other than the fact that the perpetrator was brought here for trial. For example, 18 U.S.C. § 2340A implements the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment. It applies exclusively to torture that occurs "outside the United States," and its jurisdictional element requires only that the alleged offender be "present in the United States, irrespective of the nationality of the victim or alleged offender."[108]

Similarly, the Genocide Convention Implementation Act of 1987 was amended in 2007 to apply if "after the conduct required for the offense occurs, the alleged offender is brought into, or found in, the United States, even if that conduct occurred outside the United States."[109] The prior version at least required that the offender be a U.S. national or that the act occur within the United States.[110] With both statutes, the stakes for defendants are high. Where death results, torture and genocide are capital offenses.[111]

U.S. v. Yunis[112] is an example of an actual prosecution for a treaty-based universal crime. The case arose out of the 1985 hijacking of a Royal Jordanian Airlines flight on the tarmac in Beirut as it awaited a scheduled departure for Amman. The hijackers hoped to divert the aircraft to Tunis with the intention of meeting delegates at the Arab League Conference to demand the removal of all Palestinians from Lebanon. However, the Tunisians denied them entry so, after a dramatic thirty-hour zigzag over the Mediterranean, the plane returned to Beirut. The hijackers then released the hostages, held a press conference, blew up the aircraft,

107. Colangelo, *supra* note 81, at 124–25.
108. 18 U.S.C. § 2340A(b)(2) (2006).
109. 18 U.S.C.A § 1091 (West 2010).
110. 18 U.S.C. § 1091 (2006)).
111. *See* 18 U.S.C. § 2340A(a) (2006); 18 U.S.C. § 1091(b)(1) (2006).
112. 681 F. Supp. 896 (D.D.C. 1988).

and fled. At no time, did the aircraft penetrate American airspace; nor did the hijackers seek to influence the United States government.[113]

Nevertheless, Yunis was convicted under 18 U.S.C. § 1203, which prohibits extraterritorial hostage taking if "the offender is found in the United States."[114] Yunis had been forcibly brought to the United States after undercover FBI agents lured him into international waters off the coast of Cyprus.[115] The district court found jurisdiction proper because "in light of global efforts to punish . . . hostage taking, international legal scholars unanimously agree that these crimes fit within the category of heinous crimes for purposes of asserting universal jurisdiction."[116]

Even though the "[u]niversal principle, standing alone, provides sufficient basis for asserting jurisdiction," the court found additional grounds under the "passive personal principle" of international law which "authorizes states to assert jurisdiction over offenses committed against their citizens abroad."[117] Only two of the passengers on the hijacked flight were Americans. The court acknowledged that the principle is controversial but cited a recent Restatement of Foreign Relations Law finding it "has been increasingly accepted when applied to terrorist . . . attacks on a state's nationals by reason of their nationality."[118] In fact, the Hostage Statute itself establishes as an alternate basis for jurisdiction that a "person seized . . . is a national of the United States."[119] This point proved important on appeal when Yunis argued he was forcibly brought to rather than "found in" the United States.[120] Rather than decide the question, the D.C. Circuit simply fell back on the alternative

113. *Id.* at 899.

114. 18 U.S.C. § 1203(b)(1)(B) (2006).

115. *Yunis*, 681 F.Supp. at 906.

116. *Id.* at 901.

117. *Id.*

118. *Id.* at 902. The court also noted the United States had "relied on this very principle" when it sought to extradite Muhammed Abbas Zaiden who led the hijacking of the *Achillo Lauro* in which Leon Klinghoffer was killed. "As here, the only connection to the United States was Klinghoffer's American citizenship." *Id.* at 902–03)).

119. 18 U.S.C. § 1203(b)(1)(A) (2006).

120. United States v. Yunis, 924 F.2d 1086, 1090 (D.C. Cir. 1991).

jurisdictional ground.[121]

In all these examples, the universal crime principle has overcome the standard due process limitation of nexus. It is precisely in the same cases, though, that the compulsory process claim should be strongest. The crime may be universal, but where there is no American nexus, critical defense witnesses are all but guaranteed to lie beyond U.S. court process. Nor are they likely to appear voluntarily in regards to a universal offense for fear of being investigated themselves. In these circumstances, applying criminal law extraterritorially approaches the very abuse, suffered in the colonies, that the Sixth Amendment was designed to prevent. Recall the Virginia legislature's complaint that transferring colonists to England for trial would deprive them of the "Liberty of summoning and producing Witnesses on such Trial."[122]

Nor is the *Greco* holding any justification. The *Greco* rationale is a *post facto* accommodation to the reality that, in an interconnected world, a particular witness may lie beyond court process and that should not defeat the prosecution of a cross-border crime committed in part within the United States. It is not an a priori invitation for Congress to exercise universal jurisdiction unfettered by the requirement of compulsory process. And yet, that is exactly what has happened. Consider, again, 18 U.S.C. § 2340A. It applies exclusively to torture "outside the United States" which is, of course, beyond the reach of federal court process.[123] This means that under *Greco*, the statute only applies when compulsory process does not.

Certainly, universal crimes should not go unpunished. But recall that one of the chief complaints lodged against the government's detention facility in Guantanamo Bay, Cuba, was that it was designed, at the outset, to be a place where the Constitution did not apply.[124] In a similar vein, the

121. *Id.* at 1090.

122. Blume, *supra* note 1, at 64.

123. 18 U.S.C. § 2340A(a) (2006).

124. William Glaberson, *For 20 at Guantánamo, Court Victories Fall Short*, N.Y. TIMES, Feb. 26, 2009, at A23. Glaberson noted,

> Samuel Issacharoff, a professor at New York University Law School, said the standoff showed the limitations of the legal system in dealing with the prison set up seven years ago on the naval base in Cuba, partly

dissenter in the Ninth Circuit case upholding the PROTECT Act on Foreign Commerce Clause grounds persuasively argued, "The Constitution cannot be interpreted according to the principle that the end justifies the means. The sexual abuse of children abroad is despicable, but we should not, and need not, refashion our Constitution to address it."[125] The same is true of torture, genocide, and terrorism.[126] If these are truly universal crimes, the rest of the world should be equally prepared to prosecute them; thus, there is no need for the United States to involve itself in a way that raises constitutional questions.

V. PIRACIES & FELONIES ON THE HIGH SEAS & OFFENSES AGAINST THE LAW OF NATIONS

In rejecting a First Amendment challenge to the Copyright Clause, the Supreme Court noted that the two provisions were "adopted close in time[, and] [t]his proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles."[127]

At first glance, the same argument could be advanced against the proposition that the inability to provide compulsory process precludes assertions of universal criminal jurisdiction. The Sixth Amendment was adopted fairly soon after Article I, Section Eight, Clause Ten, which authorizes Congress to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[128] That close temporal proximity gives

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to be [sic] remain clear of American courts. 'The Bush administration chose the path of holding people beyond the reach of the law," Professor Issacharoff said.

Id.

125. United States v. Clark, 435 F.3d 1100, 1117 (9th Cir. 2006) (Ferguson, J., dissenting).

126. Another examples is The Child Soldiers Accountability Act of 2008, prohibiting the "Recruitment or use of child soldiers" and permitting jurisdiction solely on the grounds that "the alleged offender is present in the United States." 18 U.S.C.A § 2442 (West Supp. 2009). 21 U.S.C. § 960a prohibits drug trafficking for the benefit of terrorist organizations. It passed as part of the USA PATRIOT Improvement and Reauthorization Act of 2005 and provides that "[t]here is jurisdiction over an offense under this section if . . . after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States." 21 U.S.C. § 960a(b)(5) (2006).

127. Eldred v. Ashcroft, 537 U.S. 186, 190 (2003).

128. U.S. CONST. art. I, § 8, cl. 10.

rise to the inference that, in the Founders' view, the Compulsory Process Clause does not limit the proscription of extraterritorial crime.

This argument has it backwards. It is not that the Framers felt compulsory process did not limit extraterritorial jurisdiction but rather that the grant of authority for extraterritorial jurisdiction was so limited that compulsory process rights were not implicated.

Despite its internationalist ring, Clause Ten, as understood by the Framers, supplied a basis for universal jurisdiction solely for the crime of piracy.[129] Prosecuting piracy presents no obvious compulsory process concerns because vessels under the control of pirates are deemed stateless, meaning U.S. authorities would be legally free to board them wherever found.[130] Accordingly, it is not inevitable that critical defense witnesses would be beyond the reach of U.S. officials seeking to compel their appearance at trial.[131]

Clause Ten has three components that appear to overlap. It authorizes Congress to define and punish both "Piracies and Felonies" committed on the high seas as well as offences against the law of nations. Piracy though is a subspecies of felony as well as an offence against the law of nations. There has been little scholarly work on this particular constitutional provision, but a 2008 article in the

129. Eugene Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction,* 103 NW. U. L. REV. 149, 152 (2009).

130. J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS 484–85 (2d ed. 1996) ("[B]ecause [stateless vessels] are not entitled to the protection of any State, they are subject to the jurisdiction of all States. Accordingly, stateless vessels may be boarded upon being encountered in international waters by a warship or other government vessel and subjected to all appropriate law enforcement actions.").

131. The clearest example would be where a U.S. warship engages and captures a pirate vessel at sea. Such are the facts of the recent case *U.S. v. Hasan,* No. 2:10-cr56, 2010 U.S. Dist. LEXIS 115746 (E.D. Va. Oct. 29, 2010). Defendants were captured on the high seas between Somalia and the Seychelles after allegedly mistaking the U.S. Navy frigate *Nicholas* for a merchant ship and attacking it. The *USS Nicholas* gave chase capturing defendants and their vessel. They were charged with piracy under 18 U.S.C. § 1651. The case is the third prosecution in the U.S. for piracy since 2009. Prior to then, the last one appears to have been in 1885. *Id.* at *2–10. Admittedly, there will be cases where potential witnesses will have disembarked and dispersed by the time a prosecution commences. Whether compulsory process is adequate in these cases will turn on the specific facts. The conceptual point remains that, at least at the time the piracy is committed, U.S. jurisdiction would extend to the parties involved.

Northwestern University Law Review explains this "striking[] redundancy."[132]

Piracy was well known to be jurisdictionally unique. "For as long as sovereignty-based jurisdictional principles have existed (that is, at least since the early seventeenth century) piracy was the only universal jurisdiction offense."[133] While it had "a uniform technical meaning as an international law offense . . . nations could and did attach the term 'piracy' to a variety of different maritime crimes" either as a rhetorical indication of their severity or simply out of imprecision.[134] There was, however, an important jurisdictional difference between classic and statutory piracy. As the author of the foremost eighteenth-century treatise on international law explained, "piracy created by municipal statute can only be tried by that State within whose territorial jurisdiction" or "on board of whose vessels, the offence thus created was committed."[135] Thus, the Framers singled out the specific offense of piracy from the broader categories of felonies and offences against the law of nations precisely because its jurisdictional treatment was different. It alone admitted a universal jurisdiction.[136] All other felonies and offenses required a U.S. nexus.

This interpretation of original understanding is bolstered by the recognition that despite the "vast array of foreign high seas conduct that was available for criminalization in the Age of Sail" Congress, with "one exception, . . . did not use the Piracies and Felonies Clause to legislate universally over anything but piracy itself until [1980 with] the MDLEA."[137]

The one exception, however, is significant and must be addressed. In 1790, the First Congress passed "[a]n Act for the Punishment of Certain Crimes Against the United States."[138] The measure was "an omnibus act, creating every federal crime, such as treason, counterfeiting, and more

132. Kontorovich, *supra* note 129, at 163.

133. *Id.* at 165.

134. *Id.* at 166.

135. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW § 124, at 194 (Richard Henry Dana Jr. ed., Boston, Little, Brown, & Co. 1866).

136. Kontorovich, *supra* note 129, at 165.

137. *Id.* at 174–75.

138. United States v. Suerte, 291 F.3d 366, 372 (5th Cir. 2002).

common crimes committed in areas of exclusive federal authority."[139] Among its many provisions was § 8 which criminalized "robbery" committed on the high seas by "any person."[140] That is classic piracy and unobjectionable. However, the statute went on to create a number of statutory piracies including captains absconding with vessels and sailors assaulting their commanders.[141] The statute made no jurisdictional distinction for these later offenses; so if taken literally, it would have extended jurisdiction "universally to a wide variety of crimes aboard any vessel on the high seas, and even to some offenses on land."[142]

On its face, this act seems powerful evidence of Congress's ability to legislate extraterritorially unconstrained. After all, it was passed by the First Congress which "'included 20 Members who had been delegates to the [Constitutional] Convention.'"[143] This was also the same Congress that had already drafted the Sixth Amendment and submitted it to the states.[144] However, the historical record reveals that the seeming universal jurisdiction conferred by § 8 was immediately greeted with suspicion by leading jurists, and the Supreme Court ultimately confined its application to piratical offenses only.[145]

In 1791, Supreme Court Justice James Wilson discussed it in the context of giving instructions to a Virginia grand jury. As was then customary, he expounded for the grand jurors at length on the Constitution and the entire corpus of federal law.[146] Upon arriving at § 8, he "expressed 'an official obligation to state some doubts' about the statute's apparent extension of universal jurisdiction beyond classic piracy."[147]

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139. Kontorovich, *supra* note 129, at 175.

140. 1 THE STATUTES AT LARGE OF THE UNITED STATES OF AMERICA 113 (Richard Peters ed., Boston, Little, Brown & Co. 1845).

141. *Id.* at 114.

142. Kontorovich, *supra* note 129, at 176.

143. *Suerte*, 291 F.3d at 373 (quoting Bowsher v. Synar, 478 U.S. 714, 724 n.3 (1986)).

144. *See id.*

145. Kontorovich, *supra* note 129, at 152–53.

146. *Id.* at 176.

147. *Id.*; *see also id.* at 177 (arguing that "[w]hile his charge repeatedly invoked the 'law of nations' and did not cite the Constitution . . . . There was no authority other than the Constitution for invalidating a statute, as Wilson said he would do"). Whether the constraints Wilson envisioned flowed from the Constitution or

On the other hand, Justice Iredell revealed no such qualms when instructing a New Jersey jury two years later. In a much more cursory treatment of the issue, he suggested that international law provided a basis for universal jurisdiction over crimes other than piracy when committed on the high seas outside the jurisdiction of any particular state.[148] Justice Iredell cited no authority for this proposition which appears at odds with both the "well-established contemporary view that only piracy was universally cognizable" as well as his own "views . . . expressed during the ratification suggesting that the purpose of Clause Ten was to reach crimes committed by or against Americans."[149]

It may be no surprise then that in 1819 Justice Story, author of *Commentaries on the Constitution,* sided with Wilson in delivering his own jury instructions. While acknowledging that the statute "'is manifestly designed to apply to all cases,' including foreigners on foreign ships," Story stated that statutory piracies "are punishable only when there is American involvement."[150]

The future Justice Marshall took a similar position in a celebrated speech he made as a freshman congressman on the House floor. It was occasioned by the controversial extradition of a mutineer to England to answer for a brutal revolt aboard the English warship *Hermione.*[151] Justice Marshall explained that, although the mutineer Robbins could have been tried for piracy, the United States could not have prosecuted him for murder even under the Crimes Act. First, Justice Marshall distinguished between classic and statutory piracy: "'[P]iracy . . . alone is punishable by all nations. . . . The people of the United States have no jurisdiction over offences [i.e. murder as distinguished from piracy] committed on board a foreign ship against a foreign nation.'"[152] Justice Marshall then reasoned that "'[the Define and Punish] Clause can never be construed to make to the

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international law, the point remains that the Framers and their contemporaries would not have viewed Clause Ten as authorizing universal jurisdiction for crimes other than classic piracy.

148. *Id.* at 177–78.

149. *Id.* at 178.

150. *Id.* at 179.

151. *Id.* at 179–82.

152. *Id.* at 183–84.

Government a grant of power, which the people making it do not themselves possess. . . . [T]he [Crimes Act], therefore, cannot act upon the case.'"[153]

The first Supreme Court case addressing the reach of § 8 was *United States v. Palmer*[154] in 1818. The case arose amidst anarchy on the high seas caused by unscrupulous privateers operating under dubious letters of marque from insurgent Latin American republics hoping to disrupt Spanish shipping.[155] A number of defendants, including some foreigners, were charged with the armed robbery of a Spanish ship.

At the outset, Justice Marshall held that the "constitution having conferred on congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States."[156] Nevertheless, he concluded, Congress did not intend with the Crimes Act to "inflict its penalties on persons who are not citizens of the United States, nor sailing under their flag nor offending particularly against them."[157]

Marshall's construction is extremely difficult to reconcile with the plain language of the statute stating explicitly that it applies to "any person" as well as the fact that it was "clear to most observers that Congress had intended to punish piracy to the full extent sovereign nations punish it—universally."[158] Justice Marshall's dilemma was that any construction of § 8's "any person" language would have to apply equally to all offenses enumerated in the statute, including the nonpiratical ones. Thus, a literal reading would have extended universal jurisdiction beyond classic piracy, which, as a legislator, Justice Marshall had argued Congress could not do.

The advantage of Justice Marshall's statutory holding was that Congress could override it. Justice Marshall was very

153. *Id.* at 184 (quoting 10 ANNALS OF CONG. 607 (1800)).
154. 16 U.S. 610 (1818).
155. Kontorovich, *supra* note 129, at 185.
156. *Palmer*, 16 U.S. at 630.
157. *Id.* at 631.
158. Kontorovich, *supra* note 129, at 187.

clear that the Constitution permitted universal jurisdiction over piracy; it was the nonpiratical offenses that raised problems. In fact, Congress immediately responded with a corrective statute that did just that. However, the statute expired at year's end, and "[r]emarkably, legislation to extend [it] . . . failed to do so because of . . . inarticulate draftsmanship."[159]

The Crimes Act statute, thus, reverted to its original form, and it was left to the Supreme Court to free it of *Palmer's* limiting construction. In two cases, *United States v. Klintock*[160] and *United States v. Furlong*,[161] the Court distinguished *Palmer* as holding merely that the Crimes Act did not create jurisdiction over foreign vessels. Pirate ships, on the other hand, are a different matter. "[A] vessel, by assuming a piratical character, is no longer included in the description of a foreign vessel."[162] "[A] crew acting in defiance of all law, and acknowledging obedience to no government whatever, is within the true meaning of this act. . . . Persons of this description are proper objects for the penal code of all nations."[163]

Thus, "[b]y 1820, both Congress and the Supreme Court had rejected universal jurisdiction over anything but 'piracies.'"[164] According to the Court, the distinguishing feature of pirate ships is that they are stateless vessels under the protection of no recognized sovereign and so subject to the jurisdiction of all. Any indication of the 1790 Crimes Act to the contrary was merely the result of "artless drafting."[165]

Interestingly, the Fifth Circuit overlooked this nuance in the course of rejecting a due process challenge to the MDLEA.[166] Recall that the MDLEA "was specifically enacted to punish drug trafficking on the high seas" and is "America's most used criminal universal jurisdiction

159. *Id.* at 188.
160. 18 U.S. 184, 192–93 (1820).
161. 18 U.S. 144, 147 (1820).
162. *Furlong*, 18 U.S. at 198.
163. *Klintock*, 18 U.S. at 152.
164. Kontorovich, *supra* note 129, at 153.
165. *Id.* at 189.
166. United States v. Suerte, 291 F.3d 366, 376–77 (5th Cir. 2002).

statute."[167] The court read the early history to suggest that "the Fifth Amendment imposes no nexus requirement on the reach of statutes criminalizing felonious conduct by foreign citizens on the high seas."[168] The court observed that "[t]he First Congress promptly enacted far-reaching legislation under the Piracies and Felonies power."[169] The court was particularly persuaded by the Crime Act's broad application to "any person" and Justice Marshall's statement in *Palmer* that, as a constitutional matter, the Define and Punish Clause leaves "'no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States.'"[170] Since drug trafficking is not piracy, the court added, "[W]hile at issue [in *Palmer*] was Congress's power to define and punish *piracies*, Chief Justice Marshall's assessment should apply with equal weight to *felonies* such as at issue here, a parallel provision within the same constitutional clause."[171]

As an original rule of construction, that assumption would be reasonable, but in this case it is entirely improper. On the contrary, Justice Marshall confined his assessment to piracy precisely because universal jurisdiction could not be extended to felonies, which is exactly why the drafters mentioned it separately. As for the 1790 Act appearing to extend universal jurisdiction to crimes other than piracy, contemporary jurists denounced it and "[s]everal courts blamed it on shoddy draftsmanship, which would have been understandable given the massive work of the First Congress."[172]

The only other thing left to explain is why Congress's Clause Ten authority to define and punish "[o]ffences against the Law of Nations" does not plainly provide an alternate basis for extraterritorial jurisdiction and one which the Framers evidently did not feel was in tension with

167. United States v. Estupinan, 453 F.3d 1336, 1338 (11th Cir. 2006); Kontorovich, *supra* note 129, at 151.

168. *Suerte*, 291 F.3d at 373.

169. *Id.* at 372.

170. *Id.* at 373.

171. *Id.* at 374.

172. Kontorovich, *supra* note 129, at 176.

the Sixth Amendment.[173] The answer is that the authority to punish offences against the law of nations was originally intended not as a broad mandate to punish extraterritorial crimes but rather as a mechanism to provide legal recourse to foreign dignitaries injured inside U.S. territory.

The Founders were motivated to include the Offences Clause in the Constitution "in the first place" by their fears that "the several . . . states had not provided adequate legal recourse to foreign ambassadors . . . who had suffered some insult . . . on U.S. territory, and . . . the need . . . to avoid possibly serious conflicts resulting from these failures at the state level."[174] They were acutely aware that "under the Articles of Confederation[,] Congress 'could not cause infractions of treaties or of the law of nations, to be punished: that particular states might by their conduct provoke war without control.'"[175]

Two prominent incidents highlighted the deficiency. In May 1784, in what became known as the Marbois Affair, a French adventurer, De Longchamps, assaulted the Consul General of France first at his home in Philadelphia and then again, two days later, on a public street.[176] In the face of the ensuing international uproar, the Continental Congress sheepishly explained that the "nature of a federal union" meant it could neither initiate its own prosecution nor force any state to do so.[177] Five years later, during the Constitutional Convention, a New York policeman entered the residence of the Dutch Ambassador in an attempt to arrest an employee.[178] In response to the Dutch government's official protest, Secretary Jay could report only that "'the federal government does not appear . . . to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases.'"[179]

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173. *Id.* at 150.

174. Colangelo, *supra* note 81, at 143.

175. *Id.* at 143 n.135 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 19 (Max Farrand ed., rev. ed. 1966)).

176. Respublica v. De Longchamps, 1 U.S. 111, 111 (1784); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 716 (2004).

177. Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447, 466 (2000).

178. *Id.* at 466.

179. *Sosa*, 542 U.S. at 717.

Even more worrisome was the states' refusal to honor federal treaties. The agreement ending the American Revolution stipulated that British creditors would be repaid.[180] Nevertheless, state courts repeatedly blocked collection efforts prompting reciprocal English threats of reprisal.[181] The Continental Congress was held accountable for all this even though it lacked the power to rectify it.

Edmund Randolph recognized the existential threat this situation posed to the new nation. He warned repeatedly that the confederation might be "doomed to be plunged into war, from its wretched impotency to check offences against this law [of nations]."'[182] Later, at the constitutional convention he reminded delegates that "[i]f the rights of an ambassador be invaded by any citizen it is only in a few States that any laws exist to punish the offender."[183] As a remedy, he submitted a proposal that permitted the new federal government "'[t]o provide tribunals and punishment for mere offenses against the law of nations.'"[184] The Committee on Detail added the substance of it to a provision permitting Congress to define and punish piracy on the high seas and the crime of counterfeiting.[185] The Committee on Style made the authority to punish counterfeiting a separate provision and, with a few more adjustments, reported the version of Clause Ten we have today.[186]

None of this is to say the concepts of piracy, the Law of Nations, or Fifth Amendment Due Process cannot evolve with time. The point is merely that the compulsory process problem is only triggered once universal jurisdiction is expanded beyond piracy, a fairly recent development. Accordingly, it proves nothing that the Framers, whose conception of universal jurisdiction was confined to piracy, saw no inconsistency between Clause Ten and the Compulsory Process Clause.

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180. Stephens, *supra* note 177, at 466–67.

