TEXAS REVIEW of LAW & POLITICS

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

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PREFACE

Texas and our nation recently lost a brilliant legal mind with the untimely passing of the Honorable William Lockhard Garwood. For more than thirty years, Judge Garwood served as an exemplary jurist who approached his work with diligence and courage. His opinions have left an impressive legacy, not only in their holdings, but also in their scholarly nature, meticulous application of traditional canons of statutory interpretation, and recognition of the proper role of the judiciary. In 2008, the *Review* had the honor of recognizing Judge Garwood as our Distinguished Jurist of the Year. We now dedicate this issue to his memory.

Our lead article, *Giant Among Us: Reflections on the Life and Legacy of the Honorable Will Garwood,* serves as a memorial to Judge Garwood. It includes personal remembrances and insights on Will Garwood as a man and a judge, with contributions from three of his colleagues on the United States Court of Appeals for the Fifth Circuit: the Honorable Chief Judge Edith Jones, the Honorable Judge E. Grady Jolly, and the Honorable Judge Priscilla Owen; six of his former law clerks: J. Bruce Bennett, Patrick L. O'Daniel, Christian J. Ward, Sean R. Keveney, Marc A. Levin, and Meg Williams; and constitutional scholars Lino A. Graglia and Sanford Levinson.

Recently, tax exemptions for particular individuals and entities have faced increased scrutiny. This is certainly true of § 107 of the Internal Revenue Code, known as the parsonage exemption, which allows religious ministers to deduct a portion of their pay to cover expenses related to the maintenance of a home. In our next article, *The Parsonage Exemption Deserves Broad Protection,* Justin Butterfield, Hiram Sasser, and Reed Smith analyze the history, constitutionality, and recent jurisprudence of the parsonage exemption. They argue that the exemption does not violate the Establishment Clause and is necessary to ensure fairness in the tax code.

We are currently in the midst of the first major election season since voting districts were redrawn after the 2010 Census. The constitutionality of these redistricting plans has been challenged in many states, including Texas. In their timely article, *No More Weighting: One Person, One Vote Means One Person, One Vote,* Kent

D. Krabill and Jeremy A. Fielding discuss the Supreme Court's one person, one vote jurisprudence. They also criticize several recent circuit court decisions, arguing that the population of voters, rather than the total population (which may include a large number of noncitizens) should be used as the apportionment base in order to ensure that each person's vote is weighed the same.

Our next article, *Private Employees' Speech and Political Activity: Statutory Protection Against Retaliation*, is also relevant to the 2012 election season. In it, Professor Eugene Volokh provides an annotated list that shows the historical development of state and local provisions limiting employers' rights to fire people based on their speech or political activity.

Today, an increasing number of politicians, including our 2012 Distinguished Jurist of the Year, Senator Mike Lee, have expressed interest in sunset provisions as a strategy to increase government accountability and eliminate obsolete laws. Our next piece is based on a transcript of *Showcase Panel IV: A Federal Sunset Law* from the 2011 Federalist Society National Lawyers Convention. In a panel moderated by the Honorable Jeffrey S. Sutton, the Honorable Frank H. Easterbrook, Professor William N. Eskridge, Philip K. Howard, and Professor Thomas Merrill evaluate the effects of historical sunset provisions, analyze the rationales and merits of sunsetting, and discuss the idea of a federal sunset law.

We conclude this issue with Pejman Yousefzadeh's *Dick Cheney and the Robust Conception of Presidential Power.* In this book review of Dick Cheney's *In My Time: A Personal Memoir,* Mr. Yousefzadeh highlights Vice President Cheney's belief in a strong Executive Branch. It will be interesting to see how much of an influence Cheney's legacy will have on the selection of this year's Republican vice presidential candidate.

It has truly been an honor to serve as Editor in Chief for Volume 16 of the *Review.* I am especially grateful for the opportunity to work with such an inspiring group of individuals involved with the *Review* this year. I would like to thank all of them for their support, hard work, and dedication to conservative ideas.

Austin, Texas
May 2012

Shauneen M. Garrahan
Editor in Chief

GIANT AMONG US: REFLECTIONS ON THE LIFE AND LEGACY OF THE HONORABLE WILL GARWOOD

EDITED BY CHRISTIAN J. WARD,* SEAN R. KEVENEY,** AND MARC A. LEVIN***

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* Mr. Ward is a partner in the Austin office of Yetter Coleman LLP; he received his J.D. from Harvard Law School in 2001.

** Mr. Keveney is a Trial Attorney in the Civil Rights Division of the United States Department of Justice; he received his J.D. from the University of Texas School of Law in 2002.

*** Mr. Levin is a director of the Center for Effective Justice at the Texas Public Policy Foundation; he received his J.D. from the University of Texas School of Law in 2002.

Each of the editors of this Article served as a law clerk to Judge Garwood. The editors wish to acknowledge and thank the many individuals who have contributed commentary or otherwise given invaluable assistance in its preparation: Chief Judge Edith Jones, Judge Grady Jolly, Judge Priscilla Owen, Professor Lino Graglia, Professor Sanford Levinson, Bruce Bennett, Patrick O'Daniel, Meg Williams, Allison Lawler, and Joel Simmons.

I. INTRODUCTION

With the recent passing of Fifth Circuit Judge William Lockhart Garwood, Texas and the nation have lost one of their most widely admired legal minds—a mind that gently, quietly, but firmly exerted its influence on our jurisprudence over three decades. This Article collects insights on Will Garwood as a judge and a man from colleagues, scholars, and clerks, all of whom he inspired to strive for greater perfection in thinking about the law. Judge Garwood is no longer with us in body, but his legacy survives in printed words and a deep imprint on many lives.

Judge Garwood's Life

William Lockhart Garwood was born in Houston, Texas on October 29, 1931, the son of W. St. John Garwood (later a Texas Supreme Court justice) and Ellen Clayton Garwood. He graduated from the Middlesex School in Concord, Massachusetts, and, in 1952, from Princeton University and the Woodrow Wilson School of Public and International Affairs. As a student at the University of Texas School of Law, Garwood ranked first in his class all three years and was a member of the Order of the Coif, Grand Chancellor, an Associate Editor of the Texas Law Review, and a member of Phi Delta Phi. He received his LL.B. with Honors in 1955. In the same year, he was admitted to the Texas State Bar, began serving as the first law clerk to Fifth Circuit Judge John Brown,[1] and married Merle Haffler, who would be his loving wife for 55 years.

After his clerkship ended, Garwood served for 3 years in the Pentagon Defense Appellate Division of the Judge Advocate General Corps. In 1959, he joined the law firm of Graves, Dougherty, Hearon, Moody & Garwood in Austin, Texas, where his father was practicing law after retiring from the Texas Supreme Court. In 1979, Governor Bill Clements appointed Will Garwood to the Texas Supreme Court. Justice Will Garwood became the first Republican to serve on that court since Reconstruction; he was also the only son of a former Texas Supreme Court justice to serve on it. In 1981, President Ronald

1. Judge Brown served on the United States Court of Appeals for the Fifth Circuit from 1955 until his death in 1993. He served as Chief Judge of the Circuit from 1967–1979.

Reagan appointed him to fill a newly created seat on the United States Court of Appeals for the Fifth Circuit. When Judge Garwood began serving on that court, one of his colleagues was his former employer, Judge Brown. Judge Garwood served on the Fifth Circuit for 30 years. He died on July 14, 2011, after a brief illness, during which he was making plans for his next sitting from his hospital bed.

II. PERSONAL REMEMBRANCES OF JUDGE GARWOOD

Judge Garwood never failed to impress anybody he came in close contact with by his intellect, his love for and command of the law, and his gentlemanly character. Judge Garwood's lasting impact on the courts on which he served and the broader legal community through the law clerks he mentored is undeniable. This section collects remarks from colleagues on the Fifth Circuit and former clerks focusing on Judge Garwood as a man, a teacher, and a friend.

A. *Judge Garwood as Colleague*

Some jurists make contributions to the courts on which they serve that go far beyond their solitary work in chambers. Judge Garwood was one such judge. Below are remarks by two of his Fifth Circuit colleagues, the Honorable Chief Judge Edith Jones and the Honorable Judge E. Grady Jolly, speaking to the breadth and depth of Judge Garwood's influence on them and their court. Section III of this Article contains commentary from a third colleague, the Honorable Judge Priscilla Owen, focusing particularly on how Judge Garwood approached the craft of judging.

1. Remarks by the Honorable Edith H. Jones, Chief Judge of the United States Court of Appeals for the Fifth Circuit *At the Memorial Service for Judge Will Garwood, Austin, Texas, July 29, 2011.*

Mr. [Robert] Hearon and Mr. [Bruce] Bennett are two people very hard to follow in their eulogizing, but I will say what I can because Will Garwood is a man worth talking about. I will try not to be too long. It's fitting that we have at least one woman here on the podium because Will was definitely a man's man. Who could be caught downwind of his pipe smoke and not realize that's something men do. Who could not listen to his tales about

hunting, or getting caught by the police with a fellow Princeton undergraduate who would later become Secretary of State, and not know that he was truly a man's man? But Will was also beloved by the ladies that I know; particularly by those of us on the court because he always treated us like ladies. As the famous line in "My Fair Lady" goes, he treated you like a lady and therefore you were more inclined to act like one. He treated us as equals and therefore we were more inclined to try to live up to his high intellectual standards. He made you want to be a better person because of his qualities that have already been discussed today and that you all know about. I share a few brief memories of Will, with whom I worked for 26 years, and who has been one of my best friends.

He was a man I could call up on the phone and talk to, seeking advice about cases. I would ask what he knew about the law. Even if he didn't know very much about a particular issue, his reasoning powers were such that he would inevitably lend something worthwhile to the conversation. More often than not, not only did he know the law, he knew all the cases and could recall them far better than I could. He was a treasured resource not only for me but for other judges.

He was a man who could take on the hardest cases on the court. Bob Hearon mentioned the tax law. Will would take those cases. The rest of us were always hopeful that somebody else would step to the fore but he would take them, whether they were tax or condemnation or whatever you could throw at him that was difficult, and he worked and worked until he got them absolutely right. We all had perfect confidence in his opinions. When you were researching and could find a Will Garwood opinion, because of its thoroughness, you knew that it not only articulated the law, but articulated the whole law and not just the way he wanted the law to be. Will Garwood's opinions always enhanced the stature of our court.

I would be remiss if I didn't say that the deepest bond I would hope to share with Will was based on his love of the U.S. Constitution as law. He spent his entire life, and dedicated his professional life to applying the Constitution as a document that creates our government's framework, and, most importantly, is an enforceable framework, not just a piece of paper or putty that can be molded and adapted to suit the times. Will Garwood was an incomparable defender of liberty protected by the Framers'

Constitution.

Let me read a short quotation that I think sums up the way he wrote opinions. It is from a collection of writings by the French economist Frederic Bastiat that I recently came across in the *Wall Street Journal.* Bastiat described the process and content of his writing on political economy: ". . . [i]t must not contain a single word that has not been weighed. It has to be formed, drop by drop like crystal, and in silence and obscurity, also like crystal."[2]

Will wrote in silence. He wrote very much to himself. He occasionally let work accumulate. As Judge Tom Gee[3] once said, "Will had one speed," and that's because he devoted equal attention to all cases. Those of us who walked into his chambers when he was an active judge saw a huge work table, piled about two feet high with summary calendar cases, the ones that don't get oral argument. Many people think they are the smaller cases. To Will, they weren't, and he formed his opinion on each one of those drop by drop. His writing is like crystal, firm and clear, and like crystal rock, his opinions will endure.

What else do we remember about Will? He was a man who loved his family. We all had the pleasure of Mary's company when she came down to New Orleans to join him for oral argument. He loved his pipe. You could be downwind of him in a conference and would not know whether to listen to Will or try to bat pipe smoke out of your face. But the pipe didn't detract from the quality of what he was saying. He was decisive, but he was passionate. That is something that has not been mentioned in the other eulogies. He really was passionate in his presentations at court, but it was passion tethered to reason. It was passion that was not petty. It was passion that was not pure emotionalism. It was grounded in his firm beliefs.

To sum up, I want to recall Will at our retreats. As we all remember, Will shined at our court retreats. We would get together for a weekend. It has always been Columbus Day weekend because a number of the hunters on the court didn't want to interfere with the start of dove season or the start of deer season or whatever other seasons come in between. Quite often, a number of the judges would shoot sporting clays or skeet, and

2. James Grant, *For Love of Laissez-Faire,* WALL ST. J., July 23, 2011, http://online.wsj.com/article/SB10001424052702304521304576446291489809 56.html.

3. Judge Gee served on the United States Court of Appeals for the Fifth Circuit from 1973–1991.

Will shot very well. Then, at cocktail and meal times, Will's company was highly sought after. One ritual frequently repeated itself as the night grew later and the talk and the music grew a little stranger. Will would begin to recite one of his favorite poems, by the poet Robert Service, called "The Shooting of Dan McGrew." I'd like to read just a tiny bit of that to you. I can't do it exactly as Will did with great relish and his raspy voice:

> A bunch of the boys were whooping it up in the Malamute saloon;
> The kid that handles the music-box was hitting a jag-time tune;
> Back of the bar, in a solo game, sat Dangerous Dan McGrew,
> And watching his luck was his light-o'-love, the lady that's known as Lou.
>
> When out of the night, which was fifty below, and into the din and the glare,
> There stumbled a miner fresh from the creeks, dog-dirty, and loaded for bear. . . .[4]

I won't read the rest because Will rarely got much farther than that. I had to look it up on Google to find out how it ended. So, if you want a happy reminiscence today, go and find the end of the poem.

Like his recitation of this poem, Will left us before we had heard the real end. But I will say that *we* knew that *he* knew how much we loved and admired him. The last time I saw Will, just two months ago, he was here with Mary in Austin and had received the 2011 Chief Justice Jack Pope Professionalism Award previously received by our colleague, Judge Reavley. He was in fine spirits that night, and he was a happy man. He was taken away from us too soon, but we know that he knew how much we loved and admired him. That gives us a great deal of comfort, and we hope it does to his family as well. Let light perpetual shine on Judge Garwood. Thank you.

2. Remarks by the Honorable E. Grady Jolly, Judge of the United States Court of Appeals for the Fifth Circuit

I write as a dear friend and colleague of Will Garwood, one who will miss him sorely but one who feels deep satisfaction in

4. ROBERT WILLIAM SERVICE, *The Shooting of Dan McGrew*, *in* THE SPELL OF THE YUKON, AND OTHER VERSES 45, 45 (1907).

the memory of our friendship and has everlasting gratitude for his momentous contribution to our court and to those of us judges who served with him. His name will live on in our court long after we are gone.

Although these remarks reflect my own thoughts, much of what I will write is the same of my colleagues who have served with him, knew him, and relied on his counsel.

Will and I served together as judges on the Fifth Circuit for nearly thirty years. He was the first appointment to the Fifth Circuit Court of Appeals by President Reagan; I was the second.

Over the years we grew closer and closer and so did my respect and admiration for him. Like everyone else who has known Will, the longer I knew him, the more in-depth I came to understand him, the more often I saw and spent time with him, the more my respect and admiration for him grew.

After Will had been on the court for twenty years, his law clerks had a reunion and gave a dinner in his honor. I was asked to be a speaker. In preparation for those remarks, I asked several judges on our court what thoughts were suggested by the name of Will Garwood. Every judge commented with thoughtful remarks, expressions of affection and respect. The words said then would only have increased meaning today.