181. *Id.*

182. *Id.* at 467 (quoting A Letter of His Excellency Edmund Randolph, Esquire, on the Federal Constitution (Oct. 10, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST 86, 88 (Herbert J. Storing ed., 1981)).

183. *Id.* at 471 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 25 (Max Farrand ed., 1937) (McHenry's notes, May 29, 1787)).

184. *Id.* at 471–72.

185. *Id.* at 472.

186. *Id.* at 472–73.

VI. MUTUAL LEGAL ASSISTANCE TREATIES

Instead of exercising restraint because defendants currently lack compulsory process rights abroad, Congress has instead magnified the inequity by ensuring prosecutors pursuing extraterritorial crimes are not similarly disadvantaged in gathering evidence.

Since 1977, Congress has ratified nearly fifty treaties with foreign nations requiring them to assist U.S. law enforcement in obtaining witnesses and evidence for trial.[187] Signatories to these Mutual Legal Assistance Treaties undertake to establish a "Central Authority" through which to process requests, which in the United States is the Justice Department's Office of International Affairs.[188] The treaties are careful that information is acquired "in a fashion so as to have it usable in [U.S.] courts."[189] MLATs were originally designed to overcome the complications of foreign bank secrecy laws, but they also obligate their foreign signatories to assist U.S. law enforcement in locating and identifying witnesses, serving process, taking depositions, conducting searches, and obtaining documents.[190]

Thus, for example, the MLAT between the United States and Egypt provides that "[a] person in the Requested State from whom testimony or evidence is requested pursuant to this Treaty shall be compelled, if necessary, under the laws of the Requested State to appear and testify" there.[191] President Clinton's message to the Senate accompanying the treaty included an explanatory note from the State Department adding that "Egyptian authorities would permit a U.S. prosecutor . . . to be present during the taking of such . . . testimony in Egypt when such official could provide information relevant to the execution of the request."[192]

187. *See* DOYLE, *supra* note 90, at 20–21; Robert Neale Lyman, *Compulsory Process in a Globalized Era: Defendant Access to Mutual Legal Assistance Treaties*, 47 VA. J. INT'L L. 261, 276 (2006).

188. *Id.* at 276, 288.

189. *Extradition, Mutual Legal Assistance and Prisoner Transfer Treaties: Hearing Before the S. Comm. on Foreign Relations*, 105th Cong. 8 (1998) [hereinafter *Extradition Hearings*] (statement of Mark M. Richard, Deputy Assistant Attorney Gen., Criminal Div., U.S. Dep't of Justice).

190. DOYLE, *supra* note 90, at 20–21.

191. Treaty with Egypt on Mutual Legal Assistance in Criminal Matters, U.S.-Egypt, art. 8, May 3, 1998, S. Treaty Doc. 106-19.

192. *Id.* at 4.

But this crude form of compulsory process is only available to state and federal prosecutors. Most MLATs explicitly provide that they do "not give rise to a right on the part of any private person to obtain . . . any evidence."[193] Since 1988, the National Association of Criminal Defense Lawyers has lobbied the Senate repeatedly for language permitting judges to order the government to make MLAT requests on behalf of criminal defendants.[194] The Justice Department vigorously opposed the request in a formal letter to the Senate Foreign Relations Committee appearing in the record. The letter explains that "MLATs . . . were never intended to provide benefits to the defense bar."[195] The asymmetry was justified on the grounds that "it is not 'unfair' for MLATs to govern assistance solely between U.S. and foreign Government prosecutors and investigators, any more than it is improper for the FBI to conduct investigations for prosecutors and not for defendants."[196]

The defect in this argument is that inside the United States defendants at least enjoy access to compulsory process. Abroad, under *Greco*, they do not. MLATs, thus, widen rather than maintain the ordinary domestic disparity between prosecutorial and defense resources.[197] So MLATs may not give prosecutors more, but they leave defendants with less. As recently as 2005, the position of the Justice Department remained that incoming requests "which appear to be purely for the benefit of foreign defendants will be

193. Lyman, *supra* note 187, at 288 (quoting Treaty with Ukraine on Mutual Legal Assistance in Criminal Matters, U.S.-Ukr., art. 1, Jul. 22, 1998, S. Treaty Doc. 106-16).

194. *Extradition Hearings, supra* note 189, at 27 (letter from Mark M. Richard, Deputy Assistant Attorney Gen., to Patricia McNerney, Counsel, Foreign Relations Comm. (Oct. 8, 1998)).

195. *Id.* at 27.

196. *Id.* at 27.

197. Defendants do have access to "letters rogatory," official requests from U.S. courts to foreign tribunals for assistance in taking depositions. However, the government has access to those as well so the net disparity remains. Moreover, the government has not found them effective: "[L]etters rogatory are inadequate for many evidence-gathering tasks, as the Justice Department has itself recognized . . . [which is] the very reason that a substitute, the MLAT, was invented." Lyman, *supra* note 187, at 275; *see also* DOYLE, *supra* note 90, at 22 (noting that the State Department has emphasized that letters rogatory are a time consuming, cumbersome process and should not be utilized unless there are no other options available and that assistance is a matter of discretion rather than treaty obligation).

denied."[198]

That said, even if defendants had access to MLATs that probably would still not satisfy the requirements of compulsory process were that right held to apply abroad. U.S. courts have no authority to force a foreign country to abide by its MLAT obligations. In addition, the State Department's legal advisor has explicitly denied that MLATs are equivalent to compulsory process. In 1996, a number of MLATs came before the Senate for advice and consent.[199] Following the hearing, Senate Foreign Relations Committee Chairman Jesse Helms inquired as to the "fairness and even the constitutionality" of the fact that "defendants do not have access to information through MLAT procedures."[200] State Department Deputy Legal Advisor Jamison Borek deflected the concerns on the grounds that "[n]one of the treaties require the treaty partner to compel its citizens to come to the United States . . . . Since the Government does not obtain compulsory process under MLATs, there is nothing the defense is being denied."[201]

On the other hand, the State Department's argument is weak. The mere fact the witnesses cannot be forced into a U.S. courtroom is immaterial. Many MLATs, like the one with Austria then before the Senate, use a familiar formula providing that prosecution witnesses "shall be compelled to appear [and] testify" in the requested state.[202] As long as the prosecution's witness may be compelled to appear in the foreign state and the resulting testimony is admissible in U.S. courts, the government has obtained compulsory process even if the witness never sees American shores.

198. Lyman, *supra* note 187, at 288–89.

199. *Extradition Treaties: Hungary; Belgium; Switzerland; Philippines; Bolivia; and Malaysia Mutual Legal Assistance Treaties: Korea; Great Britain; Philippines; Hungary; and Austria: Hearing Before the S. Comm. on Foreign Relations United States Senate,* 104th Cong. (1996).

200. *Id.* at 14.

201. *Id.*

202. Treaty with Austria on Mutual Legal Assistance in Criminal Matters, U.S.-Austria, art.8, Feb. 23, 1995, S. Treaty Doc. 104-21, at 10.

VII. CONCLUSION

Compulsory process is not some mere formality, it is a matter of basic fairness. As the Supreme Court put it in *Washington v. Texas*,[203] "[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense."[204] Indeed, compulsory process is so "fundamental and essential to a fair trial" that the Court in that case held it applied to the States.[205] Federal statutes proscribing universal crimes, though admirable on their face, are deeply problematic inasmuch as they inevitably create jurisdictional circumstances where the accused will have no access to compulsory court process for proving his innocence.

203. 388 U.S. 14 (1967).
204. *Id.* at 19.
205. *Id.* at 17.

"THE COURT WILL CLEAN IT UP": CONFRONTING THE SPECTER OF POLITICAL BRANCH DERELICTION OF DUTY

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I. INTRODUCTION

"Well: John Marshall has made his decision: *now let him enforce it.*"[1] President Andrew Jackson's apocryphal reaction to Chief Justice Marshall's decision in *Worcester v. Georgia*[2] has at once served as a rallying cry to those favoring a strong form of coordinate-branch review and as a warning from those urging judicial supremacy in constitutional interpretation.[3] The former would argue that President Jackson's response is illustrative of a long-held understanding in America that although it may be "emphatically the province and duty of the judicial branch to say what the law is"[4] it is not *exclusively* the Judiciary's province and duty. On the contrary, the political branches have as much right and duty to interpret the Constitution as do the courts.[5] The latter would point to the aftermath of President Jackson's refusal to ensure the faithful execution of the Court's order—the forced relocation of the Cherokees out of Georgia in what became known as the Trail of Tears—

1. *See, e.g.*, 1 HORACE GREELEY, THE AMERICAN CONFLICT: A HISTORY OF THE GREAT CIVIL WAR IN THE UNITED STATES OF AMERICA 106 (1865) (internal quotation marks omitted); 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 219 (1923) (internal quotation marks omitted); *see also* PAUL F. BOLLER JR. & JOHN GEORGE, THEY NEVER SAID IT: A BOOK OF FAKE QUOTES, MISQUOTES & MISLEADING ATTRIBUTIONS 53 (1989) (noting that President Jackson's actual words were: "The decision of the supreme court has fell still born and they find that it cannot coerce Georgia to yield to its mandate").

2. 31 U.S. (6 Pet.) 515 (1832).

3. *See, e.g.*, Ann Coulter, *Starved for Justice*, ANNCOULTER.COM (Mar. 24, 2005), http://www.anncoulter.com/cgi-local/article.cgi?article=47 (using President Jackson's quote to encourage then-Governor Jeb Bush of Florida to reject the court-ordered starvation of Teri Schiavo); Steven Breyer, Associate Justice, Supreme Court of the United States, Boston College Law School Commencement Speech (May 23, 2003), *available at* http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?filename=sp_05-23-03.html (applauding the evolution of the nation's attitude from one that begat President Jackson's quote to one defined by "widespread acceptance of the final decision even where we . . . believe the decision is wrong").

4. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

5. Concededly, President Jackson was not interpreting the Constitution as much as he was simply defying the Supreme Court. This example is used more to illustrate the dichotomy in thought that arises in the tug-of-war between the branches than to illustrate coordinate-branch review itself.

as evidence of the danger that accompanies disregard for the Court's judgments.[6]

Judicial review, or the ability of a court in the course of deciding a case or controversy to review political branch or state action and determine whether it comports with the Constitution, is a well-accepted and established element of the Judiciary's power. It was explicitly asserted by the Court in *Marbury* and had been practiced by state courts for many years—even before the ratification of the Constitution.[7] The debate since *Marbury* has not focused on the propriety of judicial review but rather on the propriety and the implications of judicial *supremacy*. Judicial supremacy does not necessarily mean that "once the Justices have spoken everyone must submissively lower their gaze and slink home."[8] But it does place the Court squarely in the driver's seat with respect to constitutional interpretation, compels the other branches to pass and execute only those laws that are consistent with the Court's interpretation of the

6. *See, e.g.*, Breyer, *supra* note 3.

7. One especially noteworthy example is *Rutgers v. Waddington*, (New York Mayor's Court, 1784). During the Revolutionary War, the British army authorized Joshua (or Joseph) Waddington to commandeer plaintiff Elizabeth Rutgers's alehouse. After the war, Rutgers filed a trespass suit for damages. The Treaty of Paris seemed to grant an "implied amnesty" for such appropriations, but more importantly, a well-established principle of the Law of Nations granted an occupying force the right to use private property without being subject to damages. This principle had become part of the New York State Constitution in 1777 with the reception of the "common law." In 1783, the New York legislature passed the New York Trespass Act, which purported to authorize damages and under which Rutgers filed her suit. The statute was therefore in direct conflict with the state constitution and the Treaty of Paris. The court thus had the difficult task of reconciling this conflict. In an opinion that would make Chief Justice Marshall (and Sir Edward Coke) proud, Judge Duane threaded the needle as follows. First, "the supremacy of the Legislature need not be called into question; if they think fit *positively* to enact a law, there is no power which can control them." But, when the legislature enacted a *general* statute that has a *specific unreasonable* effect, the court is free to assume that the legislature did not foresee that consequence and so must not have intended for it. The court can then act in equity and not apply the law in this circumstance. In this way, the court was able to find largely for Waddington (and thus for the New York State Constitution and the Treaty of Paris) without defying the state legislature. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 457–58 (1969). This is an example of modern judicial review "in embryo." It is especially interesting to note the reluctance of the court to openly defy the legislature. For comparison, in *Marbury*, Chief Justice Marshall employed similar skill in avoiding an explicit conflict with President Jefferson, while yet asserting the Court's right to judicial review.

8. Larry D. Kramer, *"The Interest of the Man": James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697, 698 (2006).

Constitution,[9] and rejects any attempt by the political branches to independently interpret the Constitution in lawmaking.[10] Under this interpretive regime, the power to challenge the Court's constitutional interpretation consists largely of public protest of Court decisions, attempts to alter the Court's course by replacing outgoing Justices with new ones with different judicial philosophies, or the exercise of exclusive powers like the pardon power that remain independent of Court control.

Coordinate review (also referred to as departmentalism or coordinate construction) takes direct issue with judicial supremacy, but it has many flavors, making the terms especially susceptible to confusion. At its core, coordinate review vests each of the three coordinate branches of government with authority to interpret the Constitution in performance of its respective duties. Just how much authority each branch has, with respect to the others, is what distinguishes the various flavors of coordinate review. At one end, Professor Michael Paulsen argues that the President not only has the duty and authority to interpret the Constitution in performance of his executive tasks but also that "[t]he Supreme Court's interpretations of treaties, federal statutes, or the Constitution do not bind the President any more than the President's or Congress's interpretations bind the courts."[11] Indeed, under this view, the only precedential value that a court opinion would have is with respect to the parties to the controversy—and even *they* may not obtain the relief ordered if the President disagrees with the Court.[12] Professor Paulsen appears to be somewhat alone in this view of coordinate review. More

9. This view is embodied in the Supreme Court case *Cooper v. Aaron*. 358 U.S. 1, 18 (1958) ("[*Marbury*] declared the basic principle that the *federal judiciary is supreme* in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a *permanent and indispensable feature* of our constitutional system.") (emphasis added).

10. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (rejecting Congress's attempt to interpret its enforcement power under § 5 of the Fourteenth Amendment to require strict scrutiny for laws that burdened religion and instead holding that the Court had the sole power to define substantive rights guaranteed by the Fourteenth Amendment).

11. Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law is*, 83 GEO. L.J. 217, 221 (1994).

12. Steven G. Calabresi, *Caeserism, Departmentalism, and Professor Paulsen*, 83 MINN. L. REV. 1421, 1422 (1999).

common is the view, articulated by Professor Steven Calabresi, that the absence of an enumerated power of judicial review places the text of the Constitution directly "at war with" *Cooper v. Aaron*'s claim to judicial supremacy.[13] But, because "the Constitution [*does* give] the federal courts the power to decide cases or controversies . . . the Courts can, indeed they must, make independent assessments of the constitutionality of any government action that is properly before them."[14] Moreover, "[t]he President is legally obligated to enforce judicial judgments [even] in cases or controversies that he independently thinks are unconstitutional, subject to a rule of clear mistake."[15]

Given these battling conceptions of the interpretive role and methodology of the coordinate branches, the following questions naturally arise: "When a member of Congress votes on a bill, or when the President decides whether to sign it, how should each assess the bill's constitutionality, and what implications should their individual assessments have?" A related question also arises: namely, "What role should the Court's constitutional interpretation play in such an assessment?"

II. COORDINATE RESTRAINT

A. *Defined*

This Essay introduces and argues for a concept that the author calls "coordinate restraint." Coordinate restraint arises out of a theory of coordinate review and is, this Essay will argue, a thoroughly reasonable normative mandate for the political branches. The essence of coordinate restraint is that the Congress, when proposing, debating, and passing laws, and the President, when deciding whether to sign or veto them, ought to give paramount concern to the constitutionality of the proposed legislation. If members of Congress or the President are not convinced that the legislation comports *in toto* with the Constitution, they are under a solemn obligation to *restrain* themselves and not

13. *Id.*
14. *Id.*
15. *Id.* at 1425.

allow the legislation to become law. While being primarily an exhortation to the political branches to exercise such restraint, this Essay also recognizes the reality of the political inertia that has driven the current, less-restrained practice. It therefore proposes one possible solution to political-branch incontinence: a theoretical constitutional amendment that in effect would force the political branches to exercise coordinate restraint.

B. *Coordinate Restraint, Separation of Powers and Federalism*

Coordinate restraint, while arising out of a coordinate-review theory, is distinctly more protective of liberty than pure coordinate review. Because coordinate review assumes an equal right of each branch to interpret the Constitution in performance of its duties and because each branch has an institutional interest to magnify its own sphere, a system of pure coordinate review actually runs the risk of endangering liberty, as the following discussion illustrates.

James Madison's warning that "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others"[16] served well to prompt the appropriate checks and balances at the federal level. These checks between Congress, the President, and the Judiciary have been remarkably successful in preventing one branch from overwhelming the other two. However, the Framers underestimated the checks needed to prevent expansion of the federal branches, not with respect to one another, but with respect to the *states* and the *people*. In other words, the "horizontal" struggle for power at the national level is not simply a zero-sum game between the branches because all three federal branches have been able to expand "vertically," taking power from the states and the people to a degree wholly unanticipated by the Framers. Alexander Hamilton's contention that the national government simply would not be interested in

16. THE FEDERALIST NO. 51, at 318–19 (James Madison) (Clinton Rossiter ed., 1961).

regulating in the traditional sphere of the states illustrates this myopia:

> I confess I am at a loss to discover what temptation the persons intrusted with the administration of the general government could ever feel to divest the States of the authorities of that description. The regulation of the mere domestic police of a State appears to me to hold out slender allurements to ambition. . . . The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction. It is therefore improbable that there should exist a disposition in the federal councils to usurp the powers with which they are connected; because the attempt to exercise those powers would be as troublesome as it would be nugatory; and the possession of them, for that reason, would contribute nothing to the dignity, to the importance, or to the splendor of the national government.[17]

As the rise of the administrative state amply demonstrates, the federal government has indeed become intensely interested in regulating within the traditional realm of the states, which has led to a substantial constriction of individual liberty. As the federal government aggrandizes itself with respect to the states and the people, neither coordinate review nor judicial supremacy have proven to be adequate constitutional-interpretation methods in combating this encroachment. Because each branch continues to interpret its own power as broadly as possible and because when the Court asserts its supremacy it rarely does so to protect the states against federal encroachment,[18] something more is needed to stem the vertical encroachment.

What coordinate restraint provides is a simultaneous horizontal and vertical check against aggrandizement of any branch. If, when analyzing proposed legislation, the inquiry begins with "does the constitution itself grant us the power

17. THE FEDERALIST NO. 17, *supra* note 16, at 114 (Alexander Hamilton) (emphasis omitted).

18. *See infra* part III(B).

to do this?" rather than "is this good policy?" or "will the Court let us get away with this?" and the commitment is to refrain from passing even good policy when the constitutional authority is dubious or absent, the political branches preserve liberty while simultaneously relieving the Court of the unenviable choice of either allowing ever more vertical encroachment or slapping down the other branches and thus risking another round of judicial-aggrandizement charges.

C. *Coordinate Restraint, Judicial Supremacy and Arlen Specter*

Although arising out of a coordinate-review framework, coordinate restraint is not necessarily inconsistent with judicial supremacy—especially if Congress and the President treat Supreme Court precedent with deference in their own constitutional analyses. This means that whatever our national constitutional jurisprudence really is in practice (likely something close to judicial supremacy), any excuse for not practicing coordinate restraint cannot be based on any normative claims that constitutional interpretation is or is not the job of the Court. This Essay argues for a practice of coordinate restraint with a high level of deference to Supreme Court precedent, subject (similar to Professor Calabresi's argument) to a rule of clear mistake.

Many will argue that the concept of coordinate restraint is not only obvious but is already the practice in the political branches; in fact, coordinate restraint is an unnecessary truism. Moreover, an exhortation to practice coordinate restraint is offensive because it implies that Congress and the President do not seriously consider the constitutionality of legislation that they propose, debate, and pass. Concededly, Congress and the President clearly *do consider* a bill's constitutionality before signing it into law. But coordinate restraint requires more than simply considering a bill's constitutionality. It is, as mentioned, a practice of giving paramount concern to whether the bill comports *in toto* with the Constitution. In other words, a bill's constitutionality ought to be as important as the policy that the bill aims to advance. Any assertion that Congress places as much emphasis on constitutionality as policy when

introducing, debating, and passing legislation is belied by numerous examples, a few of which are chronicled below. Indeed, the very term "constitutional hook" in the legislative process essentially admits that constitutionality is more of a vestigial afterthought than a primary driving concern.

Even when constitutionality is considered, it has not proven to be the dispositive factor that it ought to be. This was ably demonstrated by Senator Specter immediately after the passage of the Military Commissions Act of 2006. While the bill was being debated, Senator Specter told reporters that he would oppose it because it was "patently unconstitutional on its face."[19] Nevertheless, when the time came to vote, Senator Specter voted for the bill because it had "several good items," and then he cavalierly dismissed the perceived "patent unconstitutionality" by assuring everyone that "the [C]ourt will clean it up."[20] This dereliction of congressional duty is precisely the evil that a rule of coordinate restraint aims to prevent.

Beginning with the constitutional text and history, this Essay analyzes the degree to which coordinate branches of government are actually charged with interpreting the constitution and concludes that a mandate of coordinate restraint is consistent with that charge, even if it has not always been the practice. It offers several reasons why, constitutional mandate aside, coordinate restraint is good policy. It also examines current federal legislative practice and concludes that the indictment above, namely that coordinate restraint is not the practice, is warranted. Finally, the Essay addresses some of the major objections to a proposal of coordinate restraint, proposes a specific solution to facilitate coordinate restraint, and analyzes benefits and weaknesses of that plan.

19. Charles Babington & Jonathan Weisman, *Senate Approves Detainee Bill Backed by Bush*, WASH. POST (Sept. 29, 2006), http://www.washingtonpost.com/wpdyn/content/article/2006/09/28/AR2006092800824.html (internal quotation marks omitted).

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

III. CONSTITUTIONAL TEXT

A. *Oaths of Office*

After vesting "the executive power" in the President and setting forth the organization of the Executive Branch, Article II, § 1 concludes with the following duty of the President of the United States:

> Before he enter on the execution of his office, he shall take the following oath or affirmation:–"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."[21]

The Oath of Office Clause is noteworthy for several reasons. First, its language explicitly binds the President to "preserve, protect and defend the Constitution." This is critically important because Article II, § 3 charges the President to "take Care that the Laws be faithfully executed"[22] and Article VI makes clear that "the Laws" include, *first and foremost*, the Constitution.[23] So, read together, these three clauses make clear that, in the course of the President's duty to execute the laws of the United States, his primary obligation is to the Constitution.

Presidents and commentators have made the logical inference that "[t]he duty faithfully to execute the Constitution as supreme law might be thought to presuppose a [duty] to interpret what is to be executed."[24] The draft of the Oath of Office Clause submitted to the Committee of Style and Arrangement provides ample support for this idea; it charged the President to act to the best of his "judgment and power,"[25] seeming to imply that a President is duty bound to reject proposed legislation that *in*

21. U.S. CONST. art. II, § 1.

22. *Id.* art. II, § 3.

23. *Id.* art. VI, cl. 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land.").

24. THE HERITAGE GUIDE TO THE CONSTITUTION 194 (Edwin Meese III et al. eds., 2005).

25. *Id.*

his judgment is inconsistent with the Constitution—an exercise of coordinate restraint.

Also noteworthy is the location and phrasing of the Oath of Office Clause. Placed before the clauses that lay out the President's power and duties and phrased in limiting terms, the Oath of Office Clause seems more logically a limiting rather than empowering clause. As such, it is quite consistent with a practice of coordinate restraint. If we assume that a president must necessarily take *some* action when faced with a piece of pending legislation (as inaction simply leads to the bill's passage) and we assume that the President believes that the bill is constitutionally deficient, the Oath of Office Clause (and the Oath itself) limits the President's power to allow the bill to become law and obligates him to send the bill back to Congress where the objections can be remedied.

Congress and the Judiciary are also "bound by Oath or Affirmation, to support this Constitution."[26] Justice Joseph Story read the Oaths Clause of Article VI to mean that they are "conscientiously bound to abstain from all acts inconsistent with" the Constitution.[27] Such a reading leaves no room for a Senator to vote for a bill he believes is unconstitutional, while blithely assuring the public that "the Court will clean it up."