Judge Tom Reavley,[5] himself an icon in the annals of judges in Texas, had this to say: "Will Garwood is the true son of his father, a man I knew and worked with on the Texas judicial council: honest, industrious, brilliant of mind, and modest of conduct. When he was introduced at his oath-taking for this court, it was said that he was qualified for the position as none other. That is true. And no one, of whatever philosophy or political affiliation—no one who knows Will Garwood fails to respect and admire him."

His Austin colleague, Judge Pete Benavides,[6] said, "Will Garwood has all the attributes of an ideal judge. He is a modest man dedicated to the rule of law. He is scholarly, honest, fair, impartial, and hard-working. Neither pushy nor argumentative,

5. Judge Reavley has served on the United States Court of Appeals for the Fifth Circuit since 1979. Prior to that position, he served on the Supreme Court of Texas from 1968–1977.

6. Judge Benavides has served on the United States Court of Appeals for the Fifth Circuit since 1994. He served on the Texas Court of Criminal Appeals from 1991–1992 and as a visiting judge on the Supreme Court of Texas in 1993.

Will has the respect and admiration of every member of our court. When Will Garwood speaks, we all listen."

Judge Edith Jones, now our Chief, extolled his virtues, saying, "When I think of Will Garwood, I think: the intellectual leader of this court. Describing Will Garwood and his contribution to our court is difficult, simply because there are not sufficient superlative words available."

And Judge Carolyn King,[7] who was our Chief at that time, praised him: "He is extraordinarily careful and thorough in his plumbing of a case and the law that controls it. But his most outstanding virtue is his integrity. His fidelity to the rule of law exceeds that of any other lawyer or judge with whom I have ever worked."

If a man's or woman's greatness is determined, as most surely it is, by the respect, affection and admiration exhibited by peers, associates, colleagues, and comrades, it is plain to see that Judge Garwood, as a judge and as a human being, achieved greatness.

I have never heard of Will promoting himself—not a single instance—a very rare characteristic in any of us. Seldom does one see such modesty in a person of such achievement. I have never heard any colleague on our court say the first negative word describing or referring to Will Garwood. So what does it mean when no one ever has anything negative to say about you when you work with them, day in and day out, on highly controversial, sometimes divisive matters?

First, it means that you do not stand in judgment of your colleagues. It means that you do not engage in gossip. It means that the quality of your work is impeccable. It means that your intellect is at the highest level. It means that you wear your superiority without pretensions and without self-aggrandizement. It means that you are totally comfortable in your own skin. It means that you are unfailingly polite. It means that you have a broad and spontaneous sense of humor. It means that differences of opinion or philosophy do not affect personal relations. That no one ever says anything negative about you means that you are *sui generis*: it means that you are one of a kind, it means that you were Will Garwood.

And so I close by paraphrasing a line from William Butler

7. Judge King has served on the United States Court of Appeals for the Fifth Circuit since 1979. She served as Chief Judge of the Circuit from 1999–2006.

Yeats: "Think where man's glory most begins and ends, and say our glory was we had such a friend."[8]

B. *Judge Garwood as Mentor*

Judges influence the future development of the law in at least two ways: through the judgments they commend to the legal annals and through the individuals they commend to the legal profession. A judge's clerks may go on to become practicing attorneys, academics, permanent court staffers, policy thinkers, or—as Judge Garwood did—judges themselves. Below are remembrances from just a few of the many clerks who found in Judge Garwood not just an incomparable mentor and guide for beginning a life in the law, but also a lifelong friend.

1. Remarks by J. Bruce Bennett[9]
At the Memorial Service for Judge Will Garwood, Austin, Texas, July 29, 2011.

I believe Will Garwood was blessed with the most exceptional and reasoned legal mind I have ever encountered. But I am certain he was the kindest and most caring and considerate man that I have ever known. And I also am certain that he never once demonstrated the slightest hint of intellectual arrogance. He always treated judges, clerks, secretaries, lawyers, and litigants with the utmost respect and civility.

I first met Judge Garwood in November 1979, when he was sworn in as a member of the Supreme Court of Texas. I was a briefing attorney at the Court that term, but was assigned to another justice. Judge Garwood came to the Court well-prepared to serve; he had read every opinion issued by that court since 1959. Everyone at the Court—judges and clerks alike—rapidly recognized Judge Garwood's magnificent intellect. I eagerly sought his advice and help whenever I was assigned a case with difficult legal issues. Although Judge Garwood was busy with his own opinions and his election campaign,[10] he always welcomed

8. WILLIAM BUTLER YEATS, *The Municipal Gallery Revisited*, *in* THE COLLECTED POEMS OF W.B. YEATS 276, 278 (2000).

9. Partner at Cardwell, Hart & Bennett, L.L.P. Law clerk to Judge Garwood, 1981–1983.

10. *Editor's note:* Judges are elected in Texas. Judge Garwood was first appointed to the Texas Supreme Court by Governor Bill Clements on November 15, 1979 and had to run for election shortly thereafter in 1980.

me into his chambers and gave me valuable guidance.

Judge Garwood had an amazing ability to spot the one or two facts involved in an appeal that determined its proper outcome. Soon after Judge Garwood joined the Texas Supreme Court, I remember a conference in which the justices were highly perplexed over how to decide a case. When it came Judge Garwood's turn to speak—and as I recall he spoke last—he drew attention to, and explained, the significance of a fact that everyone else had overlooked. A stunned silence fell over the conference room, broken only when Justice Jack Pope[11] smiled and said: "There is nothing so beautiful as a mental sunrise." During his long judicial career, Judge Garwood was responsible for thousands of mental sunrises in the lawyers at oral argument, in the clerks in his chambers, and in the judges at conference.

Despite a hard-fought campaign, Judge Garwood narrowly failed to retain his seat on the Texas Supreme Court. Back then, in 1980, Republican judicial candidates did not win statewide *general* elections. But Texas's loss proved to be the nation's gain, when a few months after the election, President Reagan nominated Judge Garwood to a seat on the Fifth Circuit. It also proved to be my gain as well, for after the U.S. Senate confirmed Judge Garwood, he hired me as one of his first Fifth Circuit law clerks.

Judge Garwood's swearing-in ceremony in November 1981 was a memorable event. The Judge's 84-year-old father, former Texas Supreme Court Justice W. St. John Garwood, administered the oath. St. John told Judge Garwood to "raise his right hand." Judge Garwood raised his *left* hand. St. John said: "Son, you've just committed your first reversible error! Raise your *right* hand." That was one of the few reversible errors he committed.

The day after Judge Garwood was sworn in, about forty appeals were delivered to his chambers, and they just kept coming day after day. Judge Garwood's great friend and former law partner, the late Judge Tom Gee, whose chambers were downstairs, offered to help the Judge get caught up. Judge Garwood accepted Judge Gee's kind offer, just as Judge Garwood was leaving Austin for a week of oral arguments in New Orleans. While the Judge and I were in New Orleans, my co-clerks said

11. Judge Andrew Jackson "Jack" Pope served on the Texas Supreme Court from 1964 until he retired in 1985. He served as Chief Justice of that court from 1982–1985.

Judge Gee swept into our chambers like a category-five hurricane. In one day, Judge Gee got eight cases out of the office by sending them to oral argument and wrote one opinion himself.[12] When Judge Garwood returned to Austin, he persuaded Judge Gee to have the opinion come out with Judge Gee's name as the author since Judge Gee had actually written it. A few months later, the U.S. Supreme Court summarily *reversed* Judge Gee's opinion.[13] Judge Gee told the Judge that he was never going to help him out again!

Judge Garwood worked extremely hard on all his opinions for the Court, carefully analyzing the facts, the legal arguments, and the ramifications of those arguments. And he worked his clerks hard as well; demanding that his opinions be thorough, comprehensive, and precise.

But not necessarily *concise.* The first opinion that I drafted for him was 10 pages. It came back from him a week later 30 pages. The next opinion I drafted was 15 pages; it came back 35 pages. I'm a slow learner, but I got the message; so the next opinion I drafted was 70 pages; it came back with many edits, but was still 70 pages. The Judge then sent it over to Judge Tom Reavley who was on the panel, and whom the Judge greatly admired. A few days later, the Judge came into my office, just beaming, and showed me Judge Reavley's letter to him about the opinion. Here is what Judge Reavley wrote: "Dear Will: I gladly concur in your *monumental* opinion for the Court!"

Judge Garwood was firmly committed to our federal system of government and to the Bill of Rights. As many of you know, his opinions limiting the reach of Congress's power under the Commerce Clause and enforcing the Second Amendment inspired two of the most important constitutional movements of the last 20 years. But you also should know the Judge gave the same level of attention and care to matters of state law as well.

The Judge was assigned to write the opinion in what appeared, at first glance to everyone else, to be an ordinary land-title dispute from Mississippi.[14] But the Judge quickly saw that the case turned on unresolved points of Mississippi law that were of crucial significance, and that the wrong answers could unsettle

12. Chemetron Corp. v. Bus. Funds, Inc., 682 F.2d 1149 (5th Cir. 1982).
13. Chemetron Corp. v. Bus. Funds, Inc., 460 U.S. 1007 (1983).
14. Mills v. Damson Oil Corp., 686 F.2d 1096 (5th Cir. 1982).

land titles throughout Mississippi.[15] Being a strong proponent of federalism, the Judge also realized that the Mississippi Supreme Court—*not* a federal court—should decide what the law of Mississippi should be. So the Judge wrote an opinion certifying the unresolved legal questions to the Mississippi Supreme Court, but he also *gently* suggested to that court what the answers should be and the legal reasoning justifying those answers.[16]

The Mississippi Supreme Court accepted the case and in the introduction to its opinion providing the answers said this about Judge Garwood:

> Judge Garwood . . . has written an analytical and detailed opinion. He has simplified involved facts. He has also carefully researched the history of the legal principles involved in this case, which have been of invaluable assistance to us. . . . [W]e are in full agreement with and cannot improve upon [Judge Garwood's] analysis of the previous decisions of this Court and the issues involved. No purpose would be served in restating or reiterating them.[17]

The Mississippi Supreme Court gave the answers Judge Garwood had suggested.

The days I spent working with the Judge were the happiest of my career, and I think that is true for nearly everyone who clerked for him. We are thankful to former clerk Meg Williams, who organized the Judge's 20th and 25th clerkship reunions. The former clerks in Austin are especially grateful to Patrick O'Daniel, who clerked for the Judge, and then went on to clerk for the U.S. Supreme Court. For the past several years, Patrick has arranged monthly lunches with the Judge so that we could visit with him, share our memories and experiences, and occasionally hear the Judge's hilarious stories about his adventures in college and law school.

Judge Garwood taught us to work hard, to think deeply about the law, to understand the significance of the facts of each case, and to analyze the consequences that the adoption of a legal argument or holding would have on the broad fabric of the law. By his example, the Judge also taught us that each litigant and attorney deserves respect and courtesy.

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15. *Id.* at 1098.
16. *Id.* at 1114–15.
17. Mills v. Damson Oil Corp., 437 So.2d 1005, 1006 (Miss. 1983).

We owe Will Garwood a debt of gratitude that can never be repaid.

The Bible says: "There is nothing so precious as a faithful friend, and no scales can measure his excellence."[18] We have lost a great, excellent man, and a true, faithful friend.

Judge Garwood, on behalf of your former clerks: "Thank you." Thank you for being our patient counselor and mentor. Thank you for instilling in us a reverence for the majesty of the law. Thank you for inspiring us to practice law "in the grand manner." And most of all, thank you for allowing us be part of your wonderful life.

2. Remarks by Patrick L. O'Daniel[19]
Garwood, the Man at Princeton

After having clerked for Judge Garwood in 1992–1993, I somehow wound up organizing monthly lunches for him and his former clerks, mostly at a legendary Austin barbecue joint, Ironworks. He would always get a brisket plate and an Orange Crush before holding court at one of the long picnic tables where he would not only adjudicate the issues of the day but also reminisce about his past escapades. For some reason, these frequently involved his beloved undergrad alma mater, Princeton. Indeed, at the last lunch he attended in June 2011, he told of his brief career as a model when he was dragooned into being the male "prop" on the cover of one of the leading fashion magazines that was doing a feature on a local Princeton beauty. She was apparently displeased with him encroaching on her glossy-paged monopoly and so ruled unfavorably on his later proposal to take her out—it is unclear if an Orange Crush was part of the rejected offering. This story, however, reminded me of others he told as part of the video interview archive project I was honored to participate in with him on January 7–8, 2002.

I, along with Meg Williams, interviewed Judge Garwood about his life and legal career. He spoke with great fondness about Princeton and its formative influence on his intellect:

> I remember very well that we had a course in capitalism, socialism and democracy that a Professor Ebenstein taught. I thought so highly of him because he was a socialist. He wasn't a

18. *Sirach* 6:15 (Revised Standard Version).
19. Partner at Fulbright & Jaworski L.L.P. Law clerk to Judge Garwood, 1992–1993.

> communist, but he was a socialist. He was completely fair in his presentation of differing points of view. Actually, from his course I became a sort of a rabid capitalist, not in reaction to his point of view, but because he had exposed me to things like Hayek's *The Road to Serfdom* and Schumpeter's works. I sort of have the feeling that maybe today you don't get that kind of intellectual objectivity that this man brought. It wasn't his point of view and he wasn't embarrassed to tell you his point of view but he always also gave you the other side and the strong works on the other side as well as the strong works on his side.[20]

It is this sense of fairness that best characterizes Judge Garwood's jurisprudence—he had a definite point of view but above all, Judge Garwood was concerned about getting the facts straight and making sure that all sides had been not only fairly heard, but also fairly considered and explained when drafting an opinion.

But wisdom did not always come naturally to Judge Garwood, as demonstrated by another of his Princeton stories:

> When I got there as a freshman for some utterly stupid reason I decided I would go out for freshman football. . . . I just was obviously not very well suited for it. I chose to play end and we would line up for blocking practice. I lined up against this great big fellow named Al Parentoni. I'll never forget that name. I was supposed to run into him and then he was supposed to run into me. We'd take turns doing that. I ran into him and bounced back on the ground. He said, "Garwood, let me tell you something. You know, I really don't like football. I'm going out here because my older brother plays for the New York Giants. They just pressured me to come into football. I have a thought. When I run into you, you just take two or three quick steps backwards just before I get there and I'll do that when you run into me and we'll just get along fine." I said, "Al that's just a wonderful idea," so I survived the first week or so on this basis. Then they posted the cut list after the first week . . . . I went over there and looked and there was my name on it. I just let out a whoop. I was so glad to be on that cut list. Of course, everybody misinterpreted that. They thought I was saying that I had made the team. Oh my God, Garwood![21]

Certainly, the Princeton football team survived without the

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20. Video Interview with Judge Will Garwood, United States Court of Appeals for the Fifth Circuit (Jan. 7–8, 2002).

21. *Id.*

gangly freshman. But thank God for Judge Garwood, whose wit, grace, gentlemanly demeanor, and incisive jurisprudence have made for a better federal judiciary.

3. Remarks by Christian J. Ward[22]

Providentially, right before I had my clerkship interview with Judge Garwood, my Constitutional Law class had been studying *United States v. Lopez*,[23] and I had also studied the case extensively in drafting a law review case comment on one of the Supreme Court's later federalism cases. So I felt well-prepared to carry on an intelligent conversation with the man who originated *Lopez*'s Commerce Clause analysis, and I was excited to be doing so as I greatly admired Judge Garwood's analysis in that case and the sea-change it precipitated in American federalism jurisprudence. During the interview, I asked the Judge if, when crafting his *Lopez* opinion, he had been concerned that the Supreme Court would reverse him, given that there had been six decades and a court-packing threat since the last time the Court struck down a federal statute on Commerce Clause grounds. In his (as I would learn, characteristically) low-key manner, Judge Garwood said, "I didn't really think about that. I just followed the Constitution." Good answer.

In my year of clerking for Judge Garwood, I would come to learn that this was his basic answer to every case before him: He sought simply to follow the law—as he gleaned it from the Constitution, common law, and the text of statutes—with his unmatched powers of legal reasoning brought to bear on all those sources. And then he simply applied that law to the facts at hand—facts with which he became meticulously familiar by intensive studying of the record. (After I was in private practice, I would advise any colleague who was preparing for oral argument before Judge Garwood, "Know your record, because you can be sure he will!") I also learned that Judge Garwood's memory for the law was encyclopedic and uncannily accurate. He never used Westlaw—he didn't need to. Prior experience with other (highly capable) employers had taught me that their "citations" were usually approximate at best, useful for pointing you in the general direction of where the relevant data might be found.

22. Partner at Yetter Coleman LLP. Law clerk to Judge Garwood, 2001–2002.
23. 2 F.3d 1342 (1993), *aff'd*, 514 U.S. 549 (1995).

Judge Garwood, the skilled hunter, instead took dead aim: when he threw out a quotation from or citation to a particular case, you could expect to find it precisely where he said it would be.

That clerkship was a blessing, and a continuing one. The mentorship and friendship begun in that year continued over frequent lunches and other encounters over the next decade. Judge Garwood is missed, and yet, he's still with us. Whenever I or any of his other former clerks sit crafting a brief or other legal document, poring over cases or statutes, striving to be a credit to the legal profession or, indeed, simply a good human being, he is with us. His words and his example remain our constant guides. Thank you, Judge Garwood.

4. Remarks by Sean R. Keveney[24]

The pipe smoke. That was the first thing I noticed. I smelled the rich aroma before being ushered into his office to interview for a clerkship. Then came the sense of complete intimidation, certainly unintentional on his part, but nonetheless palpable. I suspect it came from the penetrating look, the towering reputation, and the immediate sense, soon confirmed by experience, that I was dealing with an exceptionally keen and nimble intellect. I said little in that interview on the accurate theory that the Judge would immediately see through anything other than a straight answer, something I later witnessed on multiple occasions at oral arguments. Luckily for me, and I suspect for many other clerks, it also soon became apparent that the Judge was exceedingly patient and humble, never begrudging of the time it took to walk through legal issues, and always forgiving of my errors, of which there were certainly a few.

There are a few incidents that stand out fondly in my memory and capture the kind of man the Judge was to me. My career plans changed at least three times during the year I spent in the Judge's chambers, from an offer from a law firm, to the post-9/11 certainty that I should leave the law to join the Marine Corps, to the Justice Department, and others in between. Rather than being frustrated with my equivocation, as my friends certainly were, the Judge patiently welcomed me into his office and gave me his sincere and best advice. He related anecdotes

24. Civil Rights Division, United States Department of Justice. Law clerk to Judge Garwood, 2002–2003.

about his time at the Pentagon.[25] And he provided prescient insights into what it might be like to work for the Justice Department. I struggle to think of people who have shown more patience and sincerity that the Judge did to me.

The other thing I remember particularly fondly was watching the Judge craft an opinion. I knew some good legal product was going to come out of the Judge's office when you saw him, pipe in mouth, carefully pulling down reporters from the shelves, and then returning to his desk and slowly writing his opinion longhand on yellow legal pads. Occasionally, I would see him take a reporter to the copy machine and then methodically take his scissors to cut out those portions of precedent that would make their way onto his pad and into the opinion. One of those opinions was *Bell Atlantic Corp. v. AT&T Corp.*,[26] an anti-trust case involving a complex factual record and questions of class certification. I was awed at how the Judge immersed himself in and mastered the nuances of a factual record that would have put most lawyers to sleep, a record full of competing damages computation formulas and technical evidence relating to network connectivity and telephone signal systems. Most everyone is impressed, as they should be, with *Emerson*[27] and *Lopez*,[28] with how well-reasoned, well-written, and above all, how thorough they are. What was truly impressive to me was that the Judge treated every case the way he treated *Emerson* and *Lopez*. I could not have asked for a better role model. I suspect decades' worth of his law clerks feel the same.

5. Remarks by Marc A. Levin[29]

Modesty is a word that defined Judge Garwood both professionally and personally. In the professional context, he had an appropriately modest view of what courts could and should accomplish. While he had the warmest of personal regard for the late Judge William Wayne Justice who was just down the hall, Judge Garwood saw a sharp demarcation between the role of a judge and the role of a legislator. He realized the value in

25. Judge Garwood worked in the Pentagon for the Defense Appellate Division of the Judge Advocate General Corps from 1956–1959.

26. 339 F.3d 294 (5th Cir. 2003).

27. United States v. Emerson, 270 F.3d 203 (5th Cir. 2001).

28. 2 F.3d 1342 (5th Cir. 1993).

29. Director of the Center for Effective Justice at the Texas Public Policy Foundation. Law Clerk to Judge Garwood, 2002–2003.

the rule of law whereby individuals and businesses could structure their activities with confidence and changes in policy would be the province of the democratically elected branches of government.

Judge Garwood was also modest when it came to his remarkable abilities as a judge. His prolific opinions provide plentiful evidence of his incisive thinking and encyclopedic knowledge of the law, but his abilities were even more accessible to those who worked for him and his colleagues on the bench. One time I walked in his office to ask about an obscure legal question in a current case and he literally pulled out a case from a few decades ago, flipping to the page in the bound volume in his office. Sure enough, it was on all fours. However, Judge Garwood never displayed the least bit of arrogance and was always quick to credit the contributions of others. To me and his other law clerks, his mentorship was invaluable, as he always delivered constructive criticism in a gentlemanly and gentle manner.

Judge Garwood was also unassuming in how he approached every case and brief. For example, he gave the same level of objective, careful consideration to handwritten pro se pleadings as those filed by the most prominent attorneys. Rather than judge a book by its cover, he judged the book by the clear meaning and intent of the law as memorialized in constitutions and statutes.

Another illustration of Judge Garwood's modesty was that he regularly delighted in talking about one of his few failures—his re-election loss in 1981 for the Texas Supreme Court, a post to which he was appointed by then-Governor Bill Clements. While campaigning might not be second nature for everyone of Judge Garwood's pedigree who is plucked from the reified air of elite law schools and law firms, Judge Garwood relished meeting ordinary Texans during the campaign. Alas, Judge Garwood was far ahead of his time. He was running as a Republican in an age when Democrats controlled statewide elections in Texas. More precisely, personal injury trial lawyers had an ironclad grip on the Texas Supreme Court, as they bankrolled candidates who often pledged on the campaign trail to rule in their favor. Indeed, the candidate who defeated Judge Garwood was subsequently disciplined for numerous related ethics violations.

Judge Garwood's personal life was also one of modesty.

Married to the same woman for more than a half-century, no one would know Judge Garwood came from a wealthy family by observing his demeanor or worldly possessions. A man of no pretense, I only know of Judge Garwood's family background because I first came in contact with him as an undergraduate when he was a donor to the Texas Review Society, a non-profit organization in which I was an officer that published the conservative newspaper at The University of Texas at Austin that was called, at various times, the *University Review* and *Austin Review.*

While Judge Garwood was modest in all regards, there is nothing modest about the legacy he leaves behind. The legal system and all of those who had the privilege to work with or for him have been enriched immeasurably by his remarkable contributions to the law and our lives.

5. Remarks by Meg Williams[30]

Judge Garwood was the quintessential judge, a true Southern Gentleman, a mentor of excellence to his law clerks, and a man who loved good barbecue as well as a good joke. He demanded the best of himself and of those who worked for him, but when his work permitted it, he would join his staff for "treats" on a Friday afternoon and share stories about old cases and his experiences on the court, both as a law clerk for Judge John R. Brown and as a judge. He was not afraid to laugh at himself: he recalled one instance when he had drafted an opinion following oral argument but, due to a backlog of work, accepted the offer of another judge on the panel to take the case and issue the opinion under the other judge's name. The Supreme Court summarily reversed and rendered. His colleague vowed never to take on an opinion for him again!

I was privileged to be at the first oral argument when Judge Garwood acted as presiding judge on a panel that included Judge Brown. Both men were aware of the occasion—of the passing of a torch of sorts—even though they had been colleagues for more than ten years at that time. Judge Garwood had great respect for the traditions and ceremony of the law and of the court.

Judge Garwood was humble. When time came around to

30. Law clerk to Judge Garwood, 1992–1994.

begin planning another reunion of his staff to commemorate an anniversary of his appointment to the court (held every five years), he was always reluctant to put people to the trouble of traveling any distance on his behalf. When a reunion rolled around, however, he entered into the spirit of it, enjoying the opportunity to catch up with law clerks and graciously accepting words of tribute. I treasure the privilege of learning from him, the image of him with his ever-present pipe (in my days, a real pipe despite the non-smoking ordinance for the courthouse), and the gentle pleasure he exhibited in seeing old law clerks return for a visit.

III. JUDGE GARWOOD'S LEGAL LEGACY

In his three decades on the bench, Judge Garwood crafted a lasting jurisprudential legacy. His best-known opinions were those in *United States v. Lopez*[31] and *United States v. Emerson*,[32] each of which laid the groundwork for far-reaching holdings by the Supreme Court. *Lopez* became the first case in sixty years in which the Supreme Court recognized any real limit on Congress's power under the Commerce Clause. Judge Garwood's view of the right guaranteed by the Second Amendment, expressed in his *Emerson* opinion, carried the day when the same question came before the Supreme Court.[33] But Judge Garwood's legal legacy extends beyond those two high-profile cases, which is unsurprising given that he devoted the same careful attention to every case that came before him.

This section contains remarks by Judge Priscilla Owen, who succeeded to the seat Judge Garwood filled on the Fifth Circuit after he took senior status, focusing on how Judge Garwood approached the judicial craft. Next, eminent constitutional scholars Lino Graglia and Sanford Levinson comment on the impact of Judge Garwood's opinions, particularly *Lopez* and

31. 2 F.3d 1342 (5th Cir. 1993).

32. 270 F.3d 203 (5th Cir. 2001).

33. *Compare id.* at 233 ("Accordingly, the preamble does not support an interpretation of the amendment's substantive guarantee in accordance with the collective rights or sophisticated collective rights model, as such an interpretation is contrary to the plain meaning of the text of the guarantee, its placement within the Bill of Rights and the wording of the other articles thereof and of the original Constitution as a whole."), *with* District of Columbia v. Heller, 128 S. Ct. 2783, 2790 (2008) ("Those provisions arguably refer to 'the people' acting collectively—but they deal with the exercise or reservation of powers, not rights. Nowhere else in the Constitution does a 'right' attributed to 'the people' refer to anything other than an individual right.").

Emerson, on constitutional jurisprudence.

It is probably fitting that Judge Garwood's best-known opinions both involved two of his greatest passions: meticulous adherence to constitutional principles and guns.[34] *United States v. Lopez*[35] raised a Commerce Clause challenge to the Gun-Free School Zones Act of 1990, and the Supreme Court's affirmance of Judge Garwood's holding invalidating the act marked a dramatic shift in constitutional jurisprudence. In *United States v. Emerson*,[36] Judge Garwood crafted a groundbreaking interpretation of the Second Amendment, influencing the Supreme Court's constitutional jurisprudence yet again. The commentaries by Professors Lino Graglia and Sandy Levinson discuss the impact of those and other opinions by Judge Garwood.

A. *Memories of Judge William Garwood by the Honorable Priscilla R. Owen, Judge of the United States Court of Appeals for the Fifth Circuit*

I have been asked to share some of my memories of our beloved and revered Judge Will Garwood as well as thoughts about his judicial demeanor and how he crafted his powerful opinions. I do not use the words "beloved" and "revered" casually. Everyone who knew Will Garwood truly loved him on a personal level and revered him as one of our finest jurists. All who knew him appreciated his warm personality, his sense of humor, his keen intellect, and the thoroughness with which he addressed every case that came before him. Judge Garwood was truly remarkable, yet he was a modest man.

There was nothing egotistical, overbearing, or arrogant about Judge Garwood. He was cordial to all who came before him, even when probing and revealing the weaknesses of arguments. He was a thoughtful, careful, and fair judge who had a deep and abiding respect for the law and for the legal process. He favored no segment or class of litigants. He was even-handed in applying the law to the cases that came before him.

He endured his colleagues when others might have found us exasperating, always maintaining his equilibrium and decorum as well as his sense of humor. In internal deliberations with his

34. To be clear, Judge Garwood's interest in guns stemmed from his avid interest in hunting.

35. 2 F.3d 1342 (1993).

36. 270 F.3d 203 (2001).

colleagues, when he commented on our opinions or memoranda, Judge Garwood's points were always incisive and well-taken. He had the abiding respect, admiration, and love of all his colleagues.

I have so many visual images and memories of Judge Garwood's voice and mannerisms, on and off the bench, that I am sure are shared by many. Although he was always respectful of those who appeared before him, he was not a passive questioner by any means; he was expressive. He would often lean forward when inquiring of counsel, and with some emphasis, ask something along the lines of: "But isn't it true that the record reflects. . .?" or "If we were to accept your logic. . ." and then, he would turn to his colleagues on the bench, tilt his head in their direction, and make direct eye contact, to make sure we understood the point. There were no cameras in the courtroom to capture the magnificence of Will Garwood on the bench, and though we can debate whether cameras should be in our courts, I do not need videos to recall him. Those of us who were privileged to sit with, appear before, or observe Judge Garwood in oral arguments remember, with great delight and awe, his presence and his acumen. His preparedness for oral argument was a prelude to his writings.

The volumes of opinions that Judge Garwood penned stand as a testament to his scholarship and discernment. One of those opinions, perhaps his most widely known, was *United States v. Lopez*.[37] As Professors Graglia and Levinson discuss, *Lopez* invalidated the Gun-Free School Zones Act as beyond the reach of Congress's Commerce Clause power. It was the first appellate court decision to place limits on congressional power under the Commerce Clause in nearly 60 years.[38] When Judge Garwood wrote the *Lopez* decision for a unanimous panel, he was indeed an independent thinker and jurist. The question presented was one of first impression,[39] and Judge Garwood meticulously examined the Constitution and the legislative history of the Act,

37. 2 F.3d 1342 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995).

38. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 247–48 (4th ed. 2011) ("From 1937 until 1995, not one federal law was declared unconstitutional as exceeding the scope of Congress's commerce power. . . . However, in 1995. . . . the Supreme Court declared unconstitutional a federal law prohibiting a person from having a firearm within 1,000 feet of a school on the ground that it exceeded the limits of the commerce power.").

39. *Lopez*, 2 F.3d at 1345.

concluding that Congress had not made adequate findings connecting the legislation to interstate commerce.[40] While the opinion is a landmark in federalism jurisprudence, it is also a model of the careful craftsmanship for which Judge Garwood was legendary.

The *Lopez* opinion begins by setting forth the general principles of federalism and the commerce power.[41] It then digresses to present a comprehensive outline of the evolution of federal gun control law.[42] The opinion traces more than a half-century of legislative enactments and judicial gloss[43] in order to determine whether, prior to the law considered in *Lopez*, there was any precedent to support a federal law criminalizing the simple possession of a firearm without an "express nexus to interstate commerce."[44] The opinion then examines Congress's commerce power from John Marshall's 1824 decision in *Gibbons v. Ogden*[45] to present-day civil rights and administrative statutes,[46] followed by a thorough analysis of the importance of congressional findings.[47] But Judge Garwood's unwavering attention to detail in *Lopez* was just as evident in cases much further from the limelight.