Justice Story's reading of the Oaths Clause gains further support from the current wording of the oath itself,[28] which was instituted by federal statute in 1884 and which replaced the original version of the oath passed in 1789.[29] The original version was simple: "I do solemnly swear (or affirm) that I will support the Constitution of the United States," and the U.S. Senate itself contends that the Civil War "transformed the routine act of oath-taking into one of enormous significance."[30] Consequently, the oath was

26. U.S. CONST. art. VI, cl. 3.

27. *See* THE HERITAGE GUIDE TO THE CONSTITUTION, *supra* note 24, at 295 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION) (internal quotation marks omitted).

28. 5 U.S.C. § 3331 (2006).

29. An Act to regulate the Time and Manner of administering certain Oaths, ch. 1, § 1, 1 Stat. 23, 23 (1789).

30. For a history of the oath, see *Oath of Office*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/briefing/Oath_Office.htm.

altered and expanded during Reconstruction.[31] After a few iterations, Congress settled on the 1884 version, which has been constant ever since.[32] The new version of the oath requires even more exacting fidelity to the Constitution than either the previous oath or the bare text of the Oaths Clause itself. In addition to promising to "support" the Constitution, it requires one to "bear true faith and allegiance to the same."[33] In the course of a legislator's work, the occasional committee report, floor debate, or point-of-order vote on a bill's constitutionality seems insufficient to meet the requirement of "true faith and allegiance" to the Constitution unless it is coupled with a commitment to vote against a bill that the legislator believes is inconsistent with the Constitution. Believing that "[t]he Court will clean it up" is simply not enough.

B. *The Tenth Amendment*

As noted above, the constitutional checks to maintain separation of powers at the federal level have been much more successful than the checks to prevent vertical encroachment of the federal government on the rights of the states and the people. In addition to the belief that the federal government would be uninterested in the realm traditionally governed by the states, the Framers were firmly convinced that the Constitution set up a government of limited and *delegated* powers. As Madison famously noted, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[34] Because of this conviction, the Federalists resisted creating a Bill of Rights, which they argued would actually endanger liberty because under the typical rules of construction[35] forbidding the government from acting in one area might be taken to imply governmental power to act in

31. Vic Snyder, *You've Taken an Oath to Support the Constitution, Now What? The Constitutional Requirement for a Congressional Oath of Office*, 23 U. ARK. LITTLE ROCK L. REV. 897, 908–09 (2001).

32. *Id.*

33. *Id.* at 907.

34. THE FEDERALIST NO. 45, *supra* note 16, at 289 (James Madison).

35. Specifically, the rule *expressio unius est exclusio alterius* (the express mention of one thing excludes all others).

areas not enumerated. This would be precisely antithetical to the system of limited powers—indeed implying that the federal government was one of general legislative powers. As we know, the Federalists ultimately capitulated and supported a Bill of Rights "but only with the Tenth Amendment as a bulwark" against implying that the enumeration of rights altered the scheme of enumerated and limited powers.[36] The Amendment makes clear that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[37]

The Supreme Court's repeated failure to use the Tenth Amendment as the bulwark it was intended to be is yet more reason to insist upon a regime of coordinate restraint. This Essay does not argue for overturning *McCulloch v. Maryland*.[38] It is clear from the congressional debate over the Bill of Rights that the First Congress rejected attempts to limit the federal government to only those powers "*expressly* delegated"[39] and so *McCulloch*'s reading of implied powers incidental to those powers expressly delegated does not violate the Tenth Amendment. But *McCulloch* did set the stage for real departures from both the text and the original understanding and express intent of the Tenth Amendment. In fact, in 1870, the Court engaged in *exactly* the type of reasoning the Tenth Amendment was intended to prevent:

> [T]hat important powers were understood by the people who adopted the Constitution to have been created by it, powers not enumerated, and not included incidentally in anyone of those enumerated, is shown *by the amendments*. . . . They tend plainly to show that, in the judgment of those who adopted the Constitution, there were *powers created by it, neither expressly specified nor deducible from anyone specified power, or ancillary to it alone, but which grew out of the aggregate of powers* conferred upon the government, or out of the sovereignty instituted. Most of these amendments are denials of power

36. THE HERITAGE GUIDE TO THE CONSTITUTION, *supra* note 24, at 371.
37. U.S. CONST. amend. X.
38. 17 U.S. (4 Wheat.) 316 (1819).
39. *See* 1 ANNALS OF CONG. 432, 441, 761, 767–68 (Joseph Gales ed., 1834).

> which had not been expressly granted, and which cannot be said to have been necessary and proper for carrying into execution any other powers. Such, for example, is the prohibition of any laws respecting the establishment of religion, prohibiting the free exercise thereof, or abridging the freedom of speech or of the press.[40]

Seventy years later, the Court dismissed the Tenth Amendment as "but a truism that all is retained which has not been surrendered."[41] The Court's subsequent use of the Tenth Amendment has been unpredictable,[42] making it clear that neither an interpretive regime of coordinate review nor one of judicial supremacy will consistently protect the states and the people from vertical federal government encroachment, without an insistence on true coordinate restraint.

IV. EARLY HISTORY

While the term coordinate restraint may have been coined in this paper, the concept is not new. Our history abounds with examples of Presidents and Congresses independently interpreting the Constitution as they performed their constitutional duties, and in many (although not all) cases, that independent interpretation led them to exercise restraint in legislation. This Essay will not chronicle such instances extensively but will rather provide an illustrative set of examples from our early history to demonstrate the propriety of an exhortation to the current political branches to use coordinate restraint in their legislative functions.

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40. The Legal Tender Cases, 79 U.S. 457, 534–35 (1870) (emphasis added).

41. United States v. Darby, 312 U.S. 100, 124 (1941).

42. *See, e.g.*, Printz v. United States, 521 U.S. 898, 934 (1997) (striking down the Brady Handgun Violence Prevention Act as a violation of the Tenth Amendment); New York v. United States, 505 U.S. 144, 188 (1992) (holding that the Tenth Amendment precluded the federal government from commandeering the New York state legislature in enforcing Low Level Radioactive Waste Disposal Act); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985) (holding that the Tenth Amendment does not bar the Fair Labor Standard Act from applying federal minimum wages to state public employees). These cases only tell part of the story however. Of equal importance are cases implicating Tenth Amendment values where the Court did not explicitly rely at all upon the Tenth Amendment. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 9 (2005) (upholding the seizure by federal agents of marijuana grown in accordance with California state law but in violation of federal law); United States v. Lopez 514 U.S. 549, 551 (1995) (striking down the Gun-Free School Zones Act of 1990 as outside Congress's delegated powers—powers which implicitly reside with the states).

Ratification of the Constitution and election of the First Congress and President brought the nation to a crucial moment. It was now time to set forth the laws and regulations that would govern the country under the Constitution. The First Congress faced this task with a solemn understanding not only of their duties as legislators and constitutional actors but of the precedents they were setting for future Congresses. A review of the debates of that Congress is illuminating. Almost immediately, the First Congress began debating the removal power and spent over a month debating the constitutionality of unilateral presidential removal of officers that had been appointed with the advice and consent of the Senate.[43] Congress's "Decision of 1789," in which it concluded that the President had sole removal power, was such a good example of conscientious and disinterested constitutional deliberation that, 137 years later, Chief Justice Taft relied upon it overwhelmingly as legal support for the Court's opinion in *Myers v. United States*.[44]

The First Congress was similarly assiduous in considering the constitutionality of the first Bank of the United States. Indeed, debates in the House and the Senate consumed much of the 1791 congressional term. In addition, President Washington solicited memoranda from his cabinet members on the proposed bank's constitutionality.[45] Relying heavily upon Hamilton's constitutional interpretation of Congress's "implied powers," Washington ultimately signed the bill that Congress passed,[46] and the Supreme Court upheld the bank's constitutionality in *McCulloch* on reasoning similar to Hamilton's.[47] This early example of coordinate-branch cooperation is compelling evidence that the Framers, many of whom were either in the first Cabinet or Congress, believed that laws ought to be passed only after a thorough and searching review of their constitutionality—the essence of coordinate restraint.

43. Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 83–84 (1986).

44. 272 U.S. 52, 136 (1926).

45. Brest, *supra* note 43, at 84.

46. Richard J. Dougherty, *Thomas Jefferson and the Rule of Law: Executive Power and American Constitutionalism*, 28 N. KY. L. REV. 513, 517 (2001).

47. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819).

The National Bank provides another well-known historical example of coordinate restraint as well. Despite having been found constitutional by President Washington, Congress, and the Supreme Court, when the Bank's charter eventually lapsed, President Jackson vetoed its rechartering in 1832 because he remained unconvinced that it was constitutional.[48] He remarked:

> The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it . . . . It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision.[49]

It is important to note that this veto was an exercise in restraint and that the concept of coordinate restraint is a ratchet.[50] President Jackson was not taking something that had been held unconstitutional and insisting that his interpretation of the Constitution gave him the right to do it anyway. He was going the other direction, reasoning that the other branches' findings of constitutionality did not absolve him of his duty to independently determine the act's constitutionality. Likewise, coordinate restraint says that a President or member of Congress must exercise restraint if his own inquiry convinces him that the act is not constitutionally authorized.

Returning to the founding period, President Washington, who was acutely aware that his presidency was creating the precedent for all future presidents, issued his first veto to an apportionment bill for the House on April 5, 1792, on purely constitutional grounds.[51] First, the ratios used in

48. *See, e.g.*, Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 713 (1985).

49. President Andrew Jackson, Veto Message (July 10, 1832), *in* A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS 1145 (J. Richardson ed., 1897).

50. Thank you to Professor John Manning, who so ably pointed out the redundancy of the term "one-way ratchet"—as a ratchet is by definition one-way.

51. *See* 10 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES: MARCH–AUGUST 1792, at 213–14 (Philander Chase et al. eds., 2002).

apportioning representatives were not consistent across the states. And second, this inconsistency led to eight states having more than one representative per thirty thousand, even though taken as a whole, the total number of representatives did not exceed the constitutional limit of one per thirty thousand.[52] Washington could have simply accepted Congress's interpretation of the Apportionment Clause and signed the bill. His insistence on independently assessing the bill's constitutionality and his resulting veto demonstrated his belief in coordinate restraint.

President Jefferson provides a good example of inconsistency in coordinate-branch constitutionality review. This inconsistency in turn provides a compelling justification for mandating coordinate restraint. The Alien & Sedition Act, passed under President Adams, was controversial not only on policy grounds but on constitutional grounds as well. President Jefferson was so convinced of its unconstitutionality that he pardoned "every person under punishment or prosecution under the [Act]."[53] In a letter to Abigail Adams, he justified the pardon, explaining that:

> The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; because the power was placed in their hand by the Constitution. But the executive, believing the law to be unconstitutional, were bound to remit the execution of it; because that power has been confided to them by the Constitution.[54]

This is concededly an exercise, not of the President's legislative role, but of his executive power, specifically the pardon power. But it illustrates the same principal of coordinate restraint. Not being able to veto the bill, as it was already law, President Jefferson took the next available course of action—one of governmental restraint as it relates to individual liberty—and pardoned those whose liberty he believed had been unconstitutionally withheld.

Unfortunately, what is arguably President Jefferson's biggest accomplishment as President, the Louisiana

52. *Id.*
53. Fisher, *supra* note 48, at 712.
54. Dougherty, *supra* note 46, at 521.

Purchase, is also a perfect example of the behavior this Essay admonishes against. It was believed before, and confirmed since, that the Louisiana Purchase was essential for the expansion of the United States and its ongoing independence in world affairs. Unfettered access to the Mississippi River and New Orleans was critical. But Jefferson was also acutely aware that the Constitution lacked any text providing the government with the power to acquire territory. He repeatedly asserted to members of his cabinet that "it will be safer not to permit the enlargement of the Union but by amendment to the Constitution" and that Congress is "obliged to ask the people for an amendment of the Constitution, authorizing their receiving the province into the Union."[55] More directly, he confided to John Dickinson that "[t]he general government has no powers but such as the constitution has given it; and it has not given it a power of holding foreign territory, and still less of incorporating it into the union. An amendment of the Constitution seems necessary for this."[56] And yet when the time came, President Jefferson did not ask for an amendment but merely signed the treaty.[57]

While the Louisiana Purchase was undoubtedly good for the country, the substantive value cannot cure the violation of the Constitution, especially given the lack of any evidence that an amendment would have faced any serious opposition or had any trouble passing. As Thomas Cooley pointed out:

> The poison was in the doctrine which took from the Constitution all sacredness, and made subject to the will and caprice of the hour that which, in the intent of the founders, was above parties, and majorities, and presidents, and congresses, and was meant to hold them all in close subordination. After this time the proposal to exercise unwarranted powers on a plea of necessity might be safely advanced without exciting the detestation it deserved; and the sentiment of loyalty to the Constitution

55. *Id.* at 526 (internal quotation marks omitted).
56. *Id.*
57. *Id.* at 528.

was so far weakened that it easily gave way under the pressure of political expediency.[58]

V. CURRENT PRACTICE

It is rightly argued that during the Founding Era, when the contours of the Constitution had yet to be defined, the importance of deep and searching inquiries into the constitutionality of each act was immeasurably higher than it is today, when over 200 years of precedent has defined all but the most obscure back alleys of the Constitution. While this is almost certainly true, it is a mistake to conclude therefore that consideration of a bill's constitutionality is now but a formality, which can be passed off with a mere nod or ignored entirely if the policy objectives of the act are sufficiently compelling. Unfortunately, several recent examples demonstrate that the current practice in the political branches treats the constitutional inquiry in precisely that manner.

A. *Congress*

In 2009, before the Senate passed its version of the healthcare bill, Senator Hatch of Utah, concerned with what he saw as serious constitutional flaws in the bill, proposed an amendment in the Finance Committee that would "allow for an expedited legal review of a potential constitutional challenge."[59] The response to his proposed amendment was perfunctory at best. Senator Baucus, the Chairman of the Finance Committee, simply asserted: "These provisions in the bill clearly are constitutional. I think that is fairly clear."[60] Without further ado, Senator Baucus then proceeded to kill the amendment, stating that such an inquiry was not within the committee's purview.[61] The

58. EVERETT S. BROWN, THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE: 1803–1812, at 25 n.27 (2005).

59. Matt Canham, *Can Congress Force You to Buy Insurance? Arguments Rage as Senate Bill Passes Procedural Vote,* S.L. TRIB. (Nov. 23, 2009), http://www.sltrib.com/utahpolitics/ci_13838615.

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

61. *Id.*

egregiousness of this dismissal became even more apparent when Senator Baucus later admitted that he had not in fact even read the healthcare bill.[62]

The other Senator from Utah, Bob Bennett, sponsored an alternative to the bill that ultimately passed, called the Healthy Americans Act. Like the bill that the Senate passed, the Healthy Americans Act contained an individual mandate—a requirement that everyone buy health insurance or face a substantial fine. Despite questions that nonpartisan researchers such as the Congressional Research Service raised as to the constitutionality of such a mandate,[63] the bill's sponsors seemed not at all bothered. When asked about the mandate's constitutionality, Senator Bennett indicated that "the constitutional issues never came up" when they drafted the bill and "said he looked at the individual mandate in health care as something analogous to the requirement to have car insurance."[64] Two things become apparent from this exchange. First, the obvious flaw in his analogy—the car insurance mandate is state, not federal, law—demonstrates an unacceptable lack of understanding of Congress's Article I, § 8 delegated powers as contrasted with the general legislative powers of the states. Senator Bennett's response further demonstrates the lackadaisical attitude that has spread to the coordinate branches with respect to constitutional scrutiny. If constitutional issues never came up during the legislative process, how are members of Congress to fulfill their oaths to "bear true faith and allegiance" to the Constitution?

Perhaps less egregious, but certainly no less illustrative, was Speaker Pelosi's response to a reporter who asked her during a press conference to address the constitutionality of the personal mandate. Her response: "Are you serious? Are you serious?"[65] After being assured that the reporter was

62. Jordan Fabian, *Key Senate Democrat Suggests That He Didn't Read Entire Healthcare Reform Bill*, THE HILL (Aug. 25, 2010), http://thehill.com/blogs/blog-briefing-room/news/115749-sen-baucus-suggests-he-did-not-read-entire-health-bill.

63. Canham, *supra* note 59.

64. *Id.*

65. Matt Cover, *When Asked Where the Constitution Authorizes Congress to Order Americans To Buy Health Insurance, Pelosi Says: 'Are You Serious?'*, CNSNEWS.COM (Oct. 22, 2009) http://www.cnsnews.com/news/article/55971 (internal quotation marks omitted); *see also* Canham, *supra* note 59.

indeed serious, Speaker Pelosi merely shook her head and proceeded to take a question from another reporter.[66] This response has a few possible explanations. Speaker Pelosi would, of course, explain that the bill's constitutionality was so patently obvious that such a question was a waste of time. But given the doubts raised by the Congressional Research Service, was such a response justified? In a system where legislators exercise coordinate restraint, such a question ought to be welcomed because it gives the legislator an opportunity to demonstrate to the United States that she has fulfilled her oath of office and has seriously considered the question. Whether or not the provision is in fact constitutional is entirely beside the point, and this Essay makes no claims in that regard. What this Essay does assert is that Speaker Pelosi's response belies her implicit assertion of the bill's constitutionality and in fact indicates either a state of complete ignorance as to the bill's constitutionality or an overt attempt to avoid addressing the question. Neither is consistent with coordinate restraint, or with her oath of office.

To the Senate's credit, it did ultimately take a point-of-order vote on the bill's constitutionality. On December 21, 2009, Senators Hatch and Ensign delivered floor speeches, after which Senator Ensign made a constitutional point of order, forcing a vote that occurred two days later.[67] The vote fell, predictably, along party lines, with sixty votes for its constitutionality. But does the vote really indicate that sixty senators were convinced that the bill was constitutional? Or did it just indicate that sixty senators thought it was good policy and were therefore willing to overlook any unconstitutionality? Unfortunately, it is impossible to tell for certain. It did not play out like the 2006 Military Commissions Act, where, as previously noted, a Senator railed about the bill's patent unconstitutionality before proceeding to vote for the bill. It seems more likely that the Senate simply learned from Senator Specter's mistake and kept any constitutional reservations to themselves. At the

66. Cover, *supra* note 64.

67. Jeffrey Young, *Senate to Vote on Constitutionality of Healthcare Bill*, THE HILL (Dec. 22, 2009), http://thehill.com/blogs/blog-briefing-room/news/73319-senate-to-vote-on-constitutionality-of-healthcare-bill.

very least, Senator Baucus's admission indicates that members of Congress were negligent in failing to even read the bill they passed.

B. *The President*

The 2006 Military Commissions Act and the 2009–2010 healthcare debate are not the only examples of the political branches failing to appreciate their duty to prevent bills of dubious constitutionality from becoming law. Throughout his presidency, President George W. Bush chose the signing statement over the veto as his preferred method of expressing constitutional doubts on legislation. The *Boston Globe* reported in 2006 that Bush had already issued signing statements on over 750 laws in which he identified perceived constitutional deficiencies.[68] While vastly overstating the problem with hyperbolic predictions of the end of democracy,[69] the article does point out some troubling trends. A President most likely does have the power to decline to follow or decline to enforce laws that he is convinced are not constitutional.[70] But this power simply cannot somehow transmogrify into a power to substitute a signing statement for a veto. Such a position conflates the President's *executive* duties with his role in *legislation*. And those roles are crucially separate and distinct. The power to decline to enforce an unconstitutional law comes primarily

68. Charlie Savage, *Bush Challenges Hundreds of Laws: President Cites Powers of His Office*, BOS. GLOBE (Apr. 20, 2006), http://www.boston.com/news/nation/articles/2006/04/30/bush_challenges_hundreds_of_laws/ (behind subscriber wall), *available at* http://www.nytimes.com/2006/04/30/world/americas/30iht-web.0430bush.html.

69. Among the more entertaining hyperbole are quotes from Phillip Cooper, a Portland State University law professor, asserting that "[t]here is no question that this administration has been involved in a very carefully thought-out, systematic process of expanding presidential power at the expense of the other branches of government. This is really big, very expansive, and very significant." *Id.* (internal quotation marks omitted). The article also quotes Bruce Fein, a Deputy Attorney General in the Reagan Administration, as saying that Bush "has declared himself the sole judge of his own powers and then ruled for himself every time"—a practice that "eliminates the checks and balances that keep the country a democracy." *Id.* (internal quotation marks omitted). He also asserted that "[t]here is no way for an independent judiciary to check his assertions of power, and Congress isn't doing it, either. So this is moving us toward an unlimited executive power." *Id.* (internal quotation marks omitted).

70. *See* U.S. CONST. art. II, § 3 ("[T]ake care that the Laws be faithfully executed."); *id.* art. VI, cl. 2 (This Constitution . . . shall be the supreme Law of the Land.").

from a combination of three clauses: the Vesting Clause, which vests him with "the executive power," the Take Care Clause, which obligates him to "take care that the laws be faithfully executed," and the Supremacy Clause, which affirms the Constitution's primacy over statutory law.[71] The duty to veto unconstitutional laws, on the other hand, comes not from these clauses but from the Presentment Clause of Article I, §7—an entirely different Article—which requires that the President either approve and sign a bill or "return it, with his objections to that House in which it shall have originated."[72] The President's role in the legislative process is therefore that of a *gatekeeper*. It occurs prior in time and has a different scope than the President's executive role. This point bears repeating. The President is vested with legislative and executive duties, which are not coterminous. Although they complement one another, they are not interchangeable.

As bad as signing statements are, at least they give the country some indication what the President's views are with respect to the constitutionality of legislation. The only thing worse than issuing a signing statement while signing a bill he believes is unconstitutional, is signing an unconstitutional bill *without* a signing statement but with the intent to simply ignore the law. Such is the course that President Bush's successor, Barack Obama, has chosen to take. As the *New York Times* reported, "Mr. Obama has not issued a signing statement since last summer . . . . Still, the administration will consider itself free to disregard new laws it considers unconstitutional."[73] This practice does not so much conflate the President's executive role with his legislative role as it demonstrates at best a near complete dereliction of the legislative duty assigned to the President and, at worst, an alarming disdain for the constitutional limits on the Executive.

Finally, no analysis of current practice would be complete without mentioning the Bipartisan Campaign Reform Act of

71. *Id.* art. II, § 1; *id.* art. II, § 3; *id.* art. VI, cl. 2.

72. *Id.* art. I, § 7.

73. Charlie Savage, *Obama Takes New Route to Opposing Parts of Laws*, N.Y. TIMES (Jan. 8, 2010), http://www.nytimes.com/2010/01/09/us/politics/09signing.html.

2002 (BCRA), commonly known as McCain–Feingold.[74] On January 21, 2010, the Supreme Court handed down its opinion in *Citizens United v. Federal Election Commission.*[75] *Citizens United* dealt BCRA a severe blow, holding that its ban on independent campaign contributions by corporations, unions, and nonprofit organizations (using general treasury funds) violated the Constitution. In 2007, the Court had held other provisions of BCRA unconstitutional in *Federal Election Commission v. Wisconsin Right to Life.*[76] That the Court invalidated major provisions of a federal law is of little note—it happens fairly frequently. What is noteworthy is how firmly convinced President Bush was that the bill was unconstitutional. And yet, he signed it. When asked during the 2000 presidential campaign if he believed "a President has a duty to make an independent judgment of what is and is not constitutional, and veto bills that, in his judgment he thinks are unconstitutional," Bush replied emphatically, "I do."[77] He then indicated that he would veto the version of BCRA that was on the table at the time, noting that "I think it does restrict free speech for individuals."[78] But when the time came, President Bush signed the bill, despite still proclaiming its unconstitutionality. His signing statement identified "provisions [that] present serious constitutional concerns" and "questions [that will] arise under the First Amendment."[79] President Bush had particular "reservations about the constitutionality of the broad ban on issue advertising, which restrains the speech of a wide variety of groups on issues of public import in the months closest to an election."[80] Like Senator Specter, President Bush's signature on a bill he felt was so deeply unconstitutional can only be described as a dereliction of his duties. One may speculate that President Bush saw the Court's decisions in *Wisconsin*

74. 2 U.S.C. §§ 431–442 (2006).

75. 130 S. Ct. 876 (2010).

76. 551 U.S. 449 (2007).

77. Akhil Reed Amar & Vikram David Amar, *Breaking Constitutional Faith: President Bush and Campaign Finance Reform*, FINDLAW'S WRIT (Apr. 5, 2002), http://writ.news.findlaw.com/amar/20020405.html (internal quotation marks omitted).

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

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

80. *Id.*

Right to Life and *Citizens United* as vindicating his position. More accurately, the decisions condemn him for allowing a law to breach the gate that he knew was constitutionally deficient and that he had the power to stop.

Those wishing to defend modern presidential practice will likely point to the extensive work that the Office of Legal Counsel (OLC) performs as proof that the President takes seriously his duties under the Constitution. This is almost certainly true. But even if a President routinely requests that OLC assess the constitutionality of bills that are before him, the legal analysis rendered is essentially irrelevant if the President still signs a bill in which OLC has uncovered material constitutional flaws. Coordinate restraint means more than just analyzing the law. It requires a second step of restraint where the law's constitutionality is in doubt.

VI. OBJECTIONS, PROPOSED SOLUTION, & POLICY

A. *Primary Objections*

Two major objections are probably apparent by now. First, assuming that it was in fact a safeguard of liberty, how would a system of coordinate restraint ever be implemented? Second, given the wide variety of ways in which individuals read and interpret the Constitution, what good could such a system possibly do, even if it were feasible to implement? Said another way, what good would coordinate restraint do for those political actors who see constitutionality as merely synonymous with good policy? Both objections are powerful and valid, but both can also be answered.

Implementation could take a variety of forms, but at its foundation, any implementation would require a legislator or the President to certify that the legislation he either voted for or signed comported with the Constitution *in toto*. One method of accomplishing this could be to create a House and Senate Committee on Constitutionality Review. These committees would be tasked with reviewing every bill or joint resolution for constitutionality and would be required to present formal findings on the constitutionality of each provision of the bill. These findings would rely on the constitutional text, history, and Supreme Court precedent,

subject to a rule of clear error. Once the findings are submitted, each house would be required to vote on the bill's constitutionality before ever voting on the bill's passage. If a legislator were to vote that the bill was constitutional, he could still oppose the bill on policy, or any other grounds. If, however, the legislator voted that the bill was unconstitutional, he would be prevented from voting to pass the bill. As a result, each legislator would be on record both as to the constitutionality and the wisdom of each bill.

The President's task would change as well. While the President would remain free to issue a signing statement indicating how he interpreted the bill, for purposes of supplementing the legislative history, clarifying provisions he saw as ambiguous, or even to indicate provisions he felt were bad policy and therefore may not be as vigorously enforced as the legislature might prefer, he would be prevented from using a signing statement to indicate his concerns with constitutionality. If the President were convinced that the bill contained any material constitutional defect, he would be obligated to veto the bill and return it to Congress. If Congress thereafter passed the bill over his veto (meaning that two-thirds approved not only of the policy but had certified their conviction that it was constitutional), the President would be obligated to enforce the bill.[81]

B. *Proposed Solution*

It is unlikely that Congress or the President would adopt such rules on their own. After all, the rules would place significant limitations on what they can do. No longer could a senator rail against a bill's perceived "patent unconstitutionality" and yet vote for it because it had some good points. No longer could a Speaker of the House simply dismiss questions of constitutionality with a mere "are you serious." And no longer would the President be able to sign an unconstitutional bill into law, with the assurance that his administration (but not necessarily the next one) would decline to follow or enforce provisions that violated the Constitution.

81. This is obviously subject to the President's discretion as the chief executive officer.

But these limitations on the behavior of our leaders are precisely the benefits that would accrue to the nation under a system of coordinate restraint. For that reason, a constitutional amendment would likely be required to fully institutionalize a system of coordinate restraint.[82] The text of the amendment would look something like the following:

> **Amendment XXVIII**:
> **§ 1:** No Senator or Representative shall approve a bill or joint resolution for passage, unless he has first, in good faith, attested to the constitutionality of each provision of that bill or joint resolution. The approval of a bill or joint resolution by the President shall constitute the President's attestation that the bill is constitutional in all material respects.
> **§ 2:** If one-third of the members of a House of Congress charge that, as a factual matter, a bill or joint resolution was passed in a manner that made a good faith estimation of constitutionality impossible, the bill or joint resolution shall not leave that house until a formal hearing has been held on the constitutionality of each provision.

Section 1 is a structural limitation. It requires of each member of Congress an attestation of his good-faith belief that the bill is constitutional before the final vote in the chamber. It allows a member of Congress or the President to concede constitutionality and yet vote against a bill on policy grounds but does not allow the converse. Making the attestation separate from the vote on the bill is important because it not only enables the ratchet but also limits the ability of a member of Congress to rail against a bill's constitutionality when his real objection is to the policy.

The words "*that* bill or joint resolution" limits the attestation requirement to the bill or resolution at hand, meaning that if a bill fails and a nearly identical bill comes up in a subsequent congress, that member can change his

82. Because it so fetters the political branches, such an amendment would certainly not be proposed by the necessary "two thirds of both Houses" set forth in the first clause of Article V. U.S. CONST. art. V, cl. 1. It might however conceivably be proposed via a constitutional convention as required by Article V "on the Application of the Legislatures of two thirds of the several States." *Id.* The state legislatures would seem naturally inclined to make such an application given that they are the most obvious victims of the vertical encroachment discussed. At the very least, state legislators might be spurred by petitions from their own constituents, who have also felt the encroachment of the federal government.

constitutional attestation. But the good-faith provision incorporates the legal definition of good faith, which would require the member to realistically distinguish the two bills or give some other reasonable explanation for the changed vote.

From the President's perspective, a separate attestation is not required. His signature on the bill is his attestation of constitutionality. This is consistent with the President's current Article I, § 7 duties, neither adding to nor removing from them but rather merely clarifying them. If the President does not think a bill is constitutional in all material respects, his constitutional qualms are objections within the meaning of Article I, § 7, which are to be returned with the bill to Congress. The term "all material respects" incorporates the legal standard of materiality present in contract and other areas of law, which avoids fettering the President to an unrealistic degree.

Section 2 is the remedial portion—the teeth—of the amendment. It is not intended to give a role to the Court but is rather a structural remedy within the political branches.[83] This section is also crafted to remedy only egregious and objective violations. To begin with, isolated charges by a handful of senators or representatives are not sufficient to trigger the section. A full third of the house is required. Second, only passage of the bill in a manner that "made a good faith estimation of constitutionality impossible" is sufficient. This is an objective question. A senator asking a reporter: "are you serious" is not sufficient. While it raises doubt whether the senator has given much thought to a bill's constitutionality, it does not suggest that a good faith

83. This is not to say that the Court would not get involved. While it does balk at the opportunity to get involved when it sees good reasons for leaving resolution to the political branches, *see, e.g.*, Nixon v. United States, 506 U.S. 224 (1993) (holding that the Senate's "sole" power to try impeachments precluded judicial review of the procedure used); Goldwater v. Carter, 444 U.S. 996 (1979) (holding that presidential authority to terminate treaties is a nonjusticiable political question), the Court does certainly decide some rule of law and separation of powers cases. *See, e.g.*, Bush v. Gore, 531 U.S. 98 (2000) (per curiam) (holding that the Florida Supreme Court's call for a statewide recount violated the Equal Protection Clause of the Fourteenth Amendment); Powell v. McCormack, 395 U.S. 486 (1969) (limiting the House's power to refuse to seat a duly elected representative despite Congress's Article I, § 5, clause 1 powers to be the judge of its members' qualifications). Section 2 merely provides that if the Court refuses to get involved, a remedy exists nonetheless.

estimation of constitutionality was impossible. On the other hand, a 6,000 page bill that comes out of a committee on Saturday and is passed by the full chamber on Monday is passed in a manner that objectively "made a good faith estimation of constitutionality impossible" because it is simply not possible that members of Congress could read and analyze the constitutionality of a 6,000 page bill in 24–48 hours. Finally, the section does not purport to grant any private individual a right of action, which would merely add confusion to the already thorny problem of constitutional standing requirements.[84]

The amendment also does not give any standards of constitutional interpretation. This, too, is intentional. Remedying the problem of legislative and presidential incontinence does not require "constitutionalizing" judicial supremacy. The continuing debate between coordinate-branch review and judicial supremacy is healthy and should probably be allowed to continue. However, as a practical matter, it is worth noting that a good-faith attestation of constitutionality likely will be easier to defend when it is consistent with judicial interpretation of the Constitution.

C. *Secondary Objections Addressed*

The suggestion of a "Twenty-eighth Amendment" of course raises some additional objections. First, in 220 years, we have only amended the Constitution eighteen times: once for the Bill of Rights and then seventeen more times—including Twenty-first Amendment, which we only needed because the Eighteenth Amendment was a mistake that had to be repealed. So what makes this amendment worthy of the nation's attention in a way that we have only really needed sixteen times in 220 years?

The best answer seems to be to combat the inertia of a federal government that has, in some ways, lost its anchor to the Constitution. The alternative of leaving bad legislation for the courts to fix, combined with the ease of issuing a signing statement in lieu of a veto, has made it far too easy for the political branches to ignore their oaths of "true faith

84. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992) (invalidating a congressionally granted right of action that purported to grant standing in the absence of Court-articulated constitutional standing requirements).

and allegiance" to the Constitution. Compounding this problem is at least 140 years of Supreme Court precedent that gives little more than lip service to the Tenth Amendment. These practices have put the federal government on a trajectory that threatens to actualize the Anti-Federalist warning that the states would "dwindle away, and . . . [be] absorbed in . . . the general government."[85] Altering such a trajectory should be at least as important to the nation as deferring congressional pay increases until a subsequent congressional election.[86]

The results of the 2010 midterm election plainly reveal the American electorate's keen interest in combating this inertia and in holding elected officials responsible for giving short shrift to the constitutionality of legislation. To begin with, voter anger against the Washington establishment in the months leading up to the election led the Republican Party to unveil their *Pledge to America* in September 2010.[87] In the *Pledge*, Republican lawmakers vowed that if entrusted to govern they would include in every bill a clause explaining the constitutional authority that justifies the bill.[88] Moreover, they pledged to "advance major legislation one issue at a time" without burying unpopular bills in must pass legislation.[89] While the sentiment is laudable, a "Pledge to America" by a political party is as simple to ignore as any other campaign promise. So while the Republican Party correctly read America's disaffection, its *Pledge* does nothing to institutionalize "true faith and allegiance" to the Constitution.

A second objection to the proposed Twenty-eighth Amendment is that such a requirement would likely spell the end of the omnibus bill. If members of Congress and the President were required to attest to every material provision of every bill they signed, passage of an omnibus bill would likely take nearly as long as passing a series of subject-specific bills, thus removing much of the value of the

85. Brutus, *Essay No. I*, N.Y. J., Oct. 18, 1787, *reprinted in* THE ESSENTIAL ANTIFEDERALIST 109 (W.B. Allen & Gordon Lloyd eds., 2002).

86. *See* U.S. CONST. amend. XXVII.

87. A PLEDGE *TO* AMERICA (2010), *available at* http://pledge.gop.gov/resources/library/documents/pledge/a-pledge-to-america.pdf.

88. *Id.* at 7.

89. *Id.* at 33.

omnibus bill. To this objection, the response is "exactly!" The election of Republican Scott Brown to the U.S. Senate in Massachusetts, the primary defeats of Senators Bennett and Specter, the general success of Tea Party candidates in the 2010 midterm election, and several recent polls all indicate that many Americans (up to 83%) are fed up with the logrolling and pork-barrel spending that omnibus bills make possible.[90] Indeed, the 2010 midterm election can be seen as a national repudiation of the "pass laws first, ask about the authority later (or not at all)" mindset that has become endemic to Washington, as the decisive victories of Tea Party-backed senators-elect Marco Rubio, Rand Paul, Mike Lee, and Ron Johnson and the 60-plus seat Republican pickup in the House amply demonstrate.[91]

A related objection is that this would add onerous burdens to the overall lawmaking process, lead to increased gridlock, and ultimately lead to much less "getting done." James Wilson adequately answered this objection in 1791, arguing that efficiency is not necessarily the goal of separation of powers: "It might be supposed, that these powers, thus mutually checked and controlled, would remain in a state of inaction. But there is a necessity for movement in human affairs; and these powers are forced to move, though still to move *in concert*."[92] Said a different way, "what some today call 'gridlock,' [the Framers] would have termed 'stability' and a guard against tyranny."[93]

The limitations placed on the behavior of our leaders are not the only benefits that would accrue from a system of coordinate restraint. When reviewing a federal law, the

90. *See, e.g.*, Interview by Neal Cavuto with Senator John McCain (Dec. 14, 2009), *available at* http://video.foxbusiness.com/v/3953493/mccain-outraged-with-pork-barrel-spending (noting by Senator McCain that "Americans are mad as hell about [pork barrel spending] and that's what's part of the Tea Party's situation"); *83% Blame Deficit on Politicians' Unwillingness To Cut Spending*, RASMUSSEN REPORTS (Feb. 4, 2010), http://www.rasmussenreports.com/public_content/business/general_business/february_2010/83_blame_deficit_on_politicians_unwillingness_to_cut_spending.

91. In his victory speech, presumptive House Speaker John Boehner called the election "a repudiation of Washington, a repudiation of big government, and a repudiation of politicians who refuse to listen to the people." *See* David Espo, *GOP Takes the House, Falls Short of Senate* (Nov. 2, 2010), http://news.yahoo.com/s/ap/us_election_rdp (internal quotation marks omitted).

92. 1 THE WORKS OF JAMES WILSON 300 (Robert Green McCloskey ed., 1967).

93. Paulsen, *supra* note 11, at 329.

Supreme Court traditionally grants it a presumption of constitutionality.[94] Despite this presumption, the Court still strikes down a fair number of federal laws. If laws were passed with formal findings on constitutionality, which required the attestation of those who passed the law, this presumption of constitutionality would almost certainly be strengthened and the number of laws found unconstitutional would almost certainly decrease.[95] While this is concededly speculative and while there is ample evidence to suggest that the Court jealously guards the primacy of its interpretation of the Constitution,[96] it seems nonetheless implausible that the Court would ignore the sincere efforts of the political branches to more faithfully circumscribe their duties under the Constitution. Apart from a (more-deserved) presumption of validity from the Court, statutes passed under a regime of coordinate restraint seem likely to gain a wider presumption of validity from the public. At the very least, the President and Congress would give the public fewer occasions to criticize them for ignoring the constitutionality question when passing legislation.

VII. CONCLUSION

The general normative assertion that "members of Congress and the President should assess the constitutionality of legislation that they pass" is relatively undisputed and of little practical import. The dispute (and practical importance) becomes greater over questions such as "how much constitutional scrutiny ought they to apply" and "how much scrutiny is really taking place." Constitutional text and early practice suggest that the

94. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 190 (1991) (noting that the Court follows this rule "out of respect for Congress, which we assume legislates in the light of constitutional limitations").

95. At the very least, the presumption would be arguably more deserved than it currently is.

96. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (rejecting Congress's attempt to interpret its enforcement power under § 5 of the Fourteenth Amendment to require strict scrutiny for laws that burdened religion and instead holding that the Court had the sole power to define substantive rights guaranteed by the Fourteenth Amendment); Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[*Marbury*] declared the basic principle that the *federal judiciary is supreme* in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a *permanent and indispensable feature* of our constitutional system.") (emphasis added).

answer to the first question is that Congress and the President ought to apply *a great deal* of constitutional scrutiny when deciding whether or not to pass legislation. And numerous recent episodes suggest that the answer to the second question is that members of Congress and the President are in fact applying much less scrutiny than they ought. This has resulted in an aggrandizement of the federal government with respect to the states and the people and a consequent decrease in liberty. Because Congress and the President have tools available to them that facilitate their continued dereliction of duty, it is likely up to the states and the people to enforce a system of coordinate restraint in the form of an explicit constitutional amendment.

OVERSIGHT, ENFORCEMENT, AND EXTENSION IN PUBLIC-INTEREST LITIGATION: AN EMPIRICAL ANALYSIS OF COMPLIANCE WITH THE NINTH CIRCUIT'S *WESTERN STATES PAVING V. WASHINGTON STATE DOT* DECISION

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I. INTRODUCTION

For over a century, the words of Justice John Marshall Harlan's dissent in *Plessy v. Ferguson* have illuminated the minds of students, teachers, and public officials across the country and the world: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."[1] In view of this nation's history and the significant policy questions intertwined with public education, it is not hard to understand why the headline Fourteenth Amendment cases of the last decade have concerned the Equal Protection Clause's application to public law schools,[2] public undergraduate universities,[3] and public grade schools.[4]

Public contract law, however, is less like the media's darling and more like the redheaded stepchild of law—so much so that even former Chief Justice Rehnquist has described the practice of public-contract procurement as "mundane,"[5] and scholarly commentary has concurred with his assessment.[6] Nevertheless, much like public education, the practice of public contracting is vitally important piece of the U.S. economy and is a critical component of Equal Protection Clause jurisprudence. After all, two of the Court's most influential Equal Protection Clause decisions—*City of Richmond v. J.A. Croson, Co.*,[7] and *Adarand Constructors, Inc. v. Pena*,[8]—arose from public contract procurement disputes. Thus, as a matter of both significant practical and philosophical importance for those committed to the principle of "Equal Protection under the law," developments in public-contracting law must not go overlooked, just as it

1. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

2. *See* Grutter v. Bollinger, 539 U.S. 306 (2003).

3. *See* Gratz v. Bollinger, 539 U.S. 244 (2003).

4. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

5. *See* United States v. Winstar Corp., 518 U.S. 839, 932 (1996) (Rehnquist, C.J., dissenting).

6. Michael H. LeRoy, *Presidential Regulation of Private Employment: Constitutionality of a Executive Order 12,954 Debarment of Contractors Who Hire Permanent Striker Replacements*, 37 B.C. L. REV. 229, 266 (1996).

7. 488 U.S. 469 (1989).

8. 515 U.S. 200 (1995).

must not go overlooked if a government agency gets a contract for the construction or improvement of a public building, road, airport, or implementation of airport concessions in violation of this principle.[9]

II. THE IMPORTANCE OF PUBLIC INTEREST LITIGATION IN SECURING "EQUAL PROTECTION UNDER THE LAW"

On the other hand, it is often forgotten that litigation is only one of many beneficial services that public-interest legal organizations provide to the public. Long before public-interest legal organizations file documents in court, they often seek public agency information through federal and state public records access laws in order to become fully informed of the background facts of a potential case. In actively seeking public documents, these organizations are able to determine whether or not federal and state agencies are actually following the law. This often underappreciated oversight function performed by public-interest legal organizations provides an invaluable service to society. A recent example that highlights the significant effect this oversight has had on such agencies in the area of public contracting may be seen through the results of the Sacramento, California-based Pacific Legal Foundation's (PLF or Foundation) *Western States Paving* Project. To that end, this Article constitutes both an empirical analysis and a five-year retrospective of the Ninth Circuit's *Western States*

9. Roger Clegg, *Unfinished Business: The Bush Administration and Racial Preferences,* 32 HARV. J.L. & PUB. POL'Y 971, 975 (2010) ("[P]rograms that discriminate on these bases are divisive and unfair, and any system that [awards] contracts to anyone other than the lowest qualified bidder will cost the government and its taxpayers money."); Ralph W. Kasarda & Robert Luther III, *Why Courts Must Subject Municipalities to Constitutional Tort Liability Under § 1983 When Unconstitutional Race- and Sex-Based Preference Statutes Deprive an Otherwise Lowest Qualified Bidder of a Public Contract,* 19 GEO. MASON U. C.R. L.J. 371, 404 (2009). Kasarda & I argue:

> Where a public entity wrongfully denies the award of a contract to the lowest responsible bidder due to an underlying unconstitutional statute that gave preferential treatment to another bidder because of the race and sex of his subcontractors, equity requires that the wrongdoing party make the wronged party whole by paying not only bidding, preparation, and overhead costs, but also lost profits. In addition to making the aggrieved party whole, requiring public entities to pay these frequently substantial sums for their unconstitutional conduct will deter such misconduct in the future.

Kasarda & Luther, *supra*, at 404.

Paving v. Washington State Department of Transportation decision.[10]

III. THE *WESTERN STATES PAVING* DECISION

In the May 2005 case of *Western States Paving Co., Inc., v. Washington State Department of Transportation*, the U.S. Court of Appeals for the Ninth Circuit considered whether the Transportation Equity Act for the 21st Century ("TEA-21") violated the Fifth or Fourteenth Amendments of the United States Constitution, either on its face or as applied by the state of Washington Department of Transportation (Washington DOT) when it awarded race- and sex-based preferences to local public contractors.[11] The case arose when the owner of Western States Paving Company, a white male contractor, submitted a subcontract bid on a state contract that imposed a 14% minority utilization requirement.[12] Western States Paving's bid was not selected "even though its bid was $100,000 less than that of the minority-owned firm that was selected [and] the prime contractor explicitly identified the contract's minority utilization requirement as the reason that it rejected Western States' bid."[13] Western States Paving filed suit against the United States, the U.S. Department of Transportation, the State of Washington, the City of Vancouver, and Clark County.[14]

After failing to prevail at the district court level, Western States Paving appealed to the Ninth Circuit. The Ninth Circuit acknowledged that under the rule from *Adarand Constructors, Inc v. Pena,* the strict-scrutiny standard of review must be applied to all race-based legislation.[15] And

10. 407 F.3d 983 (9th Cir. 2005), *cert denied*, 546 U.S. 1170 (2006). This study was conducted in 2007 and held until now so that courts had time to consider and apply the holding from *Western States Paving*. The author is of the opinion that the data considered in the context of subsequent post-*Western States Paving* precedent causes this Article to be a more significant contribution to the race preferences in public contracting literature than the data would have contributed standing alone had it been released earlier.

11. 407 F.3d at 987.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 990 ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.") (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)).

while the court upheld the facial constitutionality of TEA-21, it determined that the local Disadvantaged Business Enterprise (DBE) program was unconstitutional "as applied" in that state and local agencies that wished to accept federal money for local race- and sex-based preference programs were unable to produce concrete evidence of past—or current effects of—race or sex discrimination in the regional labor market, in accordance with the Court's instructions from *Adarand*.[16]

Specifically, in consideration of the as-applied challenge, Washington State contended that its application of TEA-21 need not independently satisfy strict scrutiny but rather it was merely obligated to comply with federal statute and regulations.[17] The court countered, agreeing with the Eight Circuit in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*,[18] that "'[t]o the extent the federal government delegates [the] tailoring function, a State's implementation becomes critically relevant to a reviewing court's strict scrutiny.'"[19] As part of its as-applied analysis, the court began by observing that TEA-21 is a narrowly tailored remedial measure only if its application is limited to "those States in which the effects of discrimination are actually present[]" and "those minority groups that have actually suffered discrimination."[20] Because Washington DOT lacked any statistical studies indicating the effects of past or present discrimination—relying instead on the disparity between participation in affirmative action and race-neutral contracts which the court admonished for not

16. *Id.* at 1002. The court stated,

> The record is therefore devoid of any evidence suggesting that minorities currently suffer—or have ever suffered—discrimination in the Washington transportation contracting industry. We must therefore conclude that Washington's application of TEA-21 conflicts with the guarantees of equal protection because the State's DBE program is not narrowly tailored to further Congress's remedial objective.

Id.

17. *Id.* at 996; *see generally* Ross R. Fulton, Comment, *"Our Federal System": States' Susceptibility to Challenge When Applying Federal Affirmative Action Law*, 74 U. CHI. L. REV. 687 (arguing that federalism requires local governments to make local findings of discrimination to comply with the federal DBE/MBE program regulations).

18. 345 F.3d 964 (8th Cir. 2003).

19. *W. States Paving*, 407 F.3d at 996–97 (quoting *Sherbrooke*, 345 F.3d at 971).

20. *Id.* at 998.

reflecting "the performance capacity of DBEs in a race-neutral market[]"—the court concluded that Washington State's application of TEA-21 did not fulfill the obligations imposed by the Fourteenth Amendment.[21] It also declined to give great weight to the disparity between the nominal DBE availability and proportion of contracts awarded to DBE's because "[t]his oversimplified statistical evidence is entitled to little weight . . . [when] it does not account for factors that may affect the relative capacity of DBEs to undertake contracting work."[22] The court ultimately struck down Washington DOT's implementation of the TEA-21 program because their actions were not "narrowly tailored."[23]

Thus, after the Ninth Circuit's decision in *Western States Paving,* a state or local entity that accepts federal funds may not pursue a federally mandated DBE goal by granting race- or sex-based preferences, unless the entity can produce concrete evidence of past or current effects of race or sex discrimination in the regional labor market.[24] In effect, this means that after *Western States Paving,* public agencies in the Ninth Circuit are forbidden from spending federal funds on state and local race-based preference schemes simply because Congress has recognized that discrimination has occurred in the nation's history.