One example is Judge Garwood's opinion for the court in *Kaluom v. Stolt Offshore, Inc.*, a maritime case concerning the applicability particular wage statutes to an individual seaman.[48] At issue in *Kaluom* was whether a foreign national, employed on a foreign vessel setting out from a port in Louisiana, was owed penalty wages under two federal statutes.[49] Judge Garwood first addressed the canons of statutory construction that provide that the language of a statute is ordinarily conclusive as to its meaning and that the statute must be considered as a whole before attempting to apply its parts individually.[50] These rules of construction controlled the outcome; Kaluom could only win if the court read the provisions favoring him in isolation, which it

40. *Id.* at 1367–68.
41. *Id.* at 1346.
42. *Id.* at 1348.
43. *Id.* at 1348–59.
44. *Id.* at 1358.
45. 22 U.S. (9 Wheat.) 1 (1824).
46. *Lopez*, 2 F.3d at 1360–63.
47. *Id.* at 1363–67.
48. 504 F.3d 511 (5th Cir. 2007).
49. *Id.* at 513.
50. *Id.* at 515.

refused to do.[51] Judge Garwood could have written a cursory opinion to that effect, but characteristically, he went further.

Just as he did in *Lopez*, Judge Garwood traced the history of the provisions at issue, referring to seamen's wage statutes dating back to the first Congress and following the development of the statutes and accompanying voyage limitations over time.[52] In doing so, he established that two of the provisions at issue had formerly been in the same section, and he concluded that their later separation effected no substantive change.[53]

These are just two of the opinions that Judge Garwood authored, but they exhibit the quality of his writing throughout his long tenure as a judge. His writing was thorough. It relied on authority. It was persuasive. It addressed the arguments squarely and forthrightly. The rigor that Judge Garwood brought to the process ensured that he was rarely wrong. He was reversed by the United States Supreme Court only twice, or maybe I should say one and one-half times.[54] In one instance, he concurred in another judge's opinion and wrote a short, separate concurrence.[55] In the two decisions he authored that were reversed or the vacated, the Supreme Court was divided 5-4. In one, Justice Breyer wrote for the majority and Justices Scalia and Kennedy penned dissents, joined variously by Chief Justice Rehnquist and Justice Thomas.[56] In the other case, Justice White wrote for the majority with Justices Brennan, Blackmun, and Stephens writing separate dissents, with Justice Marshall joining Justice Brennan.[57] The times that writings of Judge Garwood were not directly reversed but abrogated by a subsequent Supreme Court decision are few and far between as well.[58]

This is an amazing record. It demonstrates the strength of Judge Garwood's legal acumen. Judge Garwood came from a conservative background, to be sure. But his analysis and writings

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51. *Id.* at 518.
52. *Id.* at 519–22.
53. *Id.* at 520–22.
54. Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999), *vacated sub nom.* Zadvydas v. Davis, 533 U.S. 678 (2001); Bullock v. Lucas, 743 F.2d 244, 248 (5th Cir. 1984) (Garwood, J., concurring), *modified sub nom.* Cabana v. Bullock, 474 U.S. 376 (1986).
55. *Bullock*, 743 F.2d at 248 (Garwood, J., concurring).
56. *Zadvydas*, 533 U.S. at 678.
57. *Cabana*, 474 U.S. at 376.
58. Hooper v. F.D.I.C., 785 F.2d 1228 (5th Cir. 1986), *abrogated by* Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988); *In re* Fox, 902 F.2d 411 (5th Cir. 1990), *abrogated by* Owen v. Owen, 500 U.S. 305 (1991).

drew on the law and precedent, not personal viewpoints. His colleagues, even those who disagreed with him from time to time, uniformly praised Will for his intellectual honesty and integrity as a judge and for his enormous abilities as a scholar and member of the judiciary.

In 1998, the Texas Law Review dedicated a portion of one of its issues to Judge Garwood.[59] Two of his colleagues, Judges Patrick Higginbotham and Grady Jolly, as well as a well-known University of Texas graduate, Tex Lezar, wrote tributes to Will.[60] You can see in those writings the admiration for Judge Garwood and for the opinions he wrote for the court.

In 2004, the Fifth Circuit Judicial Conference was dedicated to Judge Garwood. Very few judges have a conference dedicated to them. Carolyn Dineen King was the Chief Judge then, and she explained that judicial conferences are dedicated to recognize the giants among us. Virtually all of the federal district court and circuit judges from the Fifth Circuit were present at that conference, as well as hundreds of accomplished and distinguished lawyers from across Texas, Louisiana, and Mississippi. Judge King is known to be sparing with her praise, but she said this about Judge Garwood:

- "[He was] the very best lawyer among us."[61]
- "[A] Garwood opinion . . . is compelling in its reasoning, well written, and readable. The end result is a beautifully lawyered decision, one that commands the respect of winners and losers alike and the admiration of judges everywhere."[62]
- "Judge Garwood can fairly be labeled conservative, but he has never permitted his conservative viewpoint to overcome his adherence to the rule of law which reigns supreme in his decisions."[63]
- "Judge Garwood has been the unannounced leader of this court for many years, even in senior status. He is viewed

59. Dedication to Judge William Garwood, 76 TEX. L. REV. 905–20 (1998).

60. Patrick E. Higginbotham, *A Note About a Colleague*, 76 TEX. L. REV. 905 (1998); E. Grady Jolly, *In Praise of a Modest and Scholarly Colleague*, 76 TEX. L. REV. 911 (1998); Tex Lezar, *A Lawyer's Tribute to Judge Will Garwood*, 76 TEX. L. REV. 915 (1998).

61. Carolyn Dineen King, Chief Judge, United States Court of Appeals for the Fifth Circuit, Remarks at the 2004 Fifth Circuit Judicial Conference 1 (May 15, 2004) (on file with the TEXAS REVIEW OF LAW & POLITICS).

62. *Id.* at 3.

63. *Id.*

by us as our leader because of his extraordinary ability, his integrity, and his graciousness and uncommon civility to his colleagues."[64]

- "Judge Garwood is truly a giant among us."[65]

Judge Garwood will be remembered not only as a giant among us, but also as a warm, genuine person. All who knew him will remember his wonderful sense of humor and his infectious joy of living fully. He was serious, passionate, and well-informed on a broad array of subjects. He was a gentleman in every sense of the word and a scholar. But Judge Garwood also appreciated and delighted in humor. He was animated in conversation, on topics serious and not so. He spoke not only with his voice rising and falling with emphasis, his eyes shining and his face expressive, but he also gestured broadly with his hands and arms, and he leaned in and out as he held us enthralled. He was engaged, on all levels, and engaging. He was balanced. He had a large, delightful smile that put even strangers at immediate ease in all sorts of settings and circumstances. Judge Garwood was friendly and approachable, and there was nothing pretentious about Will. Yet, he was always dignified.

Judge Garwood was known for dressing in true business attire when he was in Chambers or traveling to and from New Orleans. I remember that he would have his shoes shined, if time permitted, at a Houston airport during the delay between flights connecting from Austin to New Orleans. He wore a coat and tie to work every day—every work day, that is, except the few times he came into his chambers in Austin before or after a hunting trip.

Although he was a private man, Judge Garwood let slip on occasion a comment or two, accompanied by a beaming smile, that let you know that he was very proud of his family and that he was close to them. He and his beloved wife had a son and a daughter, and six grandchildren. So far, Judge Garwood's son, his daughter-in-law, and two of his grandchildren have attended Princeton, Judge Garwood's alma mater. Judge Garwood proudly wrote of this in a Princeton publication.

Judge Garwood was unique and irreplaceable. He has left us his legacy, for which we are enduringly grateful. He had a clear

64. *Id.*
65. *Id.*

view of the proper role of a judge which he expressed soon after he became a judge on the United States Court of Appeals for the Fifth Circuit. He admonished that

> the judicial function is, and has always been, not to make laws or policy or to give advisory opinions, but rather to settle specific, concrete disputes between private parties, or between the government and a private party, and to settle such disputes according to the general laws in effect when the events in question occurred, not according to laws made up at the time of trial and applicable only to those parties and that case.
>
> That is what we mean by a government of laws, not of men. That is our ideal—actions of individuals are judged against known general standards, not on the basis of rules made up for the particular person and case—and judges apply the law whether they agree with it or not, and regardless of which litigant they like the best, or which is the most popular.[66]

Judge Garwood adhered to these principles throughout his years on the bench. May all who serve on courts across the country, state and federal, aspire to do likewise.

B. *Commentary by Lino A. Graglia*[67]

The highest praise that can be given to a judge is that he aspired to be a good one, to judge with wisdom and impartiality, but not to be more than a judge, that is, to follow the law rather than assume the role of lawmaker. That, I think, describes Will Garwood's service on the federal bench. That attitude plus his exceptional intellectual ability made him, in my opinion, as fine a judge as we have had in the federal system.

I can speak from first-hand knowledge of Judge Garwood's ability and integrity, although not without some regret, because of my involvement or interest in two of his most important decisions. The first is a case, *Scott v. Moore*,[68] that involved interpretation of a complex, obscure, but potentially very important section of the federal code of laws known as the Ku Klux Klan Act,[69] derived from an 1875 Reconstruction Era statute. Plaintiffs in that case were a construction contractor and

66. Judge Will Garwood, Remarks at the Meeting of the Philosophical Society of Texas (Dec. 3–4, 1982).

67. A. Dalton Cross Professor of Law, The University of Texas School of Law.

68. Scott v. Moore, 680 F.2d 979 (5th Cir. 1982), *rev'd sub nom.* United Brotherhood of Carpenters & Joiners of America, Local 610 v. Scott, 463 U.S. 825 (1983).

69. 42 U.S.C. § 1985(3) (2006).

some of its employees that had contracted to build a major project for the Army Corp of Engineers near Port Arthur, Texas.[70] Various union members, representatives, and sympathizers objected strongly to the fact that the company was not unionized.[71] Putting this objection into action, a large mob attacked the job site causing severe personal injuries and extensive property damage.[72] The question was whether the 1875 Act, enacted to suppress Klan violence, was applicable to this situation.[73]

Plaintiffs won in the district court,[74] and the defendants appealed to the Fifth Circuit. Kay Graglia and I were hired to work with Vinson & Elkins in writing the brief for plaintiffs on appeal. Plaintiffs won again, by a split vote, before a three-judge panel,[75] but the full bench voted to grant defendants' motion for a rehearing *en banc*.[76] During long consultations, some of the most knowledgeable lawyers in Texas tried to figure out how each of the eleven judges then in regular service on the Fifth Circuit was likely to vote. On arriving at the courthouse in New Orleans on the day of argument, however, we were astounded to encounter a bench populated by no fewer than twenty-four judges,[77] perhaps the largest judicial panel in the history of American law.

What happened was that the Fifth Circuit, which had recently been split to form the Eleventh, was unsplit for this one argument. Some obscure rule, unknown to any of the lawyers, at least on our side, and probably never before and never again to be applied, provided that rehearings *en banc* in cases filed in the Court of Appeals before the split are to be heard as if the split had not occurred.[78] A half-hour is not a lot of time to argue a case before three judges; facing twenty-four, can be intimidating.

I was happy to learn that we again won the case, but by a tally that would seem more appropriate as a football score, 14–10,

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70. *Scott*, 680 F.2d at 983.
71. *Id.*
72. *Id.* at 983–84.
73. *Id.* at 986–88.
74. 461 F. Supp. 224 (E.D. Tex. 1978).
75. 640 F.2d 708 (5th Cir. Mar. 1981).
76. 656 F.2d 108 (5th Cir. Aug. 1981).
77. 680 F.2d at 982.
78. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, § 9(3), 94 Stat. 1994 (codified as amended at 28 U.S.C. § 41 (2006)).

than a judicial decision.[79] More ominously, we won over the dissent of Judge Garwood, which caused me great personal conflict because I was afraid that, as usual, he might be right, as he, in fact, proved to be. Further, there was the distressing spectacle of Judge Garwood openly coming out on the side of unions and union violence, again illustrating the unfortunate consequences of encountering a person of principle and integrity. Judge Garwood did his best to extricate himself from this embarrassing position by stating, "I do not denigrate the right of individuals not to belong to unions, nor do I suggest that the right to work on a job not restricted to union members is unworthy of protection against unlawful interference."[80]

Nonetheless, there was still the matter of the rule of law, and as always, Judge Garwood felt constrained to abide by it. In his view, this federal statute, meant to prevent the Klan from supplanting or coercing state governments, could not reasonably be understood to cover what was essentially a private dispute fully covered and controlled by state law.[81] He saw no need to supplant applicable state law with federal law.[82] Unfortunately, from my clients' point of view, the Supreme Court agreed with Judge Garwood, although only by a 5–4 vote.[83] My only consolation, such as it is, was that we actually came out ahead in the overall judicial count, by a score of 21–16.

My other unfortunate encounter with Judge Garwood's jurisprudence involved the more recent and very famous *United States v. Lopez*, the case challenging the constitutionality of a federal law prohibiting guns around schools.[84] For almost 30 years, I had been teaching my first-year constitutional law students that there are no judicially enforceable limits on what Congress can do pursuant to its power to regulate interstate commerce. The essence of American federalism, I taught, was that although we live under a national government of limited powers, with Congress confined to those powers enumerated in the Constitution, Congress could in fact do anything, though

79. 680 F.2d 979 (5th Cir. 1982).
80. *Id.* at 1025.
81. *Id.*
82. *Id.*
83. United Brotherhood of Carpenters & Joiners of America, Local 610 v. Scott, 463 U.S. 825 (1983).
84. United States v. Lopez, 2 F.3d 1342, 1367–68 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995).

only with a little duplicity. Congress could, for example, prohibit the carrying of a gun near a school by simply claiming to be regulating interstate commerce.

One thing students could be sure of in constitutional law, I sagely instructed, was that the Supreme Court, having nearly had its feathers trimmed by President Franklin Roosevelt's "Court-packing Plan," would never again hold a federal statute unconstitutional because it is not a valid exercise of Congress's commerce power. The Supreme Court had not done that for nearly 60 years,[85] and surely no federal judge would even think of doing it any longer. Imagine my embarrassment, then, when in 1995 a unanimous panel of the Fifth Circuit, in an opinion by Judge Garwood, living right here in Austin, went out of its way to prove me wrong.[86] Was it not just like Judge Garwood to take the Constitution seriously and discover that it still provides for a federal government of limited powers and still has a Tenth Amendment? Prohibiting guns around schools, it just so happens, as he pointed out, has very little to do with the regulation of commerce among the states and, therefore, could not be upheld on that ground.[87]

One very unusual thing that made the *Lopez* ruling simply too tempting for Judge Garwood to resist was that Congress had grown so heedless of the limits on its powers that in passing the Gun-Free School Zones Act of 1990, it neglected to even mention interstate commerce.[88] Judge Garwood, in effect, told Congress that regulating things it has no power to regulate by claiming to be regulating interstate commerce may be just a game, but it is a game Congress must at least play, it is the price vice owes to virtue; there must be some limit even to duplicity.

Let Judge Garwood have his fun, I remember thinking at the time, he will get slapped down by his jurisprudential superiors soon enough and taught to stay in line. Again, to my dismay, his position prevailed in the Supreme Court, although only by a 5–4

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85. Johanna R. Shargel, *In Defense of the Civil Rights Remedy of the Violence Against Women Act*, 106 YALE L.J. 1849, 1852 (2008) ("In 1994 . . . the Commerce Clause appeared to be a sound basis for congressional action. The Supreme Court had not invalidated legislation relying on the Commerce Clause in nearly sixty years . . . ."); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 153 (2d ed. 2005).

86. *Lopez*, 2 F.3d at 1342.

87. *Id.* at 1366.

88. *Id.* at 1364.

vote.[89] To everyone's amazement, it turned out that there are judicially enforceable—albeit rather uncertain—limits on the national government's power. Except for Judge Garwood, this almost surely would have never happened; the case would have been over and never heard of again if the Fifth Circuit had simply affirmed the district court's dutiful decision upholding the statute. So Judge Garwood, with the help of Judges Reavley and King, not usually his ideological allies, started something of a revolution in the law of Congress's commerce power.[90] One result was to make first-year constitutional law more difficult, albeit more interesting, to teach.

C. *Judge Garwood and the Right to Bear Arms, by Sanford Levinson*[91]

Although I am greatly honored to hold the W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair in Law, I cannot say that I knew the late Judge Will Garwood very well. I was always pleased when I occasionally saw him at the law school or around Austin. I annually sent him a letter not only expressing my sincere gratitude for the support the Garwood Chair had provided with regard to allowing me to achieve some of my scholarly ambitions, but also enclosing recent examples of that scholarship. He was too tactful to ever indicate his views about what I sent him; it would certainly not surprise me if he occasionally thought it ironic that the Garwood family was supporting, for example, the writing of my book *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct it).*[92]

Yet, there may be at least one area where our interests and even our conclusions, at least in part, may have converged. The one time I am certain that Judge Garwood cited my work was in his seminal opinion for the Fifth Circuit in *United States* v. *Emerson.*[93] In that opinion, Judge Garwood became the first federal judge in the country to write a majority opinion

89. United States v. Lopez, 514 U.S. 549 (1995).

90. Judges Reavley, King, and Garwood made up the Fifth Circuit panel that decided *U.S. v. Lopez.*

91. W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair, The University of Texas School of Law.

92. The answer to the parenthetical comment, incidentally, is a brand new constitutional convention.

93. 270 F.3d 203, 220 n.12 (5th Cir. 2001) (citing Sanford V. Levinson, *The Embarrassing Second Amendment,* 99 YALE L.J. 637 (1989)), *cert. denied,* 536 U.S. 907 (2002).

supporting the proposition that the Second Amendment, which had been the disrespected stepchild within the family known as the Bill of Rights, in fact protected an important individual right "to keep and bear arms,"[94] even if, in the instant case, the right was appropriately limited by the federal statute prohibiting the possession of firearms by anyone against whom a court had issued a protective order in a domestic relations dispute alleging the possibility of violence.[95]

Judge Garwood's majority opinion is a model example of meticulous judging. He engaged in a truly impressive examination of the various positions that had been argued in law reviews and other venues in the decades prior to his decision. He also analyzed many of the relevant historical materials. One of the impressive aspects of the opinion is its discussion of the distinct differences between what he called "the collective rights and sophisticated collective rights models for interpreting the Second Amendment,"[96] both of which justify expansive regulation of firearms. Although Judge Garwood explicitly recognized those communitarian, even insurrectionist, overtones within the Amendment,[97] he concluded that the Amendment was best understood as protecting "individual Americans in their right to keep and bear arms whether or not they are a member of a select militia or performing active military service or training."[98] Still, he just as certainly rejected what might be called an (even close to) "absolutist" conception of this individual right inasmuch as he upheld its abridgment with regard to Dr. Emerson.[99] Although Dr. Emerson appealed to the Supreme Court, the United States, through Solicitor General Theodore Olson, opposed a grant of certiorari, and the Court agreed.[100] I confess that I would love to know the vote on certiorari. Did, for example, judges who might be described as "pro-Second Amendment" (like Scalia and Thomas) vote against the grant because they rightly feared, in 2002, that they would be highly

94. Ricardo Gandara, *Senior 5th Circuit U.S. Judge of Austin Remembered for Brilliant Legal Mind*, AUSTIN AMERICAN-STATESMAN, July 15, 2011, http://www.statesman.com/news/local/senior-5th-circuit-u-s-judge-of-austin-1613325.html?cxtype=rss_ece_frontpage.

95. *See* 18 U.S.C. § 922(g)(8) (2006).

96. *Emerson*, 270 F.3d at 260.

97. *Id.* at 240.

98. *Id.* at 260.

99. *Id.* at 227.

100. Brief for the United States in Opposition, *Emerson v. United States* (No. 01-8780), 2002 WL 32157045, *cert. denied*, 536 U.S. 907.

unlikely to get the five votes needed to accept the proposition that Dr. Emerson has presumptive Second Amendment rights at all? But that only suggests that four liberals might well have wished to take the case in order to nip such arguments in the bud, unless, of course, they were also uncertain about getting the all-important fifth vote from Justice Kennedy. Perhaps both sides were engaging in what has come to be called a "defensive denial" of certiorari.[101]

In any event, Judge Garwood surely had cause to feel vindicated when the majority of the United States Supreme Court adopted a similar view in *Heller* in 2008.[102] And, if truth be known, Justice Scalia's majority opinion in *Heller* is far inferior to Judge Garwood's *Emerson* opinion, in two quite different ways. First, Justice Scalia, unlike Judge Garwood, comes close to ignoring the extent to which the Second Amendment must be understood against the background of allowing "the people," independently of state control, to possess the means potentially to respond—and perhaps even to overthrow—an oppressive government.[103] Judge Garwood, on the other hand, explicitly recognized those "insurrectionist" overtones,[104] even if he ultimately adopted a highly "individualist" interpretation of the Amendment. In my *Yale* essay, I suggested that if liberals were often "embarrassed" by the prospect that gun rights were protected at all, then modern day conservatives—at least in 1989—were equally embarrassed by these "insurrectionist" aspects of the Amendment's ideological history.[105] Justice Scalia

101. *See, e.g.*, H. W. PERRY, DECIDING TO DECIDE: AGENDA SETTING IN THE U.S. SUPREME COURT (1991) (defining "defensive denial" as a denial of certiorari arising from judges' distaste for the outcome on the merits, rather than the state of the law, and discussing the role of political ideology in the certiorari granting process); *see also* Udi Sommer, *Beyond Defensive Denials: Evidence from the Blackmun Files of a Broader Scope of Strategic Certiorari*, 31 JUST. SYS. J. 316 (2010) (asserting that "strategic conduct during certiorari is attached to a broader institutional context" than just the settling of the state of the law); Linda Greenhouse, *Dwindling Docket Mystifies Supreme Court*, N.Y. TIMES, Dec. 7, 2006, http://www.nytimes.com/2006/12/07/washington/07scotus.html (suggesting that the Supreme Court case load has dwindled because "neither the liberals nor the conservatives want to risk granting a case in which . . . they might not prevail").

102. District of Columbia v. Heller, 128 S. Ct. 2783, 2784–87 (2008).

103. *Compare* Heller, 128 S. Ct. at 2801–02 (commenting that most Americans appreciated the Second Amendment for purposes of hunting and self-defense), *with Emerson*, 270 F.3d at 240 (5th Cir. 2001) (recognizing the importance of being armed for resisting an oppressive army), *and* Levinson, *supra* note 93, at 649 (noting the importance of the Second Amendment in allowing militias to fend off the usurpation of rulers).

104. *See Emerson*, 270 F.3d at 240 (discussing the belief of some founders that an armed populace would fend off "federal tyranny").

105. Levinson, *supra* note 93, at 642, 650.

tried in effect to tame the Amendment and make it instead a protection for the right of individual self-defense against criminals.[106] As Saul Cornell has ably shown, that may have been a *common law* right, but it is highly unlikely that the purpose of those who supported the Amendment was simply (if at all) to constitutionalize this aspect of the common law.[107]

Justice Scalia also proved himself decidedly non-absolutist, although, unlike Judge Garwood, he made no serious attempt to justify the panoply of federal gun control laws that apparently pass muster under the Court's undisclosed level of review.[108] Thus, for example, Justice Scalia offers nothing by way of an explanation for Martha Stewart's inability, as a convicted felon (for lying to an FBI agent),[109] to have a gun in her home in order to engage in what is proffered to be a "fundamental right," namely, to defend herself against the prospect of physical violence within her "castle."[110] It is no surprise that Justice Scalia's opinion has been condemned by Nelson Lund, a committed originalist and devotee of the right to bear arms, for its manifest intellectual inadequacies.[111]

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106. *Heller*, 128 S. Ct. at 2783–87.

107. *See* SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGIN OF GUN CONTROL IN AMERICA (2006) (reviewed by Sanford Levinson, *Guns and the Constitution: A Complex Relationship*, 36 REV. AM. HIST. 1, 1–14 (2008) (tracing the common law and constitutional treatment of citizen ownership of weapons in the context of Founding-era debates, modern shifts in Supreme Court jurisprudence, and the application of myriad interpretive modalities)); *see also* Richard Uviller & William Merkel, THE MILITIA AND THE RIGHT TO BEAR ARMS (2004) (reviewed by Sanford Levinson, *Superb History, Dubious Constitutional and Political Theory: Comments on Uviller and Merkel, The Militia and the Right to Bear Arms*, 12 WM. & MARY BILL RTS. J. 315 (2004) (discussing the difficulty of ascertaining the legislative intent behind the Second Amendment, particularly with respect to whether an individual-focused or a collective-focused animus motivated the enactment of the Amendment)).

108. *See, e.g.*, Sanford Levinson, *Assessing* Heller, 71 INT'L J. CONST. L. 316 (2009) (asserting that interventionist judges bear the burden of demonstrating the clarity of any historical materials on which they rely, and suggesting that Scalia did not meet this burden in *Heller* because his opinion adheres inconsistently to an originalist modality).

109. *See Heller*, 128 S. Ct. at 2816–17. (asserting that the Second Amendment does not foreclose prohibition of firearm ownership by felons); *see also* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. PUB. POL'Y 695 (exploring the history and constitutionality of disarming felons with special emphasis on the Martha Stewart case).

110. *Heller*, 128 S. Ct. at 2798–99, 2810.

111. Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009). It has also been condemned by conservative federal judges Richard Posner and J. Harvie Wilkinson as exemplifying illegitimate "judicial activism," a charge that they would perhaps level at Judge Garwood as well, but that is the subject for a separate essay. *See* J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009) (asserting that in *Heller* the Court reached a conservative conclusion while eroding the tenets of conservative juriprudence that once provided separate checks on judicial activism); Richard Posner, *In Defense of Looseness: The Supreme*

It is probably worth noting that Judge Garwood also wrote for the Fifth Circuit in the famous case of *United States* v. *Lopez*,[112] which struck down the Gun-Free School Zones Act of 1990 as beyond Congress's power under the Commerce Clause. As every law professor and most students know, the Court, to the utter surprise of most law professors, upheld Judge Garwood,[113] holding for the first time since 1936 that a particular law affecting only private parties (and not the state per se) was invalid even though predicated on the Commerce Clause. It had become conventional wisdom that Congress functionally had plenary power under the Commerce Clause unless it ran into a specific prohibition of the Bill of Rights. As is obvious from the title of the Act, the case had something to do with guns, but that was almost irrelevant. Rather, the case sounded in federalism and the opinion spoke to Judge Garwood's view that the Constitution, rightly understood, established only a "limited" national government that was overreaching its authority in the instant case. Although at the time *Lopez* sparked many symposia and articles, either celebratory or anguished, about the "federalism revolution" on which the Court was purportedly embarking, I think it's fair to say that by the time of Judge Garwood's death, that revolution had basically dissipated. Perhaps it is unfair to say that it was only "full of sound and fury, signifying nothing"—after all, the various "anti-commandeering cases"[114] certainly remain on the books, not to mention restrictions on federal jurisdiction in the name of, even though without any evident connection to, the Eleventh Amendment—but Congress continues to have basically all the power it needs to manage the post-New Deal state, for better or for worse.[115]

Court and Gun Control, THE NEW REPUBLIC, Aug. 27, 2008, http://www.tnr.com/article/books/defense-looseness (asserting that the *Heller* decision is evidence "that the Supreme Court, in deciding constitutional cases, exercises a freewheeling discretion strongly flavored with ideology," to the detriment of methodological consistency).

112. 2 F.3d 1342, 1367–68 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995).

113. United States v. Lopez, 514 U.S. 549 (1995).

114. *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

115. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1 (2005). Presumably the acid test for this proposition will come sometime in 2012 when the Court hands down a decision regarding the constitutionality of the Affordable Care Act of 2010, popularly known as "Obamacare." I confess that I am one of the no-doubt majority of law professors who view this as an easy case. I will therefore be surprised if more than two of the Justices agree with the attack on its constitutionality, and it would not be truly surprising if only Justice Thomas expressed doubts on this score. But, as evidenced in *Lopez*, law professors are

If *Lopez* is only "accidently," as it were, a "gun case," that is certainly not the case with one of Judge Garwood's very last opinions for the Fifth Circuit, *United States* v. *Portillo-Munoz*.[116] Armando Portillo-Munoz was arrested following a traffic stop for "spinning around" on his red motorcycle with a gun protruding from his waistband.[117] He was subsequently discovered to be possessing a dollar containing evidence of what one assumes was cocaine.[118] Most seriously, he readily "admitted to being a native and citizen of Mexico illegally present in the United States."[119] Why was he in possession of a gun? The answer is that he needed it to protect chickens from coyotes at a ranch at which he had worked for the previous six months.[120] He had no prior criminal history of any kind.[121] He was ultimately indicted for being an "[a]lien, illegally and unlawfully present in the United States, in Possession of a Firearm under 18 U.S.C. § 922(g)(5)."[122] The question presented was whether this violated his rights under the Second Amendment by making the possession of *any* firearm *anywhere* a crime.[123]

The breadth of the federal statute forced Judge Garwood, writing for himself and Judge Garza,[124] to confront one of the thorniest questions not only of the Second Amendment, but also, beyond that, of American constitutional law and political thought, most notably—and disastrously—exemplified by *Dred Scott* v. *Sandford*.[125] The issue in both cases is: Who counts as part of the American community entitled to protection under the Constitution? Chief Justice Taney declared that those we today call African-Americans were decidedly outside the aforementioned community, which meant, among other things, that they had "no rights or privileges but such as those who held

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certainly not the last word on constitutional meaning, and it can be foolhardy to predict. Moreover, if President Obama is defeated, as is certainly possible, then it is highly likely that the replacements for Justices Ginsburg and Breyer, should they retire, would be extremely conservative.

116. 643 F.3d 437 (5th Cir. 2011).

117. *Id.* at 438.

118. *Id.*

119. *Id.* at 439.

120. *Id.*

121. *Id.*

122. *Id.*.

123. *Id.*

124. The third judge on the panel, Judge Dennis, dissented in part and concurred in part. *Id.* at 442.

125. 60 U.S. 393 (1857).

the power and the Government might choose to grant them."[126] One of the factors underlying Taney's assertion, as I suggested in my *Yale* essay,[127] was precisely the capacious view that he took of the rights enjoyed by all American citizens, which included the right "to keep and carry arms wherever they went."[128]

Of course the Constitution with some frequency speaks of "person[s]" instead of only citizens, most notably in the Fifth and Fourteenth Amendments, and other times refers to the rights of "the people," as in the First, Second, Fourth, Ninth, and Tenth Amendments. So even if this case concededly concerns a non-citizen in the country illegally, is this dispositive as to whether he counts as a "person" or one of the "people" entitled to constitutional protection? Judge Garwood, citing relevant authority from the Supreme Court, concluded that the Second Amendment "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[129] Judge Garwood concluded, not unreasonably, but certainly controversially, that these conditions were not met in the instant case.[130] Portillo-Munoz, therefore, was not entitled to an iota of protection under the Second Amendment, and the conviction stood.[131]

Judge Dennis dissented from the "majority's dismissal of Portillo-Munoz's Second Amendment claim,"[132] emphasizing Portillo-Munoz's eighteen-month presence in the United States, coupled with his generally exemplary behavior, including: holding a job (for which a gun was useful) and supporting his family.[133] Judge Dennis declared that the designation of the defendant as "not part of 'the people' effectively means that millions of similarly situated residents of the United States are 'non-persons' who have no rights to be free from unjustified

126. *Id.* at 405. Or, more notoriously, that they "had no rights which the white man was bound to respect." *Id.* at 407.