In response to the Ninth Circuit's decision in *Western States Paving,* the United States Department of Transportation (USDOT) Federal Highway Administration Office of Civil Rights issued a memorandum entitled "Questions and Answers Concerning Response to Western States Paving v. Washington Department of Transportation."[25] This memorandum, approved by USDOT's general counsel, indicated that the *Western States Paving* decision to forbid the government's use of race- and sex-

21. *Id.* at 1000.

22. *Id.*

23. *Id.* at 1002.

24. *Id.* at 1002–03.

25. Office of Civil Rights, *Questions and Answers Concerning Response to* Western States Paving Company v. Washington State Department of Transportation, U.S. DEPARTMENT OF TRANSPORTATION, http://www.fhwa.dot.gov/civilrights/Programs/dbe_faq.htm (last modified Nov. 4, 2010).

conscious goals in the absence of past discrimination binds only entities within the Ninth Circuit.[26]

Unfortunately, guidance such as the above-described policy has contributed to the creation of a quagmire of confusion as well as a conflict within the federal circuits because not all states within the circuits have followed the Ninth Circuit's guidance. While the decision of *Western States Paving* concluded that states may consider race-conscious methods to achieve DBE goals in the presence of evidence of past discrimination, USDOT's guidance here is problematic because it supports the premise that while government may not consider the race or sex of a contractor in the Ninth Circuit states unless evidence of past discrimination in the regional labor market can be identified, government may still consider the race or sex of a contractor in the Seventh Circuit states, even in the *absence* of evidence of past discrimination in the regional labor market. The latter scenario is evidenced in the Seventh Circuit case of *Northern Contracting, Inc., v. Illinois Department of Transportation.*[27]

Although the court in *Northern Contracting* adhered to the first half of the *Western States Paving* court's analysis by recognizing that "[i]n the post-*Adarand* era, two other circuits have considered the question of whether a state may properly rely on the federal government's compelling interest in implementing a local DBE plan for highway construction, and both have concluded that a state may properly do so,"[28] it ignored the second half of the *Western States Paving* decision's holding by failing to recognize that even though a state may rely on the federal government's compelling interest, the state must subsequently produce evidence of past discrimination for the state's implementation of the federal program to satisfy constitutional muster under the narrowly tailored prong.[29] Furthermore, by

26. *Id.*

27. 473 F.3d 715 (7th Cir. 2007).

28. *Id.* at 720.

29. Although the Ninth Circuit came to the correct conclusion in *Western States Paving*, in order for a public entity that wishes to enact race- and sex-based preferences to meet its constitutional obligations, it must be able to demonstrate evidence of past discrimination in the regional labor market; however, this evidence

relying only on a disparity study conducted by NERA Consulting, the Seventh Circuit failed to require that evidence of past discrimination be produced at the local level as to be considered narrowly tailored under *Western States Paving*.[30] Because disparity studies do not definitively establish evidence of past discrimination,[31] the Seventh Circuit's decision in *Northern Contracting* marked the most recent chapter in the ongoing federal circuit split over the type of evidence necessary to permit race- and sex-based remedial methods to achieve DBE goals.[32]

The confusion over the proper framework for evaluating these cases has trickled down from the federal circuit courts into the federal district courts.[33] Not surprisingly, a number of federal district courts outside of the Ninth and Seventh circuits have admitted uncertainty as to whether they should apply to the Ninth Circuit's framework from *Western States Paving* or should apply to the Seventh Circuit's framework from *Northern Contracting*.[34] For example, in

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must be accounted for under the umbrella of the "compelling interest" prong and not under the "narrowly tailored" prong of strict scrutiny analysis.

30. The Ninth Circuit stated,

> As the United States correctly observed in its brief and during oral argument, it cannot be said that TEA-21 is a narrowly tailored remedial measure unless its application is limited to those States in which the effects of discrimination are actually present. *See* Dist. Ct. Oral Argument Tr. 48 ("The state would have to have evidence of past or current effects of discrimination to use race-conscious goals.").

W. States Paving Co. v. Wash. State Dep't of Transp., 407 F.3d 983, 998 (9th Cir. 2005).

31. *See* Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068, 1087 (Cal. 2000) ("The City's disparity study, at best, creates only an inference of discrimination against MBE/WBE subcontractors by prime contractors; it does not establish intentional acts by the City."); Clegg, *supra* note 9, at 976 ("A disparity is not necessarily evidence of discrimination, however, let alone proof.").

32. *See* A. Benjamin Spencer, *Circuits Split Re Whether States Must Show Independent Compelling Interest in Defending Disadvantaged Business Enterprise Program*, SPLIT CIRCUITS BLOG (Jan. 16, 2007), http://splitcircuits.blogspot.com/2007_01_01_archive.html.

33. *See, e.g.*, GEOD Corp. v. N.J. Transit Corp., 678 F. Supp. 2d 276 (D.N.J. 2009) (denying the majority of both parties' cross-motions for summary judgment); S. Fla. Chapter of the Associated Gen. Contractors v. Broward Cnty., Fla., 544 F.Supp. 2d 1336, 1341 (S.D. Fla. 2008) (choosing to adopt the analysis laid out by the Seventh Circuit in *Northern Contracting* and not the analysis laid out by the Ninth Circuit in *Western States Paving*).

34. In *GEOD Corp.*, the court stated,

> Both Plaintiffs' and Defendants' arguments are based on an alleged Circuit split. Plaintiffs rely on *Western States Paving Co., Inc., v. Washington State Department of Transportation, et al.*, 407 F.3d 983 (9th Cir. 2005) for the proposition that an as-applied challenge to the

South Florida Chapter of the Associated General Contractors, v. Broward County, Florida, the court issued an order on the specific issue of whether *Western States Paving* or *Northern Contracting* controlled the litigation unfolding in the Southern District of Florida.[35] The court in *South Florida* ultimately chose to adopt the rationale of the Seventh Circuit in *Northern Contracting* and not the rationale of the Ninth Circuit in *Western States Paving.*[36]

The U.S. District Court for the District of New Jersey recently added fuel to the fire in the context of denying the parties' cross-motions for summary judgment in *GEOD Corp. v. New Jersey Transit Corp.* by selecting the third door and opining that a circuit split did not exist even though the litigants conceded this point.[37] In its opinion on the merits,

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constitutionality of a particular DBE program requires a demonstration by the recipient that the program is narrowly tailored. Conversely, Defendants rely primarily on *Northern Contracting Inc. v. State of Illinois, et al.*, 473 F.3d 715 (7th Cir. 2007) for the proposition that if a DBE program complies with TEA-21, it is narrowly tailored.

678 F.Supp. 2d at 282. In *South Florida*, the court stated:

> The threshold legal issue presented in the Plaintiffs' Motion and Defendants' Response is, essentially, whether compliance with the federal regulations is all that is required of Defendant Broward County. The County contends that it is, relying on case law from the Seventh Circuit in support of its position. *See Northern Contracting v. Illinois*, 473 F.3d 715 (7th Cir. 2007). Plaintiffs disagree, and contend that the County must take additional steps beyond those explicitly provided for in the regulations to ensure the constitutionality of the program, as administered in the County. Plaintiffs rely on law from the Ninth Circuit in support of their position. *See Western States Paving Co. v. Washington State Dept. of Transp.*, 407 F.3d 983 (9th Cir. 2005). Because there is no case law on point in the Eleventh Circuit, the Court must consider each of these arguments and the case law in other circuits to determine the appropriate approach to take in the instant case.

544 F.Supp. 2d at 1338.

35. 544 F.Supp. 2d at 1338 ("Because there is no case law on point in the Eleventh Circuit, the Court must consider each of these arguments and the case law in other circuits to determine the appropriate approach to take in the instant case.").

36. *Id.* at 1341.

> After much consideration of the relevant case law, and the arguments made by the parties, this Court agrees with the approach taken by the Seventh Circuit in *Milwaukee County* and *Northern Contracting*, and concludes that the appropriate factual inquiry in the instant case is whether or not Broward County has fully complied with the federal regulations in implementing its DBE program.

Id.

37. *GEOD Corp.*, 678 F.Supp. 2d at 282–83.

the court (having already decided that the "compelling interest" prong of strict scrutiny mandated under *Adarand* was met by the statute) limited its discussion to "whether NJ Transit's DBE program is narrowly tailored . . . in accordance with 'its grant of authority under federal law.'"[38] The court concluded that "following the *Northern Contracting, Inc. v. Illinois* line of cases, NJ Transit's DBE program . . . [did] not exceed its federal authority."[39]

Of course, when one takes the wrong fork in the road, it should not come as a surprise when one arrives late to his or her destination, if he or she arrives at all. In view of the fact that the court had already decided that *Northern Contracting* controlled, its subsequent conclusions on this point are not particularly surprising because the standard announced in *Northern Contracting* is so deferential to the statute that it is questionable whether any aggrieved bidder is capable of satisfying it.[40] It was surprising, however, that the court chose to opine that "even under the *Western States Paving Co., Inc. v. Washington State Department of Transportation* standard, the NJ Transit program remains constitutional."[41] As the court correctly noted, "[u]nder *Western States Paving,* a court must 'undertake an as-applied inquiry into whether [the state's] DBE program is narrowly tailored."[42] After applying that standard, it concluded as it did because "NJ Transit did get complaints, i.e. anecdotal evidence, of the lack of opportunities for Asian firms."[43]

> Although both parties assert a Circuit split, this Court views the various Circuits differing analyses as fact specific determinations which have lead to the parties distinguishing cases without any substantive difference in the application of law. Each case actually makes considerably the same analysis under different facts. The Third Circuit however, has not addressed this issue.

Id.

38. GEOD Corp. v. N.J. Transit Corp., No. 2:04-cv-2425 (SDW), 2010 U.S. Dist. LEXIS 111909, at *27 (D.N.J., Oct. 19, 2010) (quoting N. Contracting, Inc. v. Ill. Dep't of Transp., 473 F.3d 715, 722 (7th Cir. 2007)); *see also* Fulton, *supra* note 18.

39. *GEOD Corp.*, 2010 U.S. Dist. LEXIS 111909, at *36.

40. *N. Contracting, Inc.*, 473 F.3d at 722.

41. *GEOD Corp.*, 2010 U.S. Dist. LEXIS 111909, at *36.

42. *Id.* at *37 (quoting W. States Paving Co. v. Wash. State Dep't of Transp., 407 F.3d 983, 997 (9th Cir. 2005)).

43. *Id.* at *38.

Here, the court's analysis goes awry. Simply because Asian firms may have suffered discrimination in the past, and in this case, an Asian firm was awarded the contract sought by the white-male-owned contractor plaintiff, these two unrelated events do not justify the constitutionality of the DBE program on the whole nor has case law made any special distinction when the party awarded the contract sought by the plaintiff happens to have been a member of a class of individuals that has been found to have suffered discrimination.[44] This faux "relationship" does not satisfy the narrow tailoring required by the Ninth Circuit in *Western States Paving.* Quite to the contrary, these unrelated events, or "coincidences" for lack of a better word, in no way speak to the constitutionality of the DBE program on the whole and certainly do not justify the court's failure to engage GEOD's argument that NJ Transit's "DBE program is constitutionally defective because it is not 'narrowly tailored' because it includes in the category of DBE's to which a percentage of subcontracts must be awarded racial or ethnic groups as to which it has no evidence of past discrimination."[45]

Taken as a whole, these rulings are difficult to reconcile and reveal uncertainty in the judiciary's determinations of whether to sustain constitutional challenges to race-preference programs when evidence of past discrimination in the local labor market cannot be produced by the governmental entity. That said, few would argue that the government should treat citizens differently simply because they reside in the Seventh or Ninth Circuits—even in the presence of evidence of past discrimination within the local labor market. If such a distinction between Illinois and Washington State citizens is said to exist, there is little doubt that "the central tenet of the Equal Protection Clause teeters on the brink of incoherence."[46]

44. The court's conclusion also presumes that "anecdotal" evidence of discrimination is sufficient enough to satisfy the second prong of *Western States Paving. Id.* This question is also unresolved around the circuits.

45. *GEOD Corp.*, 2010 U.S. Dist. LEXIS 111909, at *37.

46. Coal. for Econ. Equity v. Wilson, 110 F.3d 1431, 1439 (9th Cir. 1997), *cert. denied,* 522 U.S. 963 (1997).

IV. PACIFIC LEGAL FOUNDATION'S *WESTERN STATES PAVING* PROJECT

A. *Objectives*

The Foundation takes the position that "[g]overnment cannot make us equal; it can only recognize, respect, and protect us as equal before the law."[47] Members of the Foundation's legal staff also believe in "the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons,* not groups."[48] Therefore, to the extent that any benefits or burdens created by government are based on group identity, those benefits and burdens must be subject to the strictest possible scrutiny—whether the actor be at the federal, state, or local level.

Although PLF's ultimate goal aims to abolish all government programs that grant preferential treatment to individuals on the basis of their race or sex, the specific goals for the *Western States Paving* Project can be divided into oversight, enforcement, and extension.

The Ninth Circuit decision in *Western States Paving* provides an excellent opportunity to enforce the clarified standard for agencies in the Ninth Circuit, particularly in view of the fact that USDOT has directed these agencies to administer race-neutral programs in the absence of evidence of past discrimination of the type described by the court.

B. *Methodology*

At the beginning of 2006, PLF began canvassing state departments of transportation (DOT) and public airport agencies throughout the Ninth Circuit to determine the degree of compliance with the Ninth Circuit's opinion in *Western States Paving.*

In order to determine each state DOT's compliance with its constitutional obligations, PLF asked four standard questions.[49] The first request asked that the DOT supply a

47. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring).

48. *Id.* at 227 (majority opinion).

49. Letter from Russell C. Brooks, Managing Attorney, Pac. Legal Found., to Jackie Johnson, Equal Opportunity Dep't, Phx. Sky Harbor International Airport (Mar. 10, 2006) (on file with author).

copy of its DBE goals; the second request asked for copies of the supporting documents the DOT supplied to the USDOT to support its DBE goals; and the third request asked for a copy of the DOT's current DBE program as approved and implemented.[50] A final question asked whether the DOT possessed a disparity study related to the DBE program in place.[51]

In order to determine each airport agency's compliance with its constitutional obligations, PLF asked three standard questions. The first question asked "whether the agency is administering or will administer projects with federal transit funding that requires a DBE program."[52] The second asked "whether the agency used or intends to use race and sex-conscious means to fulfill required DBE goals."[53] The third question has asked "whether the Airports' DBE goal was supported by a disparity study, if the entity intended on using race and sex-conscious means."[54]

When PLF became aware that an agency failed to act in compliance with the holding of *Western States Paving*, the Foundation sent the entity a cease and desist letter to remind the entity's administrator of its constitutional obligations.

C. *Results*

Despite the Ninth Circuit's clear prohibition against the establishment of race-conscious DBE contracting goals independent of adequate evidence of past discrimination, some public agencies within the Ninth Circuit continued to implement these unconstitutional methods. In February 2006, PLF sent public records act (PRA) requests to the nine state DOTs and the sixty-six public airports within the Ninth Circuit.[55] PLF sent a follow-up mailing to twenty-two

50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. Although the *Western States Paving* decision does not explicitly apply to the Federal Aviation Administration (FAA) or Federal Transit Administration (FTA) goals, the underlying reasoning remains consistent because, pursuant to 49 C.F.R. Part 26, state entities are obligated to provide the federal department with a DBE goal in order to obtain federal funding. *See generally* George LaNoue, *Setting Goals*

of these public airports in August 2007 to obtain information from the airports that did not respond to the 2006 mailing. A particular highlight of the project from PLF's perspective is the fact that two DOTs[56] and eight airports[57] which had illegally set race and sex-conscious DBE goals for 2006, subsequently adopted race-neutral DBE goals in 2007 after receiving PLF cease and desist letters.

1. Departments of Transportation

In March 2006, ten months after the decision in *Western States Paving,* the California DOT (Caltrans) website stated that it had still not decided whether or not to pursue solely race-neutral methods to achieve its DBE goals, despite its lack of a disparity study or evidence of past discrimination in the local public contracting industry. Based on this information, PLF sent Caltrans a cease and desist letter on March 20, 2006, insisting that Caltrans cease implementing race-conscious goals in accordance with the decision in *Western States Paving.* The receipt of PLF's cease and desist letter caused Caltrans to adopt race-neutral DBE goals for the 2006–2007 year. On June 29, 2007, Caltrans released the findings of a disparity study it had contracted for with BBC Consulting, and in August 2007, Caltrans submitted its 2007–2008 DBE goals to USDOT. Again, these goals included the statement that Caltrans intends to achieve a 13.5% DBE goal in equal proportions of race-conscious and race-neutral goals.

Subsequently, the Washington DOT adopted an 18.77% DBE goal for the 2006–2007 year. Of this 18.77% goal, the Washington DOT intended to achieve 4.07% of this goal through race-neutral methods and 14.7% through race-conscious methods. The Washington DOT's disparity study

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in the Federal Disadvantaged Business Enterprise Programs, 17 GEO. MASON U. C.R. L.J. 423 (2007).

56. Departments of Transportation that went "race-neutral" after receiving PLF cease and desist letters consist of the Arizona Department of Transportation and California Department of Transportation.

57. Airports that went "race-neutral" after receiving PLF cease and desist letters consist of the Juneau International Airport (AK), San Diego Regional Airport (CA), Santa Barbara Municipal Airport (CA), Humboldt County Regional Airport (CA), Stockton Metro Airport (CA), Redding Municipal Airport (CA), San Francisco International Airport (CA), and Great Falls International Airport (MT).

was conducted by NERA Consulting and was completed on October 20, 2005.

In 2007, Caltrans and the Washington DOT continued to maintain race-conscious goals. Both entities also possessed disparity studies. The Montana DOT failed to respond to PLF's public records act requests. The other six DOTs within the Ninth Circuit adopted race-neutral DBE goals for the 2006–2007 fiscal year.[58] For two years subsequent to these initial PRA requests, "Caltrans was unsuccessful in getting federal permission to reinstate race-based quotas. But the federal government now has complied. In letters on February 25, 2009, and April 2, 2009, the U.S. Department of Transportation (Federal Highway Administration) approved 'race conscious means' in 'implementation of [Caltrans'] FY 2009 Disadvantage[d] Business Enterprise (DBE) Program.'"[59] In response to Caltrans' repeated violations of Article I, § 31(a) of the California Constitution, which states that "[t]he State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting," PLF filed suit on June 11, 2009, to vindicate the rights of aggrieved bidders.[60] While Article I, § 31(e) of the California Constitution does provide an exemption for using race when it is required to maintain federal funding, PLF maintains that the use of race is not necessary to maintain federal funding in this instance, and thus, the government's actions are in violation of the California Constitution.[61]

58. The entities that have adopted race-neutral DBE goals for 2006–2007 consist of the Alaska DOT, Arizona DOT, Hawaii DOT, Idaho DOT, Nevada DOT, and Oregon DOT.

59. *Caltran's Quotas are Unconstitutional*, PACIFIC LEGAL FOUNDATION, http://community.pacificlegal.org/Page.aspx?pid=922 (last visited Oct. 29, 2010).

60. Complaint for Declaratory and Injunctive Relief at 9, Associated Gen. Contractors of Am., San Diego Chapter, Inc., v. California Dep't of Transp., No. 09-01622, 2009 WL 5206722 (E.D. Cal. June 11, 2009).

61. *See generally* Stephen R. McCutcheon, Jr. & Travis J. Lindsey, *The Last Refuge of Official Discrimination: The Federal Funding Exception to California's Proposition 209*, 44 SANTA CLARA L. REV. 457 (2004).

2. Public Airport Agencies

Of the sixty-six public airport agencies contacted by PLF in February 2006, forty-seven had adhered to their constitutionally mandated obligations and stopped setting race- and sex-conscious DBE goals as of November 2007,[62] while one airport was clearly in violation of *Western States Paving*.[63]

The City of Phoenix's Sky Harbor International Airport presented an interesting question as to whether it was in violation of *Western States Paving*. Sky Harbor International Airport responded to PLF's request for public records on October 2, 2007. The responses submitted indicated that the airport planned to achieve its 2006–2007 DBE goals by implementing race-conscious methods.[64] Specifically, the Airport set an overall DBE goal of 12.93% to be achieved through 4.79% race-neutral methods and 8.14% race-conscious methods.[65] The City of Phoenix also intended to achieve race-conscious goals to meet DBE goals in its Airport Concession, Department of Transportation, and Light Rail contracts.[66] However, unlike the Monterey Peninsula Airport, the City of Phoenix had conducted a disparity study.[67] Finally, PLF attorneys sought clarification concerning the programs being implemented by two airports.

62. Eleven public airports have failed to respond to both sets of our requests and will require additional follow-up, while one airport, Friedman Memorial Airport in Idaho, has told us that we could visit to review the documents but that they were not obligated under the law to send them to us in the mail. Additionally, three entities—Lake Havasu City Airport (AZ), Page Municipal Airport (AZ), and William Fairchild International Airport/Port of Port Angeles (WA)—have indicated that they did not plan to implement any projects in 2007 and therefore have no need to set DBE goals to obtain federal funding.

63. The airport in violation of the holding in *Western States Paving* was Monterey Peninsula Airport (CA). Monterey Peninsula Airport's "Overall Goal and Methodology for 2006–2007" form, obtained by PLF on October 9, 2007, indicated that the airport had established a 1% overall DBE goal for 2006–2007. The airport intended to achieve this goal through 0.75% race-neutral methods and through 0.25% race-conscious methods. A letter from the airport's manager, dated September 27, 2007, indicated that the airport did not possess a disparity study.

64. Letter from Carole Coles Henry, Dir., City of Phx. Equal Rights Dep't, to Lisa Wormington, Ariz. Civil Rights Adm'r, Ariz. Dep't of Transp. (July 28, 2006) (on file with author).

65. *Id.*

66. *Id.*

67. CITY OF PHOENIX, MINORITY-, WOMEN-OWNED, AND SMALL BUSINESS ENTERPRISE PROGRAM UPDATE STUDY (2005), *available at* http://phoenix.gov/EOD/mgtes.pdf.

V. THE AFTERMATH AND THE FRONTIER

Ultimately, PLF intends to extend the requirement that governmental agencies not pursue race- or sex-conscious efforts to meet federally mandated DBE goals to all state and local agencies that accept federal funds and then to all federal agencies, including the Department of Homeland Security and the Environmental Protection Agency. With respect to the immediate implications of this study, two factors must be considered prior to commencing litigation.

The first is the unfortunate reality that USDOT's guidelines fail to provide a constitutionally adequate enforcement mechanism for the implementation of federal DBE programs. The second consideration follows from the contrasts between Washington State's DBE program and the DBE programs approved by the state of Illinois in the Seventh Circuit decision of *Northern Contracting* and the states of Minnesota and Nebraska in the Eight Circuit decision of *Sherbrooke Turf*. Whereas Washington State did not rely on any evidence of past or present discrimination prior to establishing race- and sex-conscious goals, Illinois, Minnesota, and Nebraska relied on "statistical analyses of the availability and capacity of DBEs in their local markets"[68] prior to setting race- and sex-conscious goals. While disparity studies are one of many tools that may be consulted in the attempt to pinpoint specific evidence of past discrimination, disparity studies alone do not definitively demonstrate localized evidence of past discrimination.[69] And *Western States Paving* makes clear that where racially discriminatory measures are used to remedy the effects of past or present discrimination, the measure *must* be predicated on actual evidence of the effects of past discrimination.[70]

68. W. States Paving Co., Inc. v. Wash. State Dep't of Transp., 407 F.3d 983, 997 (9th Cir. 2005).

69. *See* Spencer, *supra* note 32.

70. In *Western States Paving*, the Ninth Circuit stated,

> As the United States correctly observed in its brief and during oral argument, it cannot be said that TEA-21 is a narrowly tailored remedial measure unless its application is limited to those States in which the effects of discrimination are actually present. *See* Dist. Ct. Oral Argument Tr. 48 ("The state would have to have evidence of past or current effects of discrimination to use race-conscious goals.").