127. Sanford V. Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 651 (1989).

128. Levinson, *supra* note 93 at 651.

129. *Portillo-Munoz*, 643 F.3d at 440 (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990)).

130. *Id.* at 440–41.

131. *Id.* at 442.

132. *Id.* at 443 (Dennis, J., dissenting in part).

133. *Id.*

searches of their homes and bodies and other abuses,"[134] inasmuch as the key to understanding the majority opinion was *not* some special problem posed by firearms, but, instead, the labeling of the defendant as outside the relevant "community" fully protected by the Constitution. I personally find Judge Dennis's opinion persuasive on the previous point, but that, perhaps, is only to demonstrate, yet once more, that I am politically liberal and Judge Garwood was far more conservative than I am.

Whatever one's views on the merits though, the previous case offers a good test of the actual meaning of *Heller*. After all, as I suggested earlier, if one is to take seriously Justice Scalia's claim that it involves an individual right of self-defense against criminals in one's own home, then there is little basis for limiting the right on the basis of the status of the claimant (thus my reference to Martha Stewart earlier). Perhaps one can defend preventing someone convicted of a *violent* crime from possessing a firearm, even if, according to the majority's own reasoning, that would make one more vulnerable to criminal violence: "Live by the sword, die by the sword." Yet there is surely no reason to deprive someone convicted of a non-violent crime, even if that crime is illegally entering the United States (along with approximately eleven million other current residents of the United States), of the ability to engage in self-protection within the confines of one's home. It seems almost to suggest that Mr. Portillo-Munoz is an "outlaw" without an ability to defend himself against criminals who wish him harm. *If,* on the other hand, the Second Amendment has far less to do with an individual right to self-defense and more to do with empowering those who are part of the American political community to take up arms, should need be, against an oppressive state, then it is far more reasonable to restrict such a right to those who are indeed part of that community. One might well believe that membership could extend to resident aliens who have, by definition, even though non-citizens, been invited by the United States to sojourn for an indefinite period, indeed perhaps the rest of their lives. This would not allow, for example, temporary visitors or, in the context of the instant case, illegal aliens to claim such a right.

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134. *Id.*

In *Portillo-Munoz*, Judge Garwood accurately noted the presence of (at least) two contradictory impulses in *Heller*, and he chose to emphasize the more communitarian one.[135] One can scarcely condemn him for doing so, even if I would have preferred the more individualist account offered by Judge Dennis.[136] What is important is that Judge Garwood clearly took his duty seriously and wrote an opinion that provides much room for thought. That is, after all, the task of a judge, even one labeled by the Constitution as a member of an "inferior" court.[137] But, as his opinions in *Emerson*, *Lopez*, and *Portillo-Munoz* amply indicate, members of such courts may make their own mark on the law.

IV. CONCLUSION

Judge Garwood leaves a legacy of service few can match. Known for one of the keenest legal minds ever to grace the bench and one of the most gentlemanly demeanors ever to grace many lives, Judge Garwood survives in more than memory. Whether refocusing a nation's view of its foundational structure, a panel's view of a particular case before it, or a fledgling lawyer's view of the practice of law, Judge Garwood spent decades making a difference that will endure.

135. *Id.* at 440 (majority opinion).
136. *Id.* at 443–44 (Dennis, J., dissenting in part).
137. U.S. CONST. art. III, § 1.

THE PARSONAGE EXEMPTION DESERVES BROAD PROTECTION

JUSTIN BUTTERFIELD, HIRAM SASSER, AND REED SMITH*

* Justin Butterfield graduated from Harvard Law School in 2007 and is now an attorney at the Liberty Institute, where he practices civil rights litigation, focusing on defending religious liberty. Hiram Sasser graduated from Oklahoma City University School of Law and is now the Director of Litigation for the Liberty Institute. Mr. Sasser's practice includes litigation and appellate advocacy on a number of constitutional and civil rights issues but focuses primarily on religious liberty. Reed Smith graduated from the University of Virginia School of Law in 2008 and is currently an associate at the litigation boutique Ahmad, Zavitsanos, Anaipakos, Alavi, and Mensing, P.C. Reed served as a law clerk to the Honorable Catharina Haynes, United States Court of Appeals for the Fifth Circuit, in the 2010–11 term, and law clerk to the Honorable Paul Stickney, United States District Court for the Northern District of Texas, in 2010. Reed also clerked in the Office of Solicitor General of Texas from 2008–09. Nothing herein is intended to reflect the opinions of the Texas Solicitor General's office, except as announced in a brief filed by that office, or any judge or court, except as announced in an opinion of the judge or court.

I. INTRODUCTION

Every spring, millions of Americans pore over arcane forms, double-checking to determine whether there is but one more tax exemption to invoke in order to keep more of what they earned. It is important to think of tax exemptions in this way: a legal means to keep more of what one earned. Among the millions of taxpayers engaging in this tedious task wrought with incomprehensible consequences are a statistically insignificant yet important group of citizens who serve the public good: pastors, rabbis, priests, imams, and other religious "ministers."[1] These ministers may deduct a portion of the pay they receive from their respective religious ministries as a parsonage exemption to cover expenses related to the maintenance of a home.[2]

Exempting the property of ministers from government taxation is neither new nor novel. As recorded in the first book of the Bible, "Joseph made it a law over the land of Egypt to this day, that Pharaoh should have one-fifth, except for the land of the priests only, which did not become Pharaoh's."[3] In an unbroken tradition since its inception, the United States has exempted all church property from taxation, including parsonages.[4] Such exemptions from taxation, along with the wider exemptions from governmental regulation afforded religious institutions, such as the constitutionally necessary "ministerial exception" that courts apply to the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964,[5]

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1. Grouping such diverse religious teachers under the term "ministers" may seem somewhat presumptuous, but it is the term of art for their calling under the law addressed in this Article and, for the sake of brevity, will be used throughout this Article as an all-inclusive term for priests, pastors, rabbis, imams, and other religious leaders. *See, e.g.*, I.R.C. § 107 (2006) (using the term "minister" broadly to incorporate religious leaders of varying beliefs); *see also* Treas. Reg. §§ 1.107-1 (as amended in 1963) (same), 1.1402(c)-5 (as amended in 1968) (same); Salkov v. Comm'r, 46 T.C. 190 (1966) (holding that a cantor of the Jewish faith is considered a "minister of the gospel" for the purposes of I.R.C. § 107).

2. I.R.C. § 107.

3. *Genesis* 47:26.

4. *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 677–78 (1970) (stating that the Religion Clauses of the Constitution have historically been viewed as allowing tax exemption for church property).

5. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012) ("We agree that there is such a ministerial exception" that applies to antidiscrimination employment laws such as the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2006), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2006)).

ecclesiastical exceptions,[6] and statutorily-created exemptions, such as those in the Religious Freedom Restoration Act of 1993,[7] guard against government absolutism and preserve the independence of religious institutions, shielding them from government intrusion. Exemptions provide not merely protection against government influence in churches caused by looming sanctions, but also against a more subtle intrusion in the form of an investigation or the adjudication of ecclesiastical matters.

There are those who believe exemptions that exclusively benefit religious organizations are either problematic or unconstitutional.[8] This movement includes several groups hostile to religion in the public square that expansively fight against legal exceptions for religious entities wherever they may find them.[9] Central to these attacks is the notion that religious institutions should be treated the same as secular institutions. But with the ever-increasing reach of governmental regulation of our businesses, our institutions, and our very lives, the damage wrought by government reach into church affairs or coffers and the attendant regulations and investigations is anything but obscure.

This Article considers the history and the legal context—focusing on an analysis of the constitutionality—of the parsonage exemption. This Article also considers the consequences and reasons for the Eleventh Circuit's *Commissioner v. Driscoll* decision, in which the court held that § 107 of the Internal Revenue Code allows a minister to invoke the parsonage

6. The Supreme Court described what is known as the church autonomy doctrine, sometimes called the ecclesiastical abstention doctrine, as "a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952) (citing Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871)). The church autonomy doctrine protects churches against otherwise actionable tort suits because imposing tort liability in some ecclesiastical circumstances "would in the long run have the same effect as prohibiting the practice and would compel the Church to abandon part of its religious teachings." Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 819 F.2d 875, 881 (9th Cir. 1987).

7. 42 U.S.C. §§ 2000bb–2000bb-4 (2006).

8. *See, e.g.*, Erwin Chemerinsky, *The Parsonage Exemption Violates the Establishment Clause and Should be Declared Unconstitutional*, 24 WHITTIER L. REV. 707 (2003) (arguing for the unconstitutionality of the parsonage exemption).

9. *See, e.g.*, Brief Amici Curiae of the Am. Humanist Ass'n & Am. Atheists et al., in Support of Respondents, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012) (No. 10-553) (contending that the ministerial exception to the ADA is in violation of the First and Fourteenth Amendments).

exemption to claim a deduction for only one home.[10] While the issue in *Driscoll* has been treated by the courts primarily as a statutory interpretation question concerning the meaning of § 107's reference to "a home,"[11] it raises larger questions regarding religious exemptions that are sometimes perceived to unfairly favor religious institutions over secular ones. This Article will explore those broader issues through the lens of the parsonage exemption in § 107.

II. THE HISTORY OF THE PARSONAGE EXEMPTION

When interpreting a statute, a court should follow the canon of constitutional avoidance and avoid any interpretation that raises doubts about the statute's constitutionality. One of the most important and persuasive considerations used in determining whether a challenged practice is constitutional under the Establishment Clause is the history of that practice.[12] As Justice Brennan wrote in his concurrence in *Walz v. Tax Commission*, "the history, purpose, and operation of real property tax exemptions for religious organizations must be examined to determine whether the Establishment Clause is breached by such exemptions."[13] It is worth noting that for nearly as long as governments have demanded tribute in the form of taxes from their subjects, those governments have chosen not to levy taxes on churches and other religious properties. As one scholar has noted, "a perusal of the history of tax exemption indicates that the granting of tax immunity to ecclesiastical . . . property is probably as old as the institution of taxation."[14]

The practice of exempting religious property from taxation has roots as deep as ancient Egypt.[15] Egypt was not aberrational; the practice of exempting religious property from taxation can be found in the histories of the Roman Empire, Persia, India,

10. 669 F.3d 1309 (11th Cir. 2012).

11. I.R.C. § 107(2006).

12. *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 677–79 (1970) (recounting the historical congressional approval of tax exemption for churches); *see also* Salazar v. Buono, 130 S. Ct. 1803, 1817 (2010) (noting the Court's consideration of history in determining the constitutionality of religious displays); McCreary County v. ACLU, 545 U.S. 844, 866 (2005) (same).

13. *Walz*, 397 U.S. at 681 (Brennan, J., concurring).

14. Claude W. Stimson, *The Exemption of Property from Taxation in the United States*, 18 MINN. L. REV. 411, 418 (1934).

15. *Genesis* 47:26.

and medieval Europe.[16] Given the exemption's deep roots in the Western world and beyond, it is unsurprising that the practice was adopted without controversy by the American colonies.[17] Each of the original colonies recognized a tax exemption for religious property either by law or by practice.[18] When the First Amendment was ratified in 1791, four of the states recognized such an exemption in their state constitutions as either permissive or mandatory.[19] Those states without a codified exemption almost certainly did not believe codification to be necessary.[20] As a Connecticut court noted, the exemption of religious properties from taxation "has been . . . accepted as axiomatic. It has been incorporated into the constitution of several States. It has been inseparably interwoven with the structure of our government and the habits and convictions of our people since 1638."[21] Justice Brennan similarly noted, "History is particularly compelling . . . because of the undeviating acceptance given religious tax exemptions from our earliest days as a Nation. Rarely if ever has this Court considered the constitutionality of a practice for which the historical support is so overwhelming."[22]

The Founders did not regard a tax exemption for religious property as conflicting with the Constitution or the Establishment Clause. Rather, "tax exemption for religious institutions has been the American practice since the disestablishment of churches."[23] Both South Carolina and Pennsylvania reformed their constitutions in 1790 in recognition of the new federal Constitution, but the practice of exempting religious property from taxation remained unchanged in those states.[24] In Virginia, which, as Justice Brennan noted, "provided the direct antecedents of the First Amendment"[25] and "remained

16. CHESTER JAMES ANTIEAU ET AL., RELIGION UNDER THE STATE CONSTITUTIONS 121–22 (1965).

17. *Id.* at 122.

18. *Id.*

19. *Id.* at 124–31.

20. *See, e.g.*, State v. Platt, 24 N.J.L. 108, 120 (1853) (noting that the tax exemption for religious property was "so entirely in accordance with the public sentiment, that it universally prevailed").

21. Yale Univ. v. Town of New Haven, 42 A. 87, 92 (Conn. 1899).

22. Walz v. Tax Comm'n, 397 U.S. 664, 681 (1970) (Brennan, J., concurring).

23. Monrad G. Paulsen, *Preferment of Religious Institutions in Tax and Labor Legislation*, 14 LAW & CONTEMP. PROBS. 144, 147 (1949).

24. ANTIEAU, *supra* note 16, at 129.

25. *Walz*, 397 U.S. at 682 (Brennan, J., concurring).

unusually sensitive to the proper relation between church and state during the years immediately following ratification of the Establishment Clause,"[26] the state supreme court reviewed Virginia's history of exempting religious property from taxation. The court concluded that "the policy of the state has always been to exempt property of the character mentioned and described in § 183 of the Constitution .... [A]s to such property[,] exemption is the rule and taxation the exception."[27] Even Washington, D.C., which throughout its history has been bound by the Establishment Clause, has always recognized a tax exemption for religious property.[28]

Against this backdrop of religious tax exemptions, it should be no surprise that in the Revenue Act of 1921, Congress, with little discussion and no controversy,[29] exempted from the gross income of ministers the rental value of any "dwelling house and appurtenances thereof" provided by a church as a part of compensation.[30] Even critics of the parsonage exemption often concede the constitutionality of exempting the value of property owned by the church, given the historical precedent for property tax exemptions and the Supreme Court's decision in *Walz*.[31]

The parsonage exemption, as codified in 1921, allowed an exemption only for those ministers who lived on property owned by their church, disadvantaging ministers whose churches provided a housing allowance rather than a church-owned parsonage.[32] In 1954, Congress amended the tax code to allow ministers to exempt a portion of their income to the extent used

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26. *Id.* at 683.

27. Commonwealth v. Lynchburg YMCA, 80 S.E. 589, 590 (Va. 1913). In *Lynchburg YMCA*, the court specifically addressed a provision that allowed an exemption for "[r]eal estate belonging to ... Young Men's Christian Associations, and other similar religious associations." VA. CONST. of 1902, art. XIII, § 183(e). Section 183 also contained an exemption for "[b]uildings with land they actually occupy, and the furniture and furnishings therein lawfully owned and held by churches or religious bodies, ... [including] the residence of their minister of any such church or religious body." *Id.* § 183(b).

28. ANTIEAU, *supra* note 16, at 122.

29. *See* Matthew W. Foster, Note, *The Parsonage Allowance Exclusion: Past, Present & Future*, 44 VAND. L. REV. 149, 151 n.10 (1991) (noting the absence of contemporary debate or discussion in Congress and absence of contemporary court challenges to this statute at the time of its passage).

30. United States Revenue Act of 1921, ch. 136, § 213(b)(11), 42 Stat. 226, 239 (current version at I.R.C. § 107 (2006)).

31. *See, e.g.*, Chemerinsky, *supra* note 8 (arguing only that I.R.C. § 107(2) is unconstitutional even while discussing all provisions of § 107).

32. § 213(b)(11), 42 Stat. at 239.

by the minister for housing.[33] According to the Senate Report, the purpose of this addition was to eliminate the disparity in the tax code between ministers who lived in a church-owned parsonage and those who were given a stipend with which to secure housing.[34]

III. THE CONSTITUTIONALITY OF THE PARSONAGE EXEMPTION

The parsonage exemption has its constitutional critics.[35] This section argues that the parsonage exemption as codified in § 107 of the Internal Revenue Code is constitutional, but the Treasury regulations[36] interpreting the parsonage exemption are constitutionally problematic.[37]

The Internal Revenue Code directly or indirectly grants many housing tax breaks, including to members of the military,[38] members of the Foreign Service or the intelligence community,[39] persons living in low-income housing,[40] first-time home buyers,[41] some employees who are required to live at their place of work,[42] some members of the Peace Corps,[43] and religious leaders. Each of these tax breaks or credits is structured slightly differently. The parsonage exemption's exclusion of the fair-market rental value of a home is similar to the exclusion of the military's Basic Allowance for Housing in that both allow for the exclusion of a reasonable amount[44] from the taxpayer's gross income.

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33. *See* RICHARD R. HAMMAR, PASTOR, CHURCH AND LAW 100 (1983) (discussing the 1954 revision, which expanded the applicability of the parsonage exemption).

34. S. REP. NO. 83-1622, at 15 (1954).

35. *See, e.g.*, Chemerinsky, *supra* note 8 (arguing that § 107(2) is unconstitutional).

36. Treas. Reg. §§ 1.107-1 (as amended in 1963), 1.1402(c)-5 (as amended in 1968).

37. The conclusion that some of the Treasury regulations interpreting the parsonage exemption are unconstitutional in no way affects the constitutionality of the exemption itself—quite the opposite. The reasons supporting the constitutionality of the exemption call for its broader application, rather than the narrower approach taken by the IRS in its regulations.

38. I.R.C. § 134 (2006).

39. I.R.C. § 912 (2006).

40. I.R.C. § 42 (2006).

41. I.R.C. § 36 (2006).

42. I.R.C. § 119 (2006).

43. I.R.C. § 912 (2006).

44. The military's Basic Allowance for Housing (BAH) is calculated to be a reasonable amount according to the cost-of-living in the location where the taxpayer is stationed and is provided directly to the taxpayer as tax-exempt funds. Basic Allowance for Housing (BAH), DEF. TRAVEL MGMT. OFF., www.defensetravel.dod.mil/site/bah.cfm (last visited April 8, 2012). What constitutes a reasonable amount under the parsonage exemption is more ambiguous, but I.R.C. §§ 503 and 4958 provide that unreasonable compensation is either subject to a tax or a revocation of the church's nonprofit status. I.R.C. §§ 503, 4958 (West 2010).

The first argument against the constitutionality of the parsonage exemption is that it was passed for an unconstitutional purpose. Despite the official reasons for the revision to the tax code given in the Senate Report, those who claim that § 107(2) is unconstitutional argue that the statements of its author, Representative Peter Mack, reveal the exemption's real and unconstitutional purpose.[45] During the committee hearings for the exemption, Mack stated:

> Certainly, in these times when we are being threatened by a godless and antireligious world movement we should correct this discrimination against certain ministers of the gospel who are carrying on such a courageous fight against this foe. Certainly this is not too much to do for these people who are caring for our spiritual welfare.[46]

There are multiple difficulties with using this single passage to claim that § 107(2) has an unconstitutional purpose. First, while Representative Mack's language is sweeping, the general thrust of his statement is consistent with the purpose given in the Senate Report: to eliminate a disparity in the tax treatment of ministers.[47] A second difficulty with the critics' interpretation of Representative Mack's comments is that this interpretation ignores that a significant (and constitutional) tax exemption was already allowed to ministers under the previous version of the tax code.[48] Thus, the revisions in the tax code under the Revenue Act of 1954[49] should not be read as creating a new benefit to ministers, but as making a benefit that was already available to some ministers (an income exemption for church-provided housing) available to all ministers who received some form of housing accommodation from their church as a part of their compensation.

Finally, those arguing that the parsonage exemption is unconstitutional have failed to address the point that the difference between providing a housing allowance and providing a church-owned parsonage is one with important theological implications for most churches because it goes directly to the

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45. *See, e.g.*, Chemerinsky, *supra* note 8, at 711.

46. *Hearings on General Revenue Revisions Before the House Comm. on Ways and Means*, 83d Cong., 1st Sess., pt. 3, at 1576 (1953) (statement of Rep. Peter Mack).

47. *See supra* text accompanying note 34.

48. *See supra* text accompanying notes 29–33.

49. Internal Revenue Code of 1954, ch. 736, 68A Stat. 32 (codified as amended at I.R.C. § 107 (2006)).

issue of church polity.[50] Church polity is "[t]he internal organizational framework of the churches, their patterns of association, cooperation, and governance, the structures by which the churches implement their doctrine and live their religious commitment."[51] The organizational structure of churches "is a manifestation of religious faith" and is often a matter of canon law.[52] The Supreme Court itself has recognized that such disputes are often theological in nature. In *Watson v. Jones*, the Court noted that "matter[s] which concern[] theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them" are "purely ecclesiastical."[53] Indeed, the ultimate issue in that case was ownership of a church's property when the congregation divided.[54]

The issue of whether a parsonage exemption is available to only those ministers who live in a church-owned home or also to those who receive a housing allowance goes to one of the deepest divides in the modern church: the authority of the institutional church. The Catholic Church places a strong emphasis on the central authority of the institutional church.[55] Therefore, Catholic congregations generally offer church-owned housing.[56] Indeed, as a matter of canon law, "[t]he Roman Pontiff is the supreme dispenser and administrator of all ecclesiastical properties in virtue of his office."[57] The Methodist Episcopal Church similarly requires that congregations involved in the purchase of property insert certain clauses protecting the

50. WILLIAM W. BASSETT ET AL., RELIGIOUS ORGANIZATIONS AND THE LAW § 3:6, at 3-22 (2011) ("Attorneys, on either side of litigation, should understand the churches as they see themselves. Primarily, organizational self-image is a manifestation of religious faith.").

51. *Id.* at 3-21.

52. *Id.* at 3-22.

53. 80 U.S. (13 Wall.) 679, 733 (1871).

54. *Id.* at 681 ("This was a litigation which grew out of certain disturbances in [a local church] which resulted in a division of its members into two distinct bodies, each claiming the exclusive use of the property held and owned by that local church.").

55. *See* BASSETT, *supra* note 50, § 3.7, at 3–28 (noting that the Roman Catholic Church is an example of a hierarchical church and, as such, "places ultimate power and authority in ecclesiastical superiors above the local congregation.").

56. *See* CARL ZOLLMANN, AMERICAN CIVIL CHURCH LAW 444–45 (Faculty of Political Sci. of Columbia Univ. ed., 2008) (noting that property used by Catholic congregations is usually held by bishops either as corporations sole or individuals in trust for those congregations).

57. THOMAS F. DONOVAN, THE STATUS OF THE CHURCH IN AMERICAN CIVIL LAW AND CANON LAW STUDIES 75 (1966).

rights of the institutional church as superior to those of the congregation.[58] This practice's historical roots can be traced back to John Wesley.[59]

Many Protestant denominations, on the other hand, tend to be distrustful of a centralized church authority. The Protestant Reformation was intended to eliminate "the system of hierarchical gradation and the identification of the Church with the priestly-sacramental clergy."[60] The Anabaptists and Quakers, for example, rejected "the visible church as a kind of 'trust foundation for supernatural ends.'"[61] Similarly, Walter Rauschenbusch, a key figure in the Social Gospel movement, noted that he and his followers "were against clericalism and against all hierarchies."[62] Other Protestant churches, such as the Presbyterian Church, have somewhat republican hierarchical structures in which local congregations elect representatives to governing bodies.[63] Because of the decentralized nature of these churches, congregations typically prefer to offer a housing allowance. Numerous factors go into this preference. For example, because church property tends to be owned at the local level,[64] there is often less money with which to provide a parsonage. Another consideration is the issue of ministers' families. Catholic priests, who remain chaste, do not have families, whereas many Protestant ministers, who usually are allowed to marry, will. This creates a dilemma for Protestant churches that offer parsonages rather than housing allowances: What should the congregation do with the minister's family once the minister dies? By offering a housing allowance instead of providing a church-owned property, the congregation does not have to deal with the uncomfortable prospect of evicting a minister's widow and children to make room for the new minister.

Though much more could be said on the theological

58. ZOLLMANN, *supra* note 56, at 445–46.

59. *Id.*

60. PROTESTANTISM 242 (J. Leslie Dunstan ed., 1961).

61. DONALD F. DURNBAUGH, THE BELIEVERS' CHURCH: THE HISTORY AND CHARACTER OF RADICAL PROTESTANTISM, at ix (MacMillan 1968) (quoting MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 144 (Talcott Parsons trans., Charles Scribner's Sons 1958) (1905)).

62. *Id.* at 285 (quoting WALTER RAUSCHENBUSCH, THE FREEDOM OF SPIRITUAL RELIGION 13 (1910)).

63. BASSETT, *supra* note 50, § 3:7.

64. ZOLLMANN, *supra* note 56 at 444.

implications of church-owned property, it is enough for present purposes to recognize that a congregation's choice to offer a housing allowance rather than allow the minister to live in a church-owned dwelling is not one of mere accounting or convenience, but rather one rich with theological and ecclesiastical underpinnings. This is significant because under the Free Exercise Clause, the government may not "impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma."[65] Moreover, as discussed further below, to the extent that § 107(2) does benefit religion, government can take actions for the purposes of equality that it may not take for other purposes. For these reasons, the constitutionality of § 107(2) cannot be considered apart from the preexisting (and constitutional) parsonage tax income exemption found in § 107(1).

Chemerinsky argues that the parsonage exemption is unconstitutional because § 107(2) benefits only ministers.[66] In noting that other Code provisions provide similar exemptions to members of the military, the Peace Corps, the Foreign Service, employees who live at their place of employment, etc., Chemerinsky dismisses these exemptions as being irrelevant to the constitutionality of the parsonage exemption because they are not located in I.R.C. § 107(2).[67] This dismissal is unreasonable, however, as it would lead to the absurd conclusion that the parsonage exemption is unconstitutional merely because of its location within the Internal Revenue Code, and it would become a valid provision just like the provision of nonprofit status for churches in I.R.C. § 501(c)(3)[68] if only some of the other housing tax exemption provisions had been moved to I.R.C. § 107(2) as well.

Chemerinsky also notes that the government pays members of the military and the Foreign Service, so a tax benefit to those groups is simply compensation for their employment in another form and thus has no bearing on ministers.[69] This cannot be the end of the analysis, though, because first-time home buyers and

65. Emp't Div. v. Smith, 494 U.S. 872, 877 (1990).
66. Chemerinsky, *supra* note 8, at 717–18.
67. *Id.* at 728.
68. I.R.C. § 501(c)(3) (2006) ("[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious . . . purposes").
69. Chemerinsky, *supra* note 8, at 728.

employees who live at their place of employment for the benefit of their employer are not all federal employees. Ultimately, the parsonage exemption is merely one of several housing tax exemptions that provide reprieve to those who work for the public good.

The parsonage exemption does provide a benefit to religion, but providing a benefit to religion does not render the exemption unconstitutional. As is most directly seen in I.R.C. § 501(c)(3), which grants tax-exempt status to educational, scientific, and religious entities, the government is permitted to provide tax exemptions to groups of entities that benefit the public, including religious entities.[70] As Justice Scalia noted during oral arguments in *Lamb's Chapel v. Center Moriches Union Free School District,* churches in New York are granted exemptions from property tax because "God-fearing" people are "less likely to mug me and rape my sister."[71] Justice Scalia also noted in his concurrence in *Lamb's Chapel* that "indifference to 'religion in general' is *not* what our cases, both old and recent, demand."[72]

Indeed, the Supreme Court has stated that the Establishment Clause prohibits hostility against religion as much as it prohibits the establishment of a state religion.[73] Declaring a tax provision unconstitutional merely because members of the clergy derive benefit from it would exemplify such hostility to religion. The Supreme Court has also stated that its "precedents plainly contemplate that on occasion some advancement of religion will result from governmental action."[74] The mere fact that the Internal Revenue Code provides some assistance to religion by reducing the tax burden on ministers (and soldiers, spies, and Peace Corps volunteers) is not a constitutional infirmity.

Chemerinsky analogizes the parsonage exemption to the absolute ban on requiring a person to work on his or her Sabbath that was struck down in *Estate of Thornton v. Caldor, Inc.*[75]

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70. *See* Walz v. Tax Comm'n, 397 U.S. 664 (1970) (allowing a tax benefit that goes to secular and religious buildings).

71. Transcript of Oral Argument at 48, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (No. 91-2204).

72. *Lamb's Chapel,* 508 U.S. at 400 (Scalia, J., concurring) (citing Zorach v. Clauson, 343 U.S. 306, 313–14 (1952)).

73. Epperson v. Arkansas, 393 U.S. 97, 103–04 (1968). Furthermore, as the Supreme Court stated in *Torcaso v. Watkins,* Secular Humanism is itself a religion that can no more be endorsed than theism. 367 U.S. 488, 495 n.11 (1961).

74. Lynch v. Donnelly, 465 U.S. 668, 683 (1984).

75. 472 U.S. 703, 710–11 (1985). *See* Chemerinsky, *supra* note 8, at 727 ("The Supreme Court's decision in *Estate of Thornton v. Caldor, Inc.* is exactly on point . . . .").

As Justice O'Connor's concurrence explains, however, the statute in *Estate of Thornton* was not struck down because it accommodated religion but because it singled out Sabbath observers for special, absolute protection without any regard for the ethical and religious beliefs of others.[76] Because of the absolute nature of the Sabbath-forcing statute, the government was endorsing "a particular religious belief, to the detriment of those who do not share it."[77] In fact, Justice O'Connor contrasted the Sabbath-forcing statute with the religious accommodation provisions of Title VII of the Civil Rights Act of 1964, noting that Title VII is acceptable because it "calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the Sabbath observance."[78] Completely unlike the Sabbath-forcing statute in *Estate of Thornton*, the parsonage exemption does not enforce one religious belief to the detriment of those who do not hold that belief. It does not favor one religion over all other religions. The parsonage exemption is a reasonable accommodation that cannot be perceived to suffer the fatal flaw of establishing one religious dogma to the detriment of all others.