VI. CONCLUSION

Undoubtedly, the decision in *Western States Paving* stands as a prominent victory in the war against government imposition of race- and sex-based preferences. However, the true measure of victory attributable to *Western States Paving* only begins with the court's decision. As this Article has described, obtaining a favorable judicial decision is often only the first step in realizing a public-interest legal organization's strategic goals. For a public-interest legal organization, a true victory can only be claimed when a judicial decree requires decision makers to change the way they effectuate public policy. This scenario reflects the type of victory achieved by Pacific Legal Foundation's *Western States Paving* Project.

While the *Western States Paving* Project reflects PLF's most recent participation in the battle to end race- and sex-based preferences in public contracting in the federal courts within the Ninth Circuit, PLF has been equally active in fighting race- and sex-based preferences in California state courts. This past July, in *Connerly v. Schwarzenegger,*[71] the Superior Court of California struck down four provisions of California's State Public Contract Code "to the extent that they contain[ed] provisions requiring state agencies to apply minority business enterprise and women business enterprise participation goals in awarding state contracts."[72]

Admittedly, the best course of action would be for all federal legislation to reflect the view of the Supreme Court's recent statement that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[73] Indeed, "[i]t is very unlikely that, in 2009, [or today]

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407 F.3d at 998. The court continued,

> The record is therefore devoid of any evidence suggesting that minorities currently suffer or have ever suffered— discrimination in the Washington transportation contracting industry. We must therefore conclude that Washington's application of TEA-21 conflicts with the guarantees of equal protection because the State's DBE program is not narrowly tailored to further Congress's remedial objective.

Id. at 1002.

71. Case No. 2010-80000412 (July 2, 2010), *available at* http://plf.typepad.com/plf/2010/07/victory-in-connerly-v-schwarzenegger.doc.

72. *Id.*

73. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

the only way to end race discrimination in contracting is through race discrimination in contracting."[74] Unfortunately, "[w]ith President Obama's term nearing its half-way point, the record is inconclusive as to the impact that his election has had on the enforcement of anti-discrimination laws."[75] Consequently, "what is needed now is not much different from what was needed when the Bush Administration began . . . namely, a decision holding that, although remedying discrimination (the only governmental interest advanced for preferences in contracting) is a compelling interest, it is now basically impossible for the use of preferences to be narrowly tailored."[76] Until that case materializes, it is clear that the decision in *Western States Paving*—and the Foundation's oversight and enforcement—have brought federal law one step closer to the end of all government-sanctioned race- and sex-based preference programs.

74. Clegg, *supra* note 9, at 975.

75. Joel W. Friedman, *The Impact of the Obama Presidency on Civil Rights Enforcement in the United States* (Tulane Public Law Research Paper No. 10-03, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1691023.

76. Clegg, *supra* note 9.

COMPLETING ELY'S REPRESENTATION REINFORCING THEORY OF JUDICIAL REVIEW BY ACCOUNTING FOR THE CONSTITUTIONAL VALUES OF STATE CITIZENSHIP

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I. INTRODUCTION

John Hart Ely famously proposed a representation reinforcing theory of judicial review.[1] Ely said that the Constitution embodies certain procedural principles that make the ideal of American representative democracy possible.[2] Thus, where courts find that the political process has broken down, putting that republican goal out of reach, they must step in and exercise judicial review to correct for the procedural breakdown and to reinforce the representational principles the Constitution embodies.[3]

Whether Ely's theory is constructed on a foundation of sand or stone depends—to a large extent—on the rigor of his conception of "American representative democracy," which he gleans largely from a footnote in an old Supreme Court opinion written by Justice Stone.[4] Ely emphasizes breakdowns in the political process that burden discrete and insular minorities or impinge a fundamental right.[5] To be sure these are important elements of the republican ideal, and our history certainly indicates a need to pay attention to the elements Ely highlights. But I argue that Ely's vision of American representative democracy, by which his theory of judicial review stands or falls, is critically incomplete. Fundamental to the American system of representative government is its deep-seated federal character. Because Ely overlooks the role federalism plays in our representational scheme, his theory reflects only an anemic version of the robust notion of representative democracy the Framers' Constitution embodies. I intend to make Ely's theory whole by emphasizing the distinction between citizens of states and citizens of the United States—a distinction embodied in

1. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

2. *See id.* at 101–02 (foreshadowing his argument, later in the same chapter, that his representation reinforcing theory of judicial review supports his vision of American representative democracy).

3. *See id.* at 103.

4. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938).

5. *See id.*

key provisions of the Constitution's text.[6] Just as judges should safeguard the American ideal by protecting fundamental rights and the federal political process, they should protect the participation of the citizens of the states at least insofar as the Constitution recognizes their unique value to its federal system.

Recognition of breakdowns in the political process that burden constitutional federalism values not only completes Ely's theory but also significantly contributes to current federalism scholarship. Herbert Wechsler's political safeguards of federalism theory has long been taken to mean that the process will secure the structural promises of federalism in the Constitution without any need for judicial review.[7] Without a clear textual hook in the Constitution for the exercise of judicial review on federalism grounds, those who would argue for such review are fighting an uphill battle. But Ely's theory powerfully answered a strikingly similar challenge. He gave compelling reasons for courts to exercise judicial review of substantive rights that were not clearly written into the Constitution's text. Those same arguments can and should provide a similar, fundamentally American justification for the exercise of judicial review on behalf of federalism values.

This Essay examines the Constitution's text and highlights many key provisions that embody what I call "the values of state citizenship." That term refers to the values embodied by a group of terms woven throughout the Constitution's text that reflect the Framers' intentional intertwining of state-based representation into their notion of American representative democracy. Terms like "citizens of the states," "inhabitants of the states," "the states in convention," "legislators of the states," and the like appear everywhere the Constitution deals with representation. Analysis of these terms reveals that healthy nation-level representation is impossible without healthy state-level representation. Hence, if we want to protect any legitimate

6. *See, e.g.*, U.S. CONST. art. III, § 2.

7. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 537–47, 551 n.11 (1985) (citing Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954)).

notion of American representative democracy, we must reinforce not only the representation of citizens of the United States but also the representation of the citizens of the States.

Part II of this Essay explains the nuts and bolts of Ely's representation reinforcing theory of judicial review. Part III explores one scholar's call for a *Democracy and Distrust* of federalism and explains that while that theory's essential insight is correct, it does not go far enough. Part IV explains how Ely's method for discovering his view of American representative democracy—the bedrock of his representational reinforcing theory—led him to an incomplete version of American representative democracy. This Essay's main contribution comes in Part V, where a close reading of the Constitution's text reveals an overlooked textual "hook" for such an Ely-an justification for judicial review of federalism. Having outlined a more complete vision of American representative democracy, Part VI goes on to show how courts might apply this beefed up version of the representation reinforcing theory to exercise judicial review on behalf of federalism more often, taking the Supreme Court's recent *United States v. Comstock*[8] case as an example of how these values might—and should—have been put into action.

II. REPRESENTATION REINFORCING JUDICIAL REVIEW

The countermajoritarian difficulty is one the most important problems in legal scholarship, both because of its apparent intractability and because it threatens the most important judicial power in our system—the power of judicial review.[9] Ely's book, *Democracy and Distrust*, offers a solution to the countermajoritarian difficulty that not only justifies judicial review but also justifies the sometimes particularly controversial Warren Court's exercise of that

8. 130 S. Ct. 1949 (2010).

9. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962). For further exploration, see also THE JUDICIARY AND AMERICAN DEMOCRACY: ALEXANDER BICKEL, THE COUNTERMAJORITARIAN DIFFICULTY AND CONTEMPORARY CONSTITUTIONAL THEORY (Kenneth D. Ward & Cecilia R. Castillo eds., 2005).

power.[10] Ely outlines the ordinary debate between what he calls interpretivists and non-interpretivists, explaining that interpretivists contend that judges deciding constitutional issues should confine themselves to "enforcing norms that are stated or clearly implicit in the written Constitution," while non-interpretivists contend that courts should go beyond that restrictive set of references to "enforce norms that cannot be discovered within the four corners of the document."[11] Ely argues that "clause-bound interpretivism" is impossible because of the open-textured nature of certain provisions of the Constitution.[12] Perhaps the prime example of such an open-textured provision is the Fourteenth Amendment's Due Process Clause.[13] Ely argues that it is impossible to give meaningful content to that clause without reference to sources outside of the Constitution's text and that, in fact, the text invites the interpreter to engage such sources to give the clause meaning.[14]

Having rejected clause-bound interpretivism, Ely searches for what sort of "values" ought to inform our understanding of these open-textured constitutional provisions. He looks at all of the popular modern options: the judge's own values, natural law, neutral principles, reason, tradition, and consensus.[15] Ultimately, though, he finds none of them satisfactory.[16] The thesis of his book is that rather than either attempting to succeed in clause-bound interpretivism or in interpreting each open-textured constitutional provision to enhance or protect some fundamental value—both of which are futile exercises—the prescient interpreter ought to recognize that the Constitution is primarily meant to entrench a process that will give rise to "American representative democracy."[17] In light of that recognition, judicial review is not only justified but necessary when the political process breaks down, when a fundamental right

10. *See* ELY, *supra* note 1, at 73 (purporting to find the proper justification for judicial review in the Warren Court's approach).

11. *Id.* at 1.

12. *See id.* at 11–41.

13. U.S. CONST. amend. XIV, § 1.

14. ELY, *supra* note 1, at 14.

15. *See id.* at 43–72.

16. *See id.* at 73.

17. *Id.* at 73–77.

necessary to participation in the political process is threatened, or when the political process fails to protect a discrete or insular minority.[18] Detached from politics and safeguarded by life tenure and salary protections, the Judicial Branch is particularly well-suited to the task of policing the political process—a role essential to realizing our goal of American representative democracy.[19]

I want to focus on Ely's concept of American representative democracy because it is the lynchpin of his representation reinforcing theory of judicial review. Even granting Ely's premise that the Constitution is a procedural document, one must additionally agree with his idea of American representative democracy in order to support his theory of judicial review. If we find that the Constitution's text actually endorses some other concept of American representative democracy, then we can question whether Ely's theory ought to be adjusted in order to ensure realization of *that* goal.

I contend that Ely's theory is incomplete because he does indeed fail to account for a constitutionally vital element of American representative democracy. Ely certainly recognizes the democratic value of citizens of the United States, but he fails to recognize several other constitutionally significant forms of representation. Having ignored several key aspects of the Constitution's vision of representation, Ely's notion of American representative democracy is anemic. Were the courts only to police the representational process according to Ely's vision, many key aspects of representation—as envisioned in the Constitution—would be left to languish. That is in fact what has happened. A more active and thorough protection of the political process would require the courts to acknowledge not just the aspects of American representative democracy embodied in the *Carolene Products* footnote but all aspects of representation enshrined in the Constitution's text. Such a version of representation reinforcing judicial review would indeed allow the courts to go beyond the current hands-off approach to process federalism endorsed by the *Garcia*

18. *Id.* at 102–03.
19. *See id.* at 102–03.

majority and to exercise judicial review where the political process fails to fulfill the constitutional promise of representation of "citizens of the states," "the state Conventions," "the state Legislatures," and the like.

III. PROFESSOR ERNEST YOUNG'S CALL FOR A *DEMOCRACY AND DISTRUST* FOR FEDERALISM

Herbert Wechsler's famous article, *The Political Safeguards of Federalism*, is commonly thought to be the theoretical godfather of Justice Blackmun's landmark opinion in *Garcia*.[20] Wechsler argues that the existence of the states as independent governments and creators of the majority of this country's legislation is the primary determinant and protection of our federalism.[21] The *Garcia* Court took that thesis and ran with it—I argue too far—by inferring that because the political process offers a primary protection of federalism values, the courts should not exercise judicial review for federalism.[22] This entrenched view has come to define the Court's approach to federalism, but several scholars think it misconceives Wechsler's argument, that Wechsler's argument no longer applies with the same force it did at the time he wrote, or that there are good reasons to have some level of judicial review of federalism values anyway. This Part outlines one of those scholar's views on the subject with the purpose of introducing the idea of a *Democracy and Distrust* for federalism as a means of principled judicial review for federalism.

Professor Ernest Young has written extensively on the subject of process federalism, arguing that whatever Justice Blackmun may have intended with his *Garcia* opinion, his notion of process federalism leaves plenty of room for judicial review based on federalism values.[23] Professor Young draws heavily on Ely's theory of representation

20. *See, e.g.*, Russell A. Miller, *Clinton, Ginsburg, and Centrist Federalism*, 85 IND. L.J. 225, 252–54 (2010) (crediting Wechsler's process federalism theory as the rationale for Justice Blackmun's *Garcia* opinion).

21. Wechsler, *supra* note 7, at 546.

22. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 537–47, 551 n.11 (1985) (citing Wechsler, *supra* note 7).

23. Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1366 (2001).

reinforcing judicial review to make his argument and says that the same sorts of procedural protections that Ely argued protect individual rights also protect federalism values in the Constitution.[24] Thus, the courts are in the same unique position of ability and obligation to police the boundaries of the constitutional process when it comes to federalism as they are with regard to individual rights. Professor Young thus calls for a *Democracy and Distrust* for federalism.

Professor Young's version of process federalism is admittedly more open to judicial review for federalism values than is the received interpretation of Justice Blackmun's *Garcia* opinion.[25] He calls upon Ely's view of representation reinforcing judicial review to justify judicial review only when the political process meant to protect federalism breaks down. Professor Young acknowledges two different occasions when, under Ely's theory, judicial review is appropriate. First, judicial review is appropriate when "pervasive and enduring discrimination against 'discrete and insular minorities,' . . . might foreclose those groups from an adequate opportunity to protect their interests through politics."[26] Second, judicial review is appropriate where "a particular governmental measure, such as a restriction on free political debate, undermines the functioning of the normal political process so that its results are no longer trustworthy."[27] Professor Young argues that process federalism fits fairly easily under the second grouping, noting that when the federal government commandeers the state governments, for example, the people can no longer trust the results of the political process because "the lines of [political] accountability have blurred."[28]

Notice that Professor Young does not argue that Ely's notion of representation is flawed. Instead, he only argues that a working concept of process federalism—which even the "nationalist" justices have adopted—requires some level of judicial review for federalism. But just how much judicial

24. *See id.* at 1364–65.
25. *Id.* at 1365–66.
26. *Id.* at 1364.
27. *Id.* at 1365.
28. *Id.*

review for federalism does Professor Young have in mind? He argues that some substantive judicial review must be possible as a backstop for the political processes protecting federalism values, but he openly acknowledges that the procedural safeguards the Rehnquist Court adopted will go a long way on their own—apart from any more substantive judicial review—to safeguard federalism values.[29] Particularly, Professor Young is fond of a normative canon of statutory construction requiring a "presumption against preemption" of state law.[30] He goes on to argue that enforcement of such a normative canon is actually a form of judicial review.[31] Even if this is so, is that all there is to *Democracy and Distrust* for federalism? What if Ely's view of representation was incomplete and the Constitution actually contains more textual evidence that American representative democracy comes to us with the federalism values built in? That is what I go on to argue in Part IV, but first we must get a clear sense of just what Ely means by American representative democracy and how he came to his understanding of the concept.

IV. AN ANEMIC VERSION OF AMERICAN REPRESENTATIVE DEMOCRACY

Ely's theory requires that he justify his view of American representative democracy. He begins his elaboration of the representation reinforcing theory by arguing that the Warren Court embodied it.[32] He goes on to argue that Justice Stone foreshadowed the Warren Court's approach in his famous *Carolene Products* footnote four synopsis of the justifications for more searching judicial review.[33] But the *Carolene Products* footnote—whatever its ultimate merit—is little more than a principle completely untethered to any deeper theoretical justification. It does not, by itself, give us a complete argument or political theory upon which we can base a justification of judicial review. Instead, to understand how the footnote four values give rise to a coherent political

29. *Id.* at 1390.
30. *Id.* at 1384–85; *see also* Miller, *supra* note 20, at 266.
31. Young, *supra* note 23, at 1387.
32. ELY, *supra* note 1, at 73.
33. *Id.* at 75.

theory, Ely tells us "it is necessary to focus . . . on the American system of representative democracy."[34]

Ely begins his discussion of American representative democracy with a review of its historical roots. Noting that the Framers sought to create a particularly rich association between the rulers and the ruled, Ely says that "the representatives in the new government were visualized as 'citizens,' persons of unusual ability and character to be sure, but nonetheless 'of' the people."[35] He goes on to say that "[t]he principal force [the Framers] envisioned [for enforcing their vision of representation] was the ballot: the people in their self-interest would choose representatives whose interests intertwined with theirs and by the critical reelection decision ensure that they stayed that way, in particular that the representatives did not shield themselves from the rigors of the laws they passed."[36]

But, according to Ely, the Framers did not want a system of pure majority rule because that would risk tyranny of the majority.[37] Thus, they put in place various mechanisms "to break up and counterpoise governmental decision and enforcement authority, not only between the national government and the states but among the three departments of the national government as well."[38] The Bill of Rights also embodies a "list strategy" of protecting certain sacrosanct values from governmental encroachment.[39] It became clear, though, that these moves were not enough to protect minorities from overbearing majorities. This led to more official legal devices, like the Fourteenth Amendment, which was meant to ensure equal representation.[40]

Next, Ely discusses the Supreme Court's willingness, even at an early stage of the country's history, to protect the interests of minorities that were not literally voteless by constitutionally tying their interests to those of groups that did possess political power.[41] Interestingly, Ely points to the

34. *Id.* at 77.
35. *Id.* at 78.
36. *Id.*
37. *Id.*
38. *Id.* at 80.
39. *Id.* at 79.
40. *Id.* at 82.
41. *Id.* at 83.

Privileges and Immunities Clause as an example of this aspect of American representative democracy.[42] There, according to Ely, the Framers intended to restrict state legislatures from treating out-of-staters less favorably than they treat locals.[43] This method of tying the plight of the politically powerless—here, nonresidents—to that of the politically represented majority serves to ensure that their interests will be represented and well looked after.

Having thus laid out his idea of what American representative democracy looks like, Ely promises to go on to show, first, that his representation reinforcing theory of judicial review is well-grounded in the Constitution's text and, second, that it is "entirely supportive of . . . the underlying premises of the American system of representative democracy."[44] I argue that Ely got the order wrong. He should have looked to the Constitution to determine what "the American system of representative democracy" looks like and *then* asked what the proper representation reinforcing theory of judicial review should hold with that constitutional concept as its lodestar. To go through the entire Constitution in an effort to determine what American representative democracy should look like is beyond this Essay's scope. Instead, I grant that Ely's version is right as far as it goes, but I argue that his theory is incomplete in at least one fundamental way. Ely is surely right that the Framers considered the concept of democratic representation to be, among other things, a sort of pluralist protection against tyranny of the majority. But Ely fails to factor in perhaps the most important sense in which the Constitution embodies pluralist representation, namely its recognition of the dual identity of the American people. The Constitution repeatedly and independently draws on two notions of identity when setting up its representational structure. First, it looks to the various ways people identify themselves with the United States. Second, it looks to the various ways they identify themselves with their respective states. Without careful attention paid to both of these senses of representation, no theory of American representative

42. *Id.*
43. *Id.*
44. *Id.* at 88.

democracy can be complete. Because Ely leaves out one half of this equation, it does him little good to show that his representation reinforcing theory of judicial review comports with his notion of American representative democracy. Once his lacking notion of the American republican system is corrected through proper attention to the overlooked constitutional provisions, his representation reinforcing theory can be supplemented to reflect a proper and complete theory of participation-oriented judicial review. In the end, this supplementation leaves plenty of room for a robust theory of process federalism—one that enhances Professor Young's theory and calls for more substantive judicial review for federalism.

V. ACCOUNTING FOR THE CONSTITUTIONAL VALUES OF STATE CITIZENSHIP

This Part surveys the Constitution's text and highlights each time the Framers provide for representation of individuals in the state-based half of their American identity. Hopefully, after the evidence is in, it will be impossible to deny that the Framers' notion of American representative democracy necessarily includes emphasis on state citizenship. If that is so, then we must supplement Ely's notion of American representative democracy and extrapolate the effects of the supplementation on his representation reinforcing theory of judicial review.

Before going through each of the state-based representation provisions, though, it is necessary to justify the importance of the distinction between representation of "We the People" through state-based mechanisms as opposed to national mechanisms. This is particularly true in light of a rarely observed but important feature of the Constitution. Contrary to modern parlance, the Framers did not think of the term "the United States" as singular. Throughout the Constitution they refer to "the United States" as "them" or otherwise refer to "them" as a plural noun.[45] What's the significance of that? One might infer

45. U.S. CONST. art. I, § 9; *id.* art. II, § 1; *id.* art. III, §§ 2, 3; *id.* amend. XI; *id.* amend. XIII, § 1. It is important to note that explicit references in the text are just as telling as those omitted. There is not one counterexample to the plural United States phenomenon to be found anywhere in the Constitution's text. There are

from the "plural United States phenomenon" that the term "citizens of the United States" refers to citizens of each of the states. In other words, the Framers did not think they were creating a new entity, only linking several smaller entities. If that is so, then there is no real distinction between citizens of the states and citizens of the United States and certainly no reason to rethink our understanding of federalism doctrine based on use of both terms. But there are several persuasive reasons to reject that argument.

First, as will be shown, "citizens of the States" is not the only term the Framers deployed to highlight the dual nature of representation they had in mind. They also refer to state legislatures as mechanisms for making political decisions such as amendments, choosing electors, and the like.[46] Furthermore, they refer to people of the States and inhabitants of the States.[47] Finally, the Constitution sometimes mentions citizens of a state as opposed to citizens of the States, plural.[48] No United States analogue to these other terms exists (or even could exist) in the Constitution. Think of it: You couldn't reasonably refer to a "citizen of the United State" because the "State" you refer to isn't in any rational sense "United." For "United" to make sense, there must be several "United States." Thus, even if it were true that "citizens of the United States" included "citizens of the States," several other constitutional phrases reflect the Framers' purposeful recognition of the distinction between representation of an individual at the national level and representation of that same individual at the state level.

Second, the Constitution contains certain provisions that utilize both terms, thereby signaling a meaningful distinction between them. For instance, the Fourteenth Amendment says "[a]ll persons born or naturalized in the

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references to the Union that refer to a singular noun, but any concept of the United States as singular is in our interpretation and modern parlance only—not the Constitution's actual text.

46. *See, e.g.*, *id.* art. II, § 1 (regarding electors); *id.* art. V (regarding amendments).

47. *Id.* art. I, § 3 (referring to "[i]nhabitant[s]"); *id.* amend. XIV, § 2 (referring to "persons").

48. *See, e.g.*, *id.* amend. XI ("The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[49] This is plain evidence that the authors thought of these two concepts as separate and distinct. Otherwise, mentioning citizens "of the State in which they reside" directly after "citizens of the United States" would be redundant.

In light of these arguments, it is clear that the Framers recognized a conceptual difference between state citizenship and United States citizenship despite the plural United States phenomenon. I would argue that the plural United States phenomenon, when understood in light of the various state-based and nation-based representational mechanisms the Framers deployed, reveals that their understanding of representation at the constitutional level was more subtle and complex than it has come to be understood today. At the very least, the plural United States phenomenon, with its emphasis on *States* as opposed to *United* in "United States," should alert us that our modern understanding (misunderstanding?) of the state–federal balance has shifted entirely too far in the national direction and therefore that greater emphasis on the provisions emphasizing state-based representation is particularly necessary today. The evidence suggests that this slide toward a more nationalized identity occurred rather recently. For example, Professor Wechsler argued that people identify primarily with their state—not with the United States—as recently as 1954.[50] While the conclusion requires empirical proof, it seems all but certain that people today identify themselves primarily as citizens of the United States—not citizens of their states. On the other hand, just because there has been a shift in how we identify ourselves as Americans does not mean that that shift is bad or undesirable. But if that shift has occurred at the expense of fidelity to the Constitution's text, then there is a colorable argument that its legitimacy is questionable.

This Essay does not demand that we return to some old concept of the state–national balance just because that was how it was in the "good ol' days." Instead, it asks only that

49. *Id.* amend. XIV, § 1.

50. Wechsler, *supra* note 7, at 546–47.

we not run roughshod over several provisions of the Constitution's text at the expense of American representative democracy rightly understood. Put another way, this Essay does not ask for a return to an old conception the state–national balance, but it does claim that fidelity to the Constitution's text requires any interpreter using Ely's representation reinforcing theory to justify the Warren Court's more famous exercises of judicial review must also recognize that representation reinforcement demands equal attention be paid to the values of state citizenship that are central to any robust account of American representative democracy.

Everywhere the Constitution provides for representation it includes an element of one of the values of state citizenship. This Part catalogues and explores those provisions. My hope is that by putting them all in one place and by showing their state-based aspects, this Part will leave the reader with no choice but to acknowledge the centrality of the values of state citizenship to American representative democracy.

Article IV, Section Four is a simple provision and one not much talked about in constitutional scholarship, but it proves that an understanding of American representative democracy that is faithful to the Constitution's text *must* recognize the importance of the values of state citizenship. It says, "The United States shall guarantee to every state in this Union a Republican Form of Government."[51] Rather than leaving the manner of political representation Americans would have at the state level to chance, the Framers guaranteed it would be of a particular sort. This was very important because—as will be discussed at length later—under our Constitution adequate and effective representation at the state level is a prerequisite of healthy representation at the national level. Because the Framers recognized the critical function the values of state representation would play at the national level, they went out of their way to guarantee that the states would have a republican form of government.

51. U.S. CONST. art. IV, § 4.

The Constitution did not have a "national" birth. Instead, its origins trace back to a properly functioning act of the state-level republican system guaranteed by Article IV, Section Four. Article VII says, "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."[52] In his Records of the Federal Convention, James Madison reports the following:

> [T]he amendments which shall be offered to the Confederation, by the Convention ought at a proper time, or times, after the approbrobation of Congress to be submitted to an assembly or assemblies of Representatives, recommended by the several Legislatures to be expressly chosen by the people, to consider & decide thereon.[53]

On the same question Mr. Patterson spoke similarly:

> I came here not to speak my own sentiments, but the sentiments of those who sent me. Our object is not such a Governmt. as may be best in itself, but such a one as our Constituents have authorized us to prepare, and as they will approve. . . . All [the States] therefore must concur before any can be bound.[54]

The Constitution began with an act of state-level republicanism, and insofar as it did, its legitimacy depends on proper state-level representation. Chief Justice Marshall—a well-known champion of an expansive national government—recognized as much in *Owings v. Speed*:

> In September, 1787, after completing the great work in which they had been engaged, the Convention resolved that the Constitution should be laid before the Congress of the United States, to be submitted by that body to Conventions of the several States, to be convened by their respective legislatures, and expressed the opinion, that as soon as it should be ratified by the Conventions of nine

52. *Id.* art. VII.

53. 4 THE FOUNDERS' CONSTITUTION 648 (Philip B. Kurland & Ralph Lerner eds., 1987).

54. *Id.* at 649.

> States, Congress should fix a day on which electors should be appointed by the states.[55]

Imagine a breakdown in political process at this fundamental level; were it to occur, the Constitution would be illegitimate. Thus, as important as representation at the national level is, it would have never been were it not for adequate and healthy representation at the state level. Again then, any concept of American representative democracy that ignores the values of state citizenship is fundamentally flawed.

Consider the Article V Amendment Process. A proposed amendment "shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof."[56] Consider also the Twenty-Second Amendment—and the others like it—that require that "[t]his article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States."[57] Thus, at the founding and in 1951, the Framers of the Constitution have relied on representation at the state—not the national—level to ensure the legitimacy of fundamental changes to the Constitution.

Article I, Section Two says, "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[58] It goes on to say, "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of the State in which he shall be chosen."[59] These provisions inject a state-based representational element into the system that gives rise to national representation. The fact that a representative must be an inhabitant of the state in which

55. 18 U.S. (5 Wheat.) 420 (1820).
56. U.S. CONST. art. V.
57. *Id.* amend. XXII, § 2.
58. *Id.* art. I, § 2.
59. *Id.*

he is chosen ties representation at the national level to representation at the state level by aligning the interests of the national representative to the interests of those whom he represents, namely the people of the state that elected him. To ignore the state-based element of this representation and to characterize American representative democracy as purely national would not be faithful to careful mechanisms like these that the Framers built into the constitutional clockwork. Article I, Section Three does the same thing for the Senate.[60]

Article III, Section Two says, in part, "The judicial Power shall extend . . . to Controversies between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States . . . ."[61] Perhaps it is not obvious how text defining the extent of the judicial power could have anything to do with the finer points of American representative democracy. But consider that the Framers found only six "controversies" worthy of specific mention when defining the judicial power, and half of them include mention of state citizens as parties. To the extent that Ely is right that one important role of the Judiciary is to police the border of political participation under the Constitution, Article III's specific provisions emphasize a particularly acute need for patrol of the borders of *state*-level political participation. Perhaps the fear was that the states would not provide fair or adequate judicial processes under the listed circumstances. If that was the case, then it is possible that the Framers intended Article III judicial review to police particular breakdowns in the state-level political process.

Article IV, Section Two says, in part, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[62] While this provision has essentially been read out of the Constitution, it highlights an important aspect of American representative democracy. The Privileges and Immunities Clause requires states to give outsiders the same advantages and benefits that they

60. *Id.* art. I, § 3.
61. *Id.* art. III, § 2.
62. *Id.* art. IV, § 2.

give to their own citizens, avoiding one of the surest potential representational breakdowns threatening realization of the American republican goal. Importantly, it recognizes the necessity of national-level protection of citizens of each State. In other words, this is another example of the Constitution's explicit concern for the plight of Americans in the state-based sense of their identity.

The Sixth Amendment says, in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."[63] The democratic values undergirding the jury system are well-documented. The Constitution's version of representative democracy consistently ties vital national practices and processes to a state-based sense of American identity. Here, it requires that the composition of the jury—one of the abiding symbols of American democracy—be determined on state-based considerations. To the extent that the jury is an icon of American democracy, American democracy is inextricably intertwined with state-based considerations.

Section Two of the Fourteenth Amendment requires that representatives be apportioned according to the number people in a given state.[64] Nothing could more clearly link constitutional representation to considerations of state-based representation. The more citizens that can be counted within the "number" of any state, the greater the amount of national representation those people will gain. It is a specifically state-based consideration that determines their representational potency—not a national consideration. To ignore the state-based element of representation in light of the consistent efforts of the Framers and drafters of the Amendments to give political voice to people in their state-based capacities as well as their national capacities is to be irresponsible with the Constitution's text.

Finally, the Constitution repeatedly relies upon the state legislatures' cooperation to ensure that American representative democracy is realized.[65] This reliance

63. *Id.* amend. VI.

64. *Id.* amend. XIV, § 2.

65. Article I, Section Four mandates that the "Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each

underscores the role of citizens of the states in the national representative scheme by placing the political hammer of accountability in the hands of state citizens, who alone control the fates of state legislators. Were a breakdown in the political process to occur at the state legislature level, several key aspects of the American representative machine would malfunction. Thus, a robust vision of American representative democracy—and one that is faithful to the Constitution's text—must not give short shrift to state legislatures and the state citizens to whom they are accountable.

State by the Legislature thereof." *Id.* art. I, § 4. This provision gives a significant level of control over the national representational scheme to the state legislatures. Intentional overtures toward a cooperative representational apparatus like this one, especially when the Constitution contains so many of them, reveal a concerted effort on the Framers' part to involve state legislatures and, concomitantly, state citizens in American representative democracy.

Article II requires that each state appoint presidential electors "in such Manner as the Legislature thereof may direct." *Id.* art. II, § 1, cl. 2. Just as they relied upon state citizens and representatives to provide for the elections of senators and representatives in Article I, here the Framers rely on them for the election of the President. In this way, the two "political" branches—also the two most responsible for American representative democracy—cannot function without the cooperation and effective action of the citizens of the states and their legislatures. It is no accident that each and every time the Framers provided for representation they explicitly tied that representation to a state-based entity that is itself accountable to the citizens of the states. After all, what good would Madison's "double security" against tyranny be if one of the sentinels left its post? The Framers linked the state governments and citizens into their scheme of American representative democracy to ensure, to the extent possible, that both levels of the "double security" remained in place for good. To be sure, this mechanism passively limits the state governments—they may not veer too far off the republican path laid out in the Constitution. But in another sense it provided the states assurance that they would exist as states through whatever unexpected ups and downs might arise during the Constitution's tenure because the Constitution itself employs them and their citizens in its representational scheme.

Article II goes on to provide that "in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; a quorum for this purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice." *Id.* This provision only makes clearer the link between presidential elections and state-level representation. It is explicitly "the Representation from each State" that votes, and just who makes up that "representation" is chosen by citizens of the states. The Framers could have made national elections like the one that chooses the President completely independent of the States. One might argue that they relied on the states only for convenience sake, but the rationales mentioned above argue the other way. Furthermore, even if it was all a matter of efficiency at the time, that surely cannot be the modern justification. Today it would be easy enough to implement any number of technologies to make presidential elections purely national affairs that do not rely at all on the states. But that has not happened. Furthermore, even if it were purely a matter of administrative ease, the scheme still undeniably links American representative democracy inextricably to state-based processes and state citizens.

VI. SUPPLEMENTING ELY TO PROVIDE FOR A *DEMOCRACY AND DISTRUST* FOR FEDERALISM

This tour of the Constitution has admittedly been tedious, but it has been more than worth it if, as is hopefully the case, it is now clear that it is impossible to understand American representative democracy apart from the values of state citizenship. Professor Ely's theory is brilliant, but because its conception of American representative democracy failed to account for this essential, life-giving element, it is incomplete. While most Ely scholars would describe themselves as nationalists, this Essay seeks to show that the most principled and consistent Elyan scholar must make room for judicial review of federalism issues or else admit adherence to an anemic and unrealistic vision of American representative democracy. What good is pursuit of a republican goal if that goal is illegitimate? Hopefully, open-minded scholars will consider pursuing *all* aspects of American representative democracy with equal zeal—even those that tend to result in judicial review for federalism. The rest of this Essay is dedicated to seeing what such a commitment might look like.

Ely's theory justifies searching judicial review in favor of discrete and insular minorities, for fundamental rights, and where the political process otherwise breaks down. That rationale, though, has never been applied enthusiastically in favor of judicial review for federalism. In light of the textual evidence discussed above, however, which indicates that American representative democracy requires healthy representation of state citizens, one might wonder whether this situation is a healthy one. Take, for example, the common practice of conditional spending.[66] A robust judicial review for federalism along the lines that this Essay calls for would require a presumption that conditional spending is unconstitutional.

Conditional spending bypasses the role of the "citizens of the states" and thereby undermines what has been shown to be a key feature of American representative democracy. In light of the evidence discussed at length above, conditional

66. *See* United States v. Dole, 483 U.S. 203, 206–07 (1987) (discussing the nature of conditional spending in some depth).

spending cannot be abided because it is unquestionably a serious breakdown in the political process. When Congress pays willing states to abide by its laws—often ignoring their own democratically made laws—it essentially enacts novel state laws in each of the cooperating states. But what it does *not* do is go through the political hurdles normally necessary to effectuate such a change of state law. Furthermore, it removes one level of political accountability from the overall process. Normally federal legislators are accountable for the laws they pass while state legislators are accountable for their own. These multiple layers of accountability are often cited as a key feature of federalism because Americans have multiple microphones for their political voices. Here, though, one move takes away the state law that was in place and replaces it with a federal law. Because it required a form of state–federal cooperation not provided for in the Constitution, citizens do not know who to blame or whom to vote out of office.[67] True, they could vote both entities out, but that would be a more difficult task. And even if they did, the deeper problem would remain—voters and their votes are ideally supposed to govern political decisions in this country, not federal legislators and their money.

Conditional spending has the effect of creating state law without engaging state citizens. Because state citizens are such a key element of American representative democracy, it would be proper for an Ely-minded judge to reinforce representation by exercising judicial review of conditional spending laws and thus clearing the channels of political change that would otherwise be open to state citizens. This does not mean that absolutely every conditional spending provision is unconstitutional. Just as a law could require strict scrutiny and pass it, a conditional spending law could be subject to the presumption of unconstitutionality and survive. To do so, though, the Court must be able to assure itself that the particular conditional spending provision was not implemented in order to avoid engaging citizens at the

67. Professor Young cites this blurring of the lines of accountability as one of the key justifications for judicial review for federalism. Young, *supra* note 23, at 1360.

state level or to ignore political discontent in a state.[68] Courts should also assure themselves that the conditional spending provision does not greatly benefit some states at the expense of one or several others either because of the relative need for the funds or because of the relative negative effects of the law the spending provision purchases.

I recognize that good Wechslerians will cringe at my view of conditional spending. Wechsler's political safeguards argument was, after all, an account of the manner in which the national legislative process takes into consideration and protects state preferences to either have state law or national law control.[69] If state law is chosen, then Congress would decide not to preempt and not to impose a spending condition. If national law is deemed the better path, then a preemptive federal statute or a spending condition would result. There is, in short, a notion of state citizen consent to exercises of national power, where they occur, underlying the classical political safeguards account.[70] After all, the alternative to conditional spending seems to be flat-out preemption of the state law in question. Thus, the Wechslerian will see conditional spending as a lovely illustration of the political safeguards of federalism in action. The state citizens' preferences are translated through their state legislators up to the national level.

I reject the Wechslerian idea that the views of state citizens are translated up to the national level. Professor Young argues that there are some instances in which the national legislative process does not fully protect the preferences of state citizens because of predictable errors in governmental decision making or in the process of "translating" state constituents' preferences up to their national representatives (for example, the argument that national politicians come to view state governments as competitors rather than constituents fits here).[71] So on Young's view, Wechsler's theory must be revised to incorporate reinforcements of the process by which state

68. *Cf.* Printz v. United States, 521 U.S. 898 (1997) (holding as unconstitutional certain provisions of the Brady Handgun Violence Prevention Act).

69. Wechsler, *supra* note 7, at 545.

70. *Id.*

71. Young, *supra* note 23, at 1360–61.

interests are accounted for in the national political process. I argue that we should reject the notion of translated preferences altogether because the very act of conditional spending itself is such a plain failure of the political process and one that is often meant to ignore the role of state citizens in the political process.

However, the implications of incorporating the values of state citizenship into our notion of American representative democracy do not end with conditional spending. Such a theory provides extra support for many of the norms of statutory construction that have grown to become vital protections for federalism values. The presumption against preemption, for instance, ought to be more vigorously enforced. Preemption of state law—especially when it occurs as a result of regulations created by unaccountable federal agencies—silences the political voices of state citizens. Presumably, preempted state laws were put in place through a democratic political process at the state level. When an agency regulation renders such laws void, it also effectively erases the votes of the state legislators that enacted those laws and those of the state citizens who put them there to enact the laws. A presumption against preemption recognizes the serious implications of such measures, which tread dangerously close to an all-out breakdown in the political process that makes American representative democracy possible. It requires judges to recognize state citizens' votes as meaningful rather than brushing them to the side simply because a federal agency has a conflicting idea.

It is beyond the scope of this Essay to delineate precisely how courts might put more heft behind that presumption against preemption than currently exists, but some suggestions are certainly called for. First, we could require clear statements on behalf of Congress. The role of clear statements themselves is discussed below, but Courts could require them absolutely in order to overcome the presumption against preemption. Furthermore, Courts could fashion a sort of tiered scrutiny structure that recognizes that some laws or regulations preempt a greater number of state laws or affect some states much more than others. In instances where one or a few states are disproportionately

affected by a certain preemptive federal law or regulation, there is a greater fear that the most affected state citizens will have no chance to have their political voices heard regarding the things that affect them most. In those instances, it seems the presumption should require some sort of judicial effort to ensure that those citizens' voices have been taken into account in the passage of the law before they recognize its legitimacy. Otherwise, an overbearing national majority could seek a national goal at the expense of a national minority that happens to be a majority in the most affected state or states. Courts must ensure that before such a law is passed that those state citizens had a chance to bind together to be heard or at least be heard individually regarding the regulation or law in question.

The canon of statutory construction that requires a clear statement before the courts will interpret a federal statute to preempt state law similarly reinforces the representation of state citizens.[72] Just as the presumption against preemption requires federal judges to recognize the importance of state citizens in American representative democracy, the clear statement rule requires *Congress* to recognize their importance as well when drafting such statutes. The argument put forward in this Essay, which hopefully makes even clearer the link between representation at the state level and American representative democracy, gives Congress even greater reason to act intentionally when legislating in a way that threatens the political projects of state citizens. Much of this argument has been made before, but up to now, no one has clearly shown that pursuing these goals is more than just a charitable cause benefiting states. Instead, it is an essential aspect of fidelity to the Constitution's text and of ensuring realization of our common goal of American representative democracy.

72. *See id.* at 1381–82 (discussing the Court's application of clear statement rules in federalism cases).

A. *United States v. Comstock*

It is impossible for any constitutional thinker to anticipate or fully grasp the wide range of applications any theory might have if put into use. The world has a way of forcing altogether reasonable theories into awkward corners that would have been almost entirely unforeseeable to their inventors. Thus, my list above of suggested methods of implementation of *Democracy and Distrust* of federalism is not meant to be complete. The Elyan judge who keeps the theory in mind when viewing cases that bring representation of state citizens into question will certainly encounter novel situations that I cannot anticipate or account for. The Supreme Court of the United States recently wrangled with one such case, *United States v. Comstock*, and because of the current tendencies of courts to run roughshod over the interests of state citizens—even if those interests are firmly grounded in the Constitution's text—I would argue the Court got it wrong.

In *Comstock*, the Supreme Court held that a federal district court can order a federal inmate who is deemed sexually dangerous to be committed to a mental facility, even if that means an increase in the person's detention beyond the limits of his sentence.[73] The Court's expansive view of congressional power led it to hold that the Necessary and Proper Clause permits Congress to exercise this power.[74] Had the Justices considered the effects such a national law has on the political representation of state citizens, though, they might well have decided the case the other way.

Two political voices are silenced when any person is incarcerated: that of a citizen of the United States *as well as* that of a state citizen. Whatever the merit of the Supreme Court's novel and expansive reading of the Necessary and Proper Clause in *Comstock* may be, it is unquestionably a controversial one. I would argue that where a controversial

73. United States v. Comstock, 130 S. Ct. 1949, 1956 (2010).

74. *Id.* at 1956–59, 1961–65 (reasoning that the explicit breadth of power granted by the text of the Necessary and Proper Clause, federal historical practices, the accommodation of state interests, and the fact that the statute was narrowly tailored justified constitutional sanction for the federal government to enact a statute such as the one at issue).

question requires the Court either to expand national power in a novel way or to maintain the status quo through judicial review, the Court ought to inquire into the ramifications the expansion of federal power will have on representation of state citizens. Where, as here, expanding federal power means silencing the political voice of state citizens, an Elyan judge should exercise caution—perhaps even a presumption against—expanding federal power. Had the Supreme Court done so, it would have exercised judicial review for federalism and reinforced representation of state citizens.

VII. CONCLUSION

Professor Ely's theory left out something important. Proper attention to the Constitution's text reveals that American representative democracy has many distinctly state-based features that the Framers made clear were essential to its realization. State citizens and legislatures play key roles in every aspect of representation the Constitution establishes. Fidelity to the Constitution's text requires that we supplement Ely's theory to emphasize this overlooked aspect of American republicanism, and doing so provides an arsenal of new arguments for judicial review for federalism.

HOW HIGH IS TOO HIGH?: JUDICIAL ELECTIONS AND RECUSAL AFTER *CAPERTON*

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I. INTRODUCTION

> *Under our precedents there are objective standards that require recusal when the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable.*[1]
>
> —Justice Kennedy in *Caperton*

This much can be said with certainty: substantial contributions to judicial election campaigns have the potential to bias judges against non-donating parties and towards donating parties to litigation. In this, the *Caperton* Court was correct. However, they failed to provide any guidance except as to the outer limits of this proposition. If only the Court in *Caperton* had been able to give us an actual formula, wherein we could input the contributions of individual parties, times between elections and relevant litigation, and the ultimate judgments of the litigation, then perhaps the question of how high the bar is set for "constitutionally intolerability" would be an easy one. The Court did correctly note that most States adopt more rigorous recusal standards than are provided for by the Fourteenth Amendment; thus, perhaps, no formula is necessary in practice.[2] This Article seeks to examine whether such a formula is necessary and possible to create and if any potential solutions make such a formula unnecessary.

II. RIGHT TO TRIAL BY IMPARTIAL ARBITER

The Due Process Clause of the Fourteenth Amendment gives litigants the right to a fair trial before an unbiased judge.[3] There are many recognized instances when a judge may be considered so biased as to not be able to give a fair trial to one of the litigants. When one of these situations

1. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2257 (2009) (internal quotation marks omitted).

2. *Id.* at 2267 ("It is for this reason that states may choose to adopt recusal standards more rigorous than due process requires.").

3. *See* Johnson v. Mississippi, 403 U.S. 212, 216 (1971) (holding that a "trial before an unbiased judge is essential to due process").

arises, the due process rights of the disadvantaged litigant are implicated, and recusal of the judge is necessary. There is a common law standard for when a judge must recuse himself, which involves a calculation of whether the judge actually has a bias against one of the parties, and the Supreme Court has held that the Fourteenth Amendment's Due Process Clause incorporated the common law approach.[4] There are, however, circumstances in which a judge may not have the direct financial interest necessary under the common law test where recusal may be necessary, either because of another interest aside from a direct monetary one or because of the danger of looking partial to the public.

One such case is when one of the litigants or their lawyers has given a campaign donation to the judge tasked with deciding their case. Depending on the size of the donation, the judge may in fact be influenced by the donation to prejudge the facts of the case, the probability that they may prejudge the facts of the case is too high, or the public perception is such that they may misjudge the case based upon their own preconceptions or interest.

While the first two reasons only directly implicate the due process rights of the litigants, it is necessary that the public have faith in their own due process rights before tribunals if they are to have any faith in our system of justice. As such, the third consideration is not merely ancillary but an important one indeed for the proper administration of justice. The question still remains, however, how much more than a mere nominal donation to the campaign of a judge is sufficient to implicate the due process rights of the party to the litigation who has not donated money to the judge's campaign. The Supreme Court took up this matter in *Caperton v. A.T. Massey Coal Co.*,[5] discussed below.

4. Tumey v. Ohio, 273 U.S. 510, 523 (1927) (incorporating the common law standard in holding that a mayor, serving as a justice of the peace, had direct pecuniary interest in finding the defendant guilty in a trial in which the mayor's township received half of any imposed fine).

5. 129 S. Ct. 2252 (2009).

A. Caperton v. A.T. Massey Coal Co.

1. The Case

The most recent and public instance in which an elected judge's legitimacy in sitting on a case was challenged was in 2009, when the Supreme Court ruled in *Caperton*. The case arose out of a West Virginia jury verdict finding Massey liable for fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations.[6] The jury awarded Caperton $50 million in both compensatory and punitive damages.[7] Massey filed post-trial motions challenging the verdict and damages award, which the state trial court denied in June 2004.[8] Furthermore, the trial court denied Massey's motion for judgment as a matter of law in March 2005.[9]

2. The Campaign

The appeal had not even begun before the intrigue began, which provided the basis for John Grisham's appropriately titled novel, *The Appeal*.[10] After the verdict but before West Virginia held its 2004 election, Don Blankenship, Massey's chairman, CEO, and president, decided to support an attorney who was running to replace one of the members of the Supreme Court of Appeals of West Virginia.[11] This attorney's name was Brent Benjamin, and Massey not only donated the statutory maximum of $1,000 to Benjamin's campaign committee but also spearheaded a donation of almost $2.5 million to a political organization, "And For The Sake Of The Kids."[12] This organization was opposed to McGraw, the incumbent, and supported Benjamin.[13]

6. *Id.* at 2254.
7. *Id.*
8. *Id.*
9. *Id.*
10. JOHN GRISHAM, THE APPEAL (2008).
11. *Caperton*, 129 S. Ct. at 2254.
12. *Id.* While Justice Kennedy, writing for the majority in *Caperton*, notes that Blankenship donated almost $2.5 million, reports at the time indicate that it was closer to $1.7 million. Brad McElhinny, *Massey Chief Pours $1.7 Million into Race*, CHARLESTON DAILY MAIL, Oct. 15, 2004, at 1A. In light of the overwhelming disparity between either amount and all other funds raised for Benjamin's campaign, the Court's holding would likely remain unchanged.
13. *Caperton*, 129 S. Ct. at 2257.

Blankenship's generosity did not end there; in addition, he spent over $500,000 on a direct mailing campaign, letters soliciting donations, and television and newspaper advertisements, all in support of Brent Benjamin.[14] All told, Blankenship's $3 million effort was more than all of Benjamin's other supporters combined, three times the amount spent by Benjamin's own campaign committee, and $1 million more than the total spent by both Benjamin's and McGraw's campaign committees combined.[15] Ultimately, Benjamin won by 47,735 votes, or 53.3% of the vote.[16]

3. The Appeal

A year later, in October 2005, recognizing that now-Justice Benjamin might have a conflict of interest in the case, Caperton moved to disqualify him based on the Due Process Clause and the West Virginia Code of Judicial Conduct.[17] Justice Benjamin denied the motion, stating that "he found 'no objective information . . . that this Justice will be anything but fair and impartial.'"[18] Massey then filed its appeal challenging the jury verdict.[19] The West Virginia Court of Appeals, which consists of only five justices, reversed the $50 million verdict in a 3–2 decision, the majority being composed of Chief Justice Davis, Justice Maynard, and Justice Benjamin, with Justices Starcher and Albright dissenting.[20]

4. The Rehearing and Recusals

Caperton sought a rehearing, and the parties moved for disqualification of three of the five Justices who decided the original appeal: Justice Maynard, Justice Starcher, and again Justice Benjamin.[21] Photos had surfaced of Justice Maynard vacationing with Blankenship in the French Riviera during the pendency of the appeal, and the grounds

14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 2257–58.
19. *Id.* at 2258.
20. *Id.*
21. *Id.*

for Justice Starcher's disqualification were his public criticism of Blankenship's role in Benjamin's 2004 campaign.[22] Justice Maynard recused himself as did Starcher, who went on to urge Justice Benjamin to recuse himself. Again, he refused.[23] Caperton moved once more for disqualification, this time including a public opinion poll that indicated that over 67% of West Virginians doubted Justice Benjamin would be fair and impartial.[24] Again the motion was denied, and Justice Benjamin, now acting in the capacity of Chief Justice, selected Judges Cookman and Fox to replace the recused justices. In April 2008, the court again reversed the jury verdict in a 3–2 decision, with Justices Benjamin, Davis, and Fox in the majority.[25] Four months after the opinion and one month after the petition for a writ of certiorari, Justice Benjamin filed a concurring opinion defending his decision not to recuse, quoting the common law standard that "he had no 'direct, personal, substantial, pecuniary interest' in [the] case."[26]

5. The Supreme Court's Decision

The Supreme Court held in a 5–4 opinion written by Justice Kennedy that the Due Process Clauses of the Fifth and Fourteenth Amendments could be violated even if the common law standard was adhered to, and as such, more was required.[27] The Court considered two cases that fell outside the common law rule: *Tumey v. Ohio*[28] and *In Re Murchison*.[29] *Tumey* dealt with a mayor who acted as a judge and derived part of his income from fines collected in his capacity as judge, wherein fines were not assessed upon acquittal.[30] In addition, the mayor was interested in the outcome of each proceeding involving a fine because a portion of the fines were used to help the financial needs of the village, and as such, the Due Process Clause required

22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 2259.
27. *Id.*
28. 273 U.S. 510 (1927).
29. *Caperton*, 129 S. Ct. at 2259–62.
30. 273 U.S. at 523.

disqualification.[31] The judge in *In Re Murchison* charged the petitioners respectively with perjury and contempt in his courtroom, first for statements he found to be untruthful and second because the accused declined to answer questions because he did not have counsel with him.[32] The judge then proceeded to try and convict both petitioners, and the Court found that the judge's earlier participation in the matter in charging them disqualified him.[33] Based upon its analysis of these two cases, the Court then turned to the facts in *Caperton* and noted, "[T]he disqualifying criteria 'cannot be defined with precision. Circumstances and relationships must be considered.'"[34] Unlike the subjective common law standard of whether an interest actually exists that would influence the particular judge in a given case, the Court found that "[t]he inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'"[35]

In the context of recusal based upon judicial-election campaign donations, the Court found that the inquiry should involve the contribution's size relative to the total amount spent on the campaign, the total amount spent in the election, and any apparent effect that the donation had in the outcome of the election.[36] Ultimately, not every campaign contribution by a litigant would create grounds for recusal, and ultimately whether the donations were a necessary and sufficient cause for electoral victory was irrelevant.[37] The Court's reasoning in applying an objective test was two-fold. First, because judges decide their own motions for disqualification, a subjective test requires the judge to make an introspective inquiry in which he may misread or misapprehend his real motives in deciding a case, for which there would be no protection or possible

31. *Id.* at 545.
32. *In Re* Murchison, 349 U.S. 133, 133–36 (1955).
33. *Id.* at 137.
34. 129 S. Ct. at 2261 (quoting *Murchison*, 349 U.S. at 136).
35. *Id.* at 2262.
36. *Id.* at 2264.
37. *Id.* at 2263–64.

review.[38] Second, although not its primary purpose, an objective rule "eliminate[s] even the appearance of partiality."[39] Unfortunately, because due process defines the outer bounds of when recusal is necessary, under this objective standard there may be situations where judges who have no actual bias would be barred.[40] Applying an objective test and noting both the amount of money spent in relation to other money spent on the election and the temporal relationship between the campaign contributions, the election, and the pendency of the case, the Court found this case to be so extreme as to violate the plaintiff's due process rights.[41]

III. GUIDANCE, BUT WHERE?

From *Caperton*, we learned that in the limited case of campaign contributions an objective test ought to be applied in determining the outer limits of the due process right to a fair trial before an impartial decision maker.[42] Still, because the Court declined to define exactly what the test is for "less extreme situations,"[43] this leaves the average judge who is faced with a motion for disqualification with myriad questions, many of which were raised by the dissent in *Caperton*, of which Chief Justice Roberts details the first forty that come to mind.[44] Among these are: How much money is too much money? When is an expenditure disproportionate? What if the supporter is not a party to the pending case but whose interests will be affected? Does the analysis change when dealing with trial, appellate, or supreme court judges? Must the judge's vote be outcome determinative as in *Caperton*?[45] Needless to say, the list could go on and on. Without laying out a clear standard for when due process concerns are implicated for judicial campaign contributions, has the majority in *Caperton* merely muddied the waters? It is clear that Justice

38. *Id.* at 2263.
39. *Id.* at 2266.
40. *Id.* at 2265.
41. *Id.* at 2264.
42. *Id.* at 2267.
43. *Id.* at 2266.
44. *Id.* at 2269–72 (Roberts, C.J., dissenting).
45. *Id.*

Benjamin should have been disqualified from deciding Caperton's appeal, but many questions linger. Because *Caperton* did not give a clear-cut rule as to when recusal is necessary, although the majority recognized that this was a rare case, the question remains whether *Caperton* should be confined to its facts. It has been noted that the reason the issue of monetary donations is so important to judicial impartiality is not inherent in the money itself but in what that money buys, and in the circumstances of a judicial election, money can be converted into political capital and ultimately votes.[46] As such, an analysis of how judicial campaigns are run practically is necessary.

IV. JUDICIAL CAMPAIGNS IN THE REAL WORLD

While some state judges are appointed and never have to enter into the electoral process, a staggering 89% of state judges must stand for election either to get into office or to maintain their position in a retention election.[47] This is in contrast to the rest of the world where (with very few exceptions) no judges ever face election—be it retention or otherwise.[48] Even when a judge is facing a retention election with no visible opponent on the ballot, the election can still exert pressure on a judge's decision making. The Honorable Otto Kaus, on deciding a controversial case while facing reelection, noted, "It was like finding a crocodile in your bathtub when you go in to shave in the morning. You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving."[49] As such, even a method designed to reduce the partisan nature of elections can still have an influence on a judge's thinking. It appears then that in any system in which judges are elected, "the fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot

46. Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of Caperton*, 123 HARV. L. REV. 80, 81 (2009).

47. Bert Brandenburg, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229, 1230 (2008).

48. *Id.* at 1232–33.

49. Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133 (1997).

be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for elected office."[50] Judges that try to adhere to the principle of ignoring the popular will rarely remain in office long. While the same may be true of legislators who ignore their constituents, judges are not meant to be representatives. Nevertheless, the parallel nature of legislative and judicial elections puts them in a position where the impression is that they are.[51]

It has been noted that questionnaires are becoming more and more prevalent as tools for interest groups both to pressure judicial candidates to take a position on certain issues before entering office and to determine what their positions may be in advance.[52] These questionnaires are often designed in such a way as to have the judicial candidate either agree or disagree with a statement without the opportunity for comment—for example, "I believe that *Roe v. Wade* was wrongly decided."[53] Such questionnaires do not allow opportunity for any nuance, nor do they allow judges to clarify their reasons for any given position they may have on previous judicial rulings. And they simplify what may in fact be complex legal problems to a single hot-button issue that often turns on mere political opinion regardless of whether the judge tries to and in fact does set aside his or her political beliefs in making judgments on any particular case.[54] Some judges are choosing not to respond to such political tactics to bring them within the realm of policy makers, like legislators,[55] but those who wish to be successful in the long run recognize that their answers could cause significant donations and other support or opposition to their candidacy.[56]

The perception has traditionally been that lawyers are the main source of contributions for judicial campaigns, almost to the exclusion of other parties. Contributions have been on

50. Chisom v. Roemer, 501 U.S. 380, 400 (1991).

51. *See* Wells v. Edwards, 347 F. Supp. 453, 455 (M.D. La. 1972) (citing Stokes v. Fortson, 234 F. Supp. 575 (N.D. Ga. 1964)).

52. Brandenburg, *supra* note 47, at 1244.

53. *Id.*

54. *Id.*

55. *Id.* at 1245.

56. *Id.* at 1244.

the rise, an illustrative example being that judicial candidates for state high courts between 1999 and 2006 raised over $157 million, more than twice the amount raised by candidates in the four election cycles prior combined.[57] In 2008 alone, almost $34 million was contributed to state high court campaigns.[58] While the composition of these donations has become less heavily weighted towards attorneys, with only 26% of donations coming from attorneys, when combined with the 35% that comes from businesses and business groups with a political interest, the vast majority of political contributions are given by parties who have or may have a future interest in a decision to be decided by the judge, with only 11% coming from political parties, 7% from the candidates themselves, and the remainder from private donors.[59] Whether wrongly or otherwise, business interests and lawyers view this campaign spending, be it direct donations or third party advertisements or the like, as litigation investment.[60] The problem of judicial campaign spending had long been perceived to be "just a Texas problem," but it has spread to other states and presents a dilemma in every state that elects judges and in every judicial election.[61]

V. POTENTIAL SOLUTIONS

Because of the high percentage of litigants and lawyers making contributions to judicial campaigns, when these contributions rise to *Caperton* levels, or at least to levels which implicate due process, the justice system can be compromised. Even recusal of potentially biased judges does not necessarily solve the problem. In *Caperton,* when two potentially biased judges were disqualified but Justice Benjamin remained, the Supreme Court of Appeals of West

57. *Id.* at 1237.

58. Kate David, *Juicy Enough For Grisham, But Does It Have Any Bite?* Caperton v. A.T. Massey Coal Co. *and the Impact for Texas Courts,* HOUS. LAW., Oct. 2009, at 38, 39–40.

59. Brandenburg, *supra* note 47, at 1238 (indicating that the figures were calculated based upon average percentage contributions of the individual parties between 1999 and 2006).

60. *Id.*

61. *Id.* at 1236.

Virginia came to the same result.[62] Even in the case where all judges who may be biased recuse, the system has infirmities. The proper way to fix the system is not post-problem band-aids such as recusal but to use recusal in only the most extreme of circumstances and work to eliminate the potential for bias and impartiality at its core.

A. *Where We Have Come From*

Caperton was certainly not decided in a vacuum or without precedent, and it is useful to review what the standards for recusal were before *Caperton* in examining potential solutions to the problem of bias in judicial campaign donations.

B. *Common Law Approach*

As was noted in *Caperton* and *Tumey*, the common law approach—which the Fourteenth Amendment's Due Process Clause incorporates in *Tumey*—examines whether the judge "has a direct, personal, substantial pecuniary interest in reaching a [specific] conclusion."[63] Judicial campaign contributions, however, simply do not fit neatly into this model.[64] The reasoning for this is both in the temporal relationship between campaign contributions and subsequent decisions and because campaign contributions are not in and of themselves useful for the money itself; to be indelicate, the contributions buy votes.[65] Even though a judge does not have a direct monetary interest in the outcome of a case—and even absent direct bribery or *quid pro quo* arrangements—the judge may feel so indebted to contributor litigants that recusal is necessary.[66]

In addition, the common law approach employed a subjective test, which the judge applied to himself or herself. As the Court in *Caperton* noted, such an approach can be dangerous because it is not easily reviewable and because it

62. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2258 (2009).

63. *Id.* at 2268 (citing Tumey v. Ohio, 273 U.S. 510, 523 (1927)).

64. Molly McLucas, *The Need for Effective Recusal Standards for an Elected Judiciary*, 42 LOY. L.A. L. REV. 671, 680 (2009).

65. *See* Karlan, *supra* note 46, at 81.

66. McLucas, *supra* note 64, at 680.

is open to both abuse and mistake due to the introspective nature of the inquiry.[67]

C. *ABA*

The Court in *Caperton* was not the first to recognize that the common law approach does not provide sufficient coverage of litigants' interests against a biased decision maker; both Congress and the American Bar Association (ABA) have long acknowledged this problem.[68] As far back as 1792, Congress recognized the need for recusal when a judge's impartiality might reasonably be questioned.[69] While there is no uniform standard applied to elected state judges, the ABA drafted the Model Code of Judicial Conduct in 1992, which recognizes that the judge should avoid even the appearance of impropriety in order to protect the public image of the judiciary.[70] Both of these tests in effect espouse the same standard applied in *Caperton*: where a reasonable observer would believe that there is the probability of partiality of the judge, recusal is necessary and proper.[71]

D. *Pure Appointment*

One potential solution is to eliminate elections completely from the equation. As noted previously, much of the rest of the world uses this system and thereby evades many of the problematic effects of judicial election campaigns on the administration of justice.[72] Does this merely sidestep the problem and push it a level higher? With recent decisions such as *Bush v. Gore*,[73] it is now well within the public consciousness the effect that judicial decisions can have on the day-to-day life.[74] As such, if we are to have elected officials—be they executive or legislative—selecting all the members of the judiciary, the pressure may simply be shifted onto them to acknowledge what the political

67. 129 S. Ct. at 2262–63.

68. McLucas, *supra* note 64, at 681.

69. *See* Act of May 8, 1792, ch. 36, § 11, 1 Stat. 275, 278–79.

70. MODEL CODE OF JUDICIAL CONDUCT Canon 3 (2007).

71. 129 S. Ct. at 2266.

72. *See* Brandenburg, *supra* note 47, at 1232–33 (indicating the limited jurisdictions outside the United States with an elected judiciary).

73. 531 U.S. 98 (2000).

74. Brandenburg, *supra* note 47, at 1236.

persuasion their appointees will be and what positions they will take, hand picking candidates to fit these goals. History has shown us that in the case of federal judges appointed for life, predicting their decision making can be difficult. But would the public perceive as fair the appointment for life of the entire state judiciary? In the same way, it would be difficult to repeal the Seventeenth Amendment[75] and remove the election of Senators from the hands of voters. There would likely be an uproar if such a move were undertaken, especially based upon what party was in power at the time the measure was approved. Absent such a system of nonaccountability to the interests of would-be constituents, albeit once more removed, the probability of bias based upon appointment remains.

E. *Appointment and Retention Elections*

As noted above, appointment of judges takes away some of the problems posed by judicial-election campaign contributions. However, it also could cause other problems to arise. Retention elections after original appointment would alleviate this problem somewhat yet still raise ghosts of the original problem. Judges would—at least for their first term—be free of the shackles of debts to campaign contributors, at least if they were only to look to the present. Judges, however, that were cognizant of the necessity of campaign funds to remain in office would be open to influence. Ultimately, this would be tempered by the low attrition rates of retention campaigns and their consequently less burdensome price tag.

F. *Publicly Funded Campaigns*

A system wherein judicial campaigns are funded, wholly or in part, by the public has also been suggested.[76] Such a system for elections generally has been adopted in some

75. *See, e.g.* Robert L. Brown, *Toxic Judicial Elections: A Proposed Remedy*, 44-Fall ARK. LAW. 12, 40 (2009); *see also* Brandenburg, *supra* note 47, at 1250–58 (analyzing public funding of judicial elections, which has been adopted in some form in 21 states).

76. *See, e.g.*, Robert L. Brown, *Toxic Judicial Elections: A Proposed Remedy*, ARK. LAW., Fall 2009, at 12, 40; *see also* Brandenburg, *supra* note 47, at 1250–58 (analyzing public funding of judicial elections, which has been adopted in some form in twenty-one states).

form in twenty-one states and has been proposed for judicial campaigns.[77] Full public funding is not necessarily a viable solution. If anyone is able to readily acquire public funding to run, there may be a glut of indistinguishable candidates, leading to unpredictable results. As such, most public funding systems require a candidate to raise some money first to qualify for public aid.[78] This again implicates the concerns that a party may be able to have influence over a judge at least slightly and may be even more dangerous since it may be easier for one party to raise the entirety of the seed money to, in effect, finance the judge's campaign through the secondary public funds. This concern aside, the costs of such a system could be quite prohibitive. Even a simple mail out can cost a not-insignificant amount of money: North Carolina employs such a system, and sent out 3.7 million voter's guides in 2008, published at a cost of $0.38 each.[79] While this total might seem small for a state's budget, this is for a mail out only and one that contains information on all candidates. If states were to, in addition, fund the individual campaigns of judicial aspirants, the costs would no doubt be much higher. With many states mired in budget crises of their own, it may be impractical and even impossible to shift such a heavy burden upon them. Ultimately, as Roy Schotland notes, even if campaigns are funded publicly, money that could influence judges through the results of an election "always finds another channel."[80]

G. *Third-Party Recusal*

Another potential fix that could serve to help limit the appearance of biased judges and the administration of an objective recusal test is the examination of a recusal motion by a third-party judge. Such a system is employed currently in some states, including Texas.[81] This system would surely alleviate some of the problems of an actual-bias test being

77. Brandenburg, *supra* note 47, at 1251.

78. *Id.* at 1254.

79. Brown, *supra* note 76, at 40.

80. Brandenburg, *supra* note 47, at 1254.

81. Jeffrey T. Fiut, *Recusal and Recompense: Amending New York Recusal Law in Light of the Judicial Pay Raise Controversy*, 57 BUFF. L. REV. 1597, 1631 (2009).

an introspective assessment as discussed in *Caperton*[82] but would also help avoid the appearance of impropriety to the public by taking recusal out of the hands of the judge, an interested party to be sure.

VI. CONSEQUENCES OF ALLOWING CONTRIBUTIONS

Even were these methods to be employed and work, there would still remain many pitfalls in the present system. Justice Michael Wolff of the Missouri Supreme Court described one such pitfall, "I always say if you're going to shoot the tiger, you'd better kill the tiger. If you don't kill the tiger, you're going to have one angry tiger."[83] This problem is not entirely fixed by having a third-party judge decide a recusal motion and may be exacerbated by it, as the displeased, nonrecused judge has his first crack at the litigants at trial. It is even possible then that a second recusal motion could be undertaken based upon the parties having biased the judge against them through the first recusal motion, were the parties willing to go double or nothing on the proposition. One proposal which could serve to fix this problem would be to take third-party recusal even further. Third-party recusal where the judge in question never has notice of the recusal motion could be employed. Under this model, the only way the judge ever hears about the motion is if it succeeds and the judge is recused, and as such, there can be no potential for post-recusal-motion prejudice. Whether it would be possible to keep all talk of a recusal motion from a judge when his fellow judge is ruling on it is a practical question which could be dealt with in the implementation of such a plan—having closed hearings on the motion, for example.

Other strategies after *Caperton* may include donations to the campaign of a judge known to be predisposed against a litigant's interests. In this case the opponent litigant would then be faced with the choice of whether to seek to disqualify the potentially favorable judge on the basis of potential bias from campaign contributions. Many iterations of these

82. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263 (2009).

83. David, *supra* note 58, at 42–43 (internal quotation marks omitted).

patterns could arise which would only further complicate the analysis.

VII. A TEST?

Justice Kennedy listed the factors that could be considered in an objective recusal test: the contribution's size relative to the total amount spent on the campaign, the total amount spent in the election, and any apparent effect that the donation had in the outcome of the election.[84] In analyzing these factors, there are certain assumptions that must be made in order to form an interrelation between them. First, one would have to assume that one campaign would spend money as efficiently as another and that similar spending would yield similar results in votes. For simplicity's sake, one must also assume that each subsequent dollar spent had a proportionate effect to the previous ones. This is not likely true, due to the declining marginal utility of money, but without such an assumption a complicated factor accounting for this decrease would have to be inserted into the equation. For a simpler model, one could also assume that only in the result that the contribution accounted for the victory and not just an increased margin of victory would the contribution be found to have been objectively influential. Election results by percentage would also play a part in the equation, and in order to determine the apparent effect of the donation, a baseline would need to be established, likely through public opinion polls before the donation, if available. One final assumption that would need to be made is that all money donated to the campaign was spent in the election. Using these principles, the term which accounts for the effect of the total amount spent by the elected judge would first need to be determined. Given a baseline public opinion poll that shows the judge's percentage of voters, x_{j1}, and then a final election percentage, x_{j2}, the difference between those percentages can be said to be accounted for by the difference between the money spent by the campaigns, given the assumptions above. An example will clarify.

84. *Caperton*, 129 S. Ct. at 2264.

Assume that the judge has a baseline of 45% while the opponent has 55% (x_{j1}=45). Assume also that the opponent spends no money on his campaign, such that $\$_o$=0, while the judge spends \$100, $\$_j$=\$100. Come election time, the judge wins with 55% of the vote (x_{j2}=55). Then the difference between the baseline and election values is 10%, x_{j2}-x_{j1}=10%. Because we assume that each dollar accounts equally, each percentage point cost \$10. When the opponent spends money on her campaign, this becomes slightly more complicated because each \$10 she spends will win back a percentage point, assuming similar efficiency. All that matters is the difference between the spending of the campaigns if we assume dollars off the top are still worth the same. Thus, the amount each percentage point can be said to have cost is ($\$_j$-$\$_o$)/($x_{j2}$-$x_{j1}$). Given that value for each percentage point, we then look at the margin of victory in terms of percentage points, or x_{j2}-50. If the contribution made by the party before the judge accounts for more than the total value of each percentage point times the margin of victory, then they can certainly be said to have been outcome determinative. So given a contribution C, if C > (x_{j2}-50)($\$_j$-$\$_o$)/($x_{j2}$-$x_{j1}$), then recusal is required as the contributor has in effect paid for the win and for the judge to be in office. This does still raise certain questions and should probably be subject to a baseline contribution such that if C/$\$_j$ is very small this should be ignored, as otherwise judges elected in close elections would often not be able to sit for cases in which only nominal donations were made. Other problems with this model include the underlying assumptions of similar efficiency of campaigns and the decreasing value of each dollar donated, the latter of which could certainly be accounted for, albeit in a complicated manner involving market analysis in the area where recusal is required.

VIII. CONCLUSION

Regardless of what solution is undertaken to reduce the likelihood of bias or the appearance of bias, ultimately, in campaigns and in life, "money always finds another channel"

and another way to influence the process.[85] As such, it is not possible to eliminate the possibility or the potential appearance of impropriety. While a test for recusal would be quite a boon, in the end such a test would likely either prove too simple and merely raise more questions or too complicated and tough to administer properly. Where my proposed test falls on that continuum remains the question in whether it can be practically implemented. Ultimately, *Caperton* need not be read further than its facts; as in all practical matters, the States' rules on recusal are in fact more rigorous.[86] Then, it is not up to the federal government to intercede but for the States to administer their more rigorous standards properly.

85. *See* Brandenburg, *supra* note 47, at 1254 (arguing that changes in campaign-funding laws do not deter funding but rather simply reroute the campaign contributions).

86. 129 S. Ct. at 2267.


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