In fact, as has been discussed previously, the parsonage exemption may even alleviate Establishment Clause concerns.[79] At the very least, the parsonage exemption provides more equal treatment for the clergy of denominations that do not traditionally have on-site housing. Without the parsonage exemption, the provision for a housing tax exemption under § 119 of the Internal Revenue Code—which applies to employees who are required to live at their workplace as a condition of employment[80]—would grant tax exemptions to clergy of denominations that traditionally provide housing at the place of worship while denying such exemptions to the clergy of religions and denominations that do not. For example, the Roman Catholic Church traditionally provides rectories where its clergy live. Other denominations are much less likely to provide for or to require as a condition of employment such on-site housing. By enacting the parsonage exemption, Congress equalized the tax

76. *Estate of Thornton*, 472 U.S. at 711 (O'Connor, J., concurring).
77. *Id.*
78. *Estate of Thornton*, 472 U.S. at 712 (O'Connor, J., concurring).
79. *See supra* text accompanying notes 32, 65, and 76.
80. I.R.C. § 119(a) (2006).

burden for clergy of all religions and denominations instead of limiting the reprieve to only those clergy of denominations that provide rectories. *Driscoll*, then, is out of step with the historical drive of the parsonage exemption because limiting the exemption to only one home increases rather than diminishes the disparity between denominations.[81] This means that, for example, a Baptist pastor who preaches in one town on Sunday mornings and teaches a Bible study in another town on Wednesday nights may not deduct the rental value of two apartments—resulting in a disparity between the Baptist pastor and a Roman Catholic priest who would have access to separate church-owned facilities in each town.

IV. THE ECCLESIASTICAL ABSTENTION DOCTRINE RENDERS THE TREASURY REGULATIONS INTERPRETING THE PARSONAGE EXEMPTION UNCONSTITUTIONAL

Finally, Chemerinsky correctly argues that because the parsonage exemption requires the government to determine who qualifies as a "minister of the gospel," there is an entanglement problem.[82] The problem lies not in § 107 itself, however, but in the Treasury regulations that interpret it.

For over one hundred years, civil courts, under what is termed

81. The Eleventh Circuit did not consider this issue in its opinion, but rather treated *Driscoll* purely as an issue of statutory interpretation. Comm'r v. Driscoll, 669 F.3d 1309 (11th Cir. 2012). The Eleventh Circuit acknowledged that the language of the parsonage exemption is ambiguous because "a home" could mean "no particular home" or "one home." *Id.* at 1312. The tax court had resolved this issue by noting that the Internal Revenue Code cross-references the Dictionary Act, which states that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise—words importing the singular include and apply to several persons, parties, or things." Driscoll v. Comm'r, 135 T.C. 557, 566 (2010), *rev'd*, 669 F.3d 1309 (11th Cir. 2012) (citing I.R.C. § 7701(p)(1)(1) (2006) and quoting 1 U.S.C. § 1 (2006)). The Eleventh Circuit rejected the tax court's reasoning because "the Code also states that any cross references 'are made only for convenience, and shall be given no legal effect.'" *Driscoll*, 669 F.3d at 1311 (quoting I.R.C. § 7806(a) (2006)). The full text of I.R.C. § 7806(a), however, states: "The cross references in this title to other portions of the title, or other provisions of law, where the word 'see' is used, are made only for convenience, and shall be given no legal effect." *Id.* It is hard to imagine how this could have been intended to negate the legal effect of the referenced statutes (including other portions of the same title). A more plausible reading is that the references themselves have no legal effect, but that does not affect the applicability of the referenced statutes. The Eleventh Circuit also noted that income exclusions are to be "narrowly construed." *Driscoll*, 669 F.3d at 1312 (citing Comm'r v. Schleier, 515 U.S. 323, 328 (1995)). However, the Eleventh Circuit ignores that this principle does not apply to religious exemptions. Larson v. Valente, 456 U.S. 228, 243 (1982) ("Strict or narrow construction of a statutory exemption for religious organizations is not favored.") (quoting Valente v. Larson, 637 F.2d 562, 570 (8th Cir. 1981), *aff'd*, 456 U.S. 228 (1982)).

82. Chemerinsky, *supra* note 8, at 730–31.

the "ecclesiastical abstention doctrine," have been forbidden to decide "a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them."[83] The United States Supreme Court defined the core of this First Amendment restraint on civil authority in *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America,* determining that the First Amendment's restraint on civil authority acknowledges a "spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[84] As Justice Brennan asserted, churches must be free to "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected . . . ."[85]

The ecclesiastical abstention doctrine, therefore, requires that only religious organizations—not the government—determine who is a minister and what actions are ministerial or worshipful.[86]

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83. Watson v. Jones, 80 U.S. (13 Wall.) 679, 733 (1871).

84. 344 U.S. 94, 116 (1952); *see also* Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1, 7–8 (1929) (holding that the judiciary cannot resolve disputes as to who should be granted a position in the clergy).

85. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 341 (1987) (Brennan, J., concurring) (quoting Douglas Laycock, *Towards a General Theory of the Religions Clauses: The Case of Church Labor Relations and the Right to Church Autonomy,* 81 COLUM. L. REV. 1373, 1389 (1981)).

86. This position has not been ratified by the Supreme Court, but it is consistent with its precedent. For example, in *Amos* the Court noted:

> [I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Id. at 336. The Supreme Court recently addressed the issue of courts determining whether a person is a minister of a religious organization in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,* 132 S. Ct. 694 (2012). The Court was "reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister." *Id.* at 707. In a concurring opinion, Justice Alito, joined by Justice Kagan, took a broad view that relied on the religious organization's belief

> that the religious function that respondent performed made it essential that she abide by the doctrine of internal dispute resolution; and the civil courts are in no position to second-guess that assessment .... [She is] the type of employee that a church must be free to appoint or dismiss in order to exercise the religious liberty that the First Amendment guarantees.

Any sincerely-held religious belief as to what constitutes an act of worship and who is designated as a minister is legitimate, and the First Amendment prohibits the government from intervening in these determinations.[87] Treasury Regulation § 1.1402(c)-5(b)(2)[88] disregards the ecclesiastical abstention doctrine, requiring the Internal Revenue Service to determine who is a minister and which functions constitute "the conduct of religious worship."[89]

The flaw in Treasury Regulation § 1.1402(c)-5 is illustrated by *Lawrence v. Commissioner*, in which the IRS refused to grant the parsonage exemption to a Southern Baptist minister of education on the grounds that he never baptized anyone or administered the Lord's Supper.[90] Lawrence was, however, described in his church minutes as "Commissioned Minister of the Gospel in Religious Education."[91] Lawrence's primary duties included the administration of his church's educational and service organizations, including Sunday school and youth group.[92] Lawrence also provided spiritual counseling, assisted in the regular worship services, and occasionally participated in

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Id. at 716 (Alito, J., concurring). Finally, Justice Thomas, in his concurring opinion, made a particularly salient point that "[j]udicial attempts to fashion a civil definition of 'minister' through a bright-line test or multi-factor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some." *Id.* at 711 (Thomas, J., concurring).

87. *Kedroff*, 344 U.S. at 116.

88. Treas. Reg. § 1.1402(c)-5(b)(2) (as amended in 1968). Section 1.1402(c)-5 provides the rules that the IRS applies to determine who qualifies as a "minister of the gospel" and whether particular activities are ministerial or sacerdotal. Treasury Regulation § 1.107-1, which deals with the rental value of parsonages, provides the following abridgement of § 1.1402(c)-5:

> Examples of specific services the performance of which will be considered duties of a minister for purposes of section 107 include the performance of sacerdotal functions, the conduct of religious worship, the administration and maintenance of religious organizations and their integral agencies, and the performance of teaching and administrative duties at theological seminaries. Also, the service performed by a qualified minister as an employee of the United States (other than as a chaplain in the Armed Forces, whose service is considered to be that of a commissioned officer in his capacity as such, and not as a minister in the exercise of his ministry), or a State, Territory, or possession of the United States, or a political subdivision of any of the foregoing, or the District of Columbia, is in the exercise of his ministry provided the service performed includes such services as are ordinarily the duties of a minister.

Treas. Reg. § 1.107-1(a) (as amended in 1963).

89. § 1.1402(c)-5(b)(2) (as amended in 1963).

90. 50 T.C. 494 (1968).

91. *Id.* at 498.

92. *Id.* at 495.

funeral services.[93] In effect, the IRS determined that a true Southern Baptist minister of the gospel will administer baptism and the Lord's Supper, and that Lawrence, who was designated by his church as a minister of the gospel, was not actually entitled to that position. The church in *Lawrence v. Commissioner* was not permitted to select its own leader or to determine the importance of its own doctrines—both violations of the First Amendment.[94]

Similarly, in *Colbert v. Commissioner*, the IRS denied the parsonage exemption to Colbert, an ordained Baptist minister who served as director of missions for the Christian Anti-Communism Crusade.[95] Colbert spoke at churches an average of 100 to 150 times per year, speaking about the dangers of communism to the world and to the Christian church.[96] The Tax Court said:

> In the instant case, we have no doubt that the petitioner was sincere in his belief that his activities and services performed for the Crusade were those of a minister of the Baptist faith . . . .
>
> . . . .
>
> . . . [B]ut . . . the preaching of anticommunism does not [come within the concept of the tenets and practices of the Baptist faith]. We fully accept the petitioner's thesis that communism is a godless force and that it is, in its purist form, necessarily incompatible with Christianity. However, this proposition is not the basis upon which to equate the preaching of anticommunism with the conduct of religious worship . . . . In the instant case there was competing testimony as to whether the petitioner's speeches and activities were the conduct of religious worship within the Baptist faith . . . .
>
> After considering the record in the instant case, we conclude that the petitioner's speeches and activities for which he was compensated by the Crusade were not the conduct of religious worship. The petitioner's speeches were not religious instruction in the principles laid down by Christ . . . .[97]

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93. *Id.* at 496.

94. As Justice Roberts noted in the Court's opinion in *Hosanna-Tabor*: "It was wrong for the Court of Appeals . . . to say that an employee's title does not matter." Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 708 (2012). It is all but a given that the *Hosanna-Tabor* Court would have deemed Mr. Lawrence a minister, contrary to the conclusion of the IRS.

95. 61 T.C. 449, 450 (1974).

96. *Id.* at 451.

97. *Id.* at 455–56.

Again, in violation of the First Amendment's ecclesiastical abstention doctrine, the IRS and the tax court—operating under Treasury Regulation § 1.1402(c)-5—in the face of a sincerely-held religious belief and testimony that Colbert's messages were inside the scope of religious worship within the Baptist faith, interposed their own theological understanding of the Baptist faith practiced by Colbert to find that anticommunism is not a "principle[] laid down by Christ."[98]

Ultimately, if the First Amendment's religious protections mean anything, they mean that a court cannot tell a person what is, for him, true religious worship. Yet that is exactly what the IRS and the tax court have done in analyzing the parsonage exemption under Treasury Regulation § 1.1402(c)-5. If, instead, the IRS looks to whether the person claiming the parsonage exemption maintains a sincerely-held religious belief as to his being a "minister of the gospel," this First Amendment violation will dissolve, leaving the parsonage exemption intact.

The IRS's concern in enforcing Treasury Regulation § 1.1402(c)-5, of course, is that persons will falsely claim to be ministers of the gospel to receive a housing tax exemption. The remedy for this was set forth by Justice Douglas in 1944 in *United States v. Ballard*, in which persons who had been found to make false statements about their religious beliefs were convicted of mail fraud for advertising their religious movement.[99] The Supreme Court noted, however, that "[h]eresy trials are foreign to our Constitution."[100] This provides the balance that sincerely-held religious beliefs are to be respected by the government, while persons acting out of insincere beliefs for fraudulent purposes may be prosecuted. The difference between the system set forth in *Ballard* and the system in use by the IRS is that under *Ballard*, the courts look at whether the person claiming to hold a religious view is sincere. Under the IRS's approach, the IRS looks at whether the person holding a religious view theologically *should* hold that view. The first approach requires the courts to merely look at facts and determine truthfulness of conviction. The latter approach requires the judiciary to become the arbiter of orthodoxy, setting forth the standard for what constitutes true worship and what constitutes false worship.

98. *Id.* at 456.
99. 322 U.S. 78, 79–83 (1944).
100. *Id.* at 86.

V. UNNECESSARY CONSTITUTIONAL COMPLICATIONS ARISE FROM THE IRS'S PROPOSED NARROW CONSTRUCTION OF I.R.C. § 107

The structure of our government "secured religious liberty from the invasion of the civil authority."[101] To that end, "the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."[102] Moreover, "[t]he interaction between the church and its pastor is an integral part of church government."[103] Indeed, "[t]he relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose."[104] It is this relationship between a minister and a church that is at the heart of the parsonage issue in *Commissioner v. Driscoll*.[105]

In *Driscoll*, the issue of statutory construction took center stage. In that case, a minister owned two homes—a primary residence and an additional residence.[106] The minister's church paid him part of his salary under the parsonage exemption for both homes.[107] The IRS sought to disallow the parsonage exemption for the second home.[108] The IRS's position stemmed from its determination that "a home" in § 107 allowed a minister to claim the parsonage exemption for only one home, not two.[109] Both the tax court and the Eleventh Circuit ruled on this case solely using statutory construction, without considering greater potential constitutional issues involved.[110] The denial of the parsonage exemption for the minister's second home is deeply troubling from a constitutional perspective. The *Driscoll* case did not involve any unreasonable income on the part of the pastor, as the IRS conceded in its reply brief on appeal.[111] The case also

101. Watson v. Jones, 80 U.S. (13 Wall.) 679, 730 (1871).

102. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948).

103. Simpson v. Wells Lamont Corp., 494 F.2d 490, 493 (5th Cir. 1974).

104. McClure v. Salvation Army, 460 F.2d 553, 558–59 (5th Cir. 1972). *See also* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012) ("members of a religious group put their faith in the hands of their ministers").

105. 669 F.3d 1309 (11th Cir. 2012).

106. Driscoll v. Comm'r, 135 T.C. 557, 558 (2010), *rev'd*, 669 F.3d 1309 (11th Cir. 2012).

107. *Id.* at 558–59.

108. *Id.* at 561.

109. *Id.* at 563–64.

110. Driscoll v. Comm'r, 135 T.C. 557, 566 (2010), *rev'd*, 669 F.3d 1309 (11th Cir. 2012).

111. *See* Reply Brief for Respondent at 8–9, Driscoll v. Comm'r, 135 T.C. 557 (2010), *rev'd*, 669 F.3d 1309 (11th Cir. 2012) (No. 1070-07) (conceding that Mr. Driscoll was still

involved no allegation of fraud.[112] Absent unreasonable income or fraud, courts and the IRS should not adopt a narrow construction of the parsonage exemption.

While the IRS may purport to advance important governmental interests for adopting a narrow construction of the parsonage exemption,[113] the religion clauses of the First Amendment countenance against such a narrow view.[114] But the more troubling aspect of the IRS's position—accepted by the Eleventh Circuit—is its preference for some types of religious organizations over others.

Section 119 of the Internal Revenue Code allows for ministers to live on employer-owned premises without incurring any income tax liability for the provision of the benefit.[115] This is a separate provision from § 107 and indeed may exist simultaneously according to the dissent in *Driscoll*.[116] Thus, it is possible for a minister to have two homes and receive exemptions for both homes, as long as one of the homes is on the premises of the ministry and the other home is the parsonage. A minister may have any number of homes under § 119, a fact the dissent relies upon to overcome the very real possibility that a minister may require a second home for

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entitled to a parsonage allowance). Unreasonable income would have led to the revocation of the allowance or the tax-exempt status of the church. *See* I.R.C. §§ 503, 4958 (2006)).

112. For a church to obtain tax-exempt status, the Internal Revenue Code requires that "no part of the net earnings of [the church] inures to the benefit of any private shareholder or individual." I.R.C. § 501(c)(3) (2006). Whether the IRS should be concerned with the ecclesiastical decisions of religious bodies concerning the remuneration of their spiritual leaders is a question reserved for another day. It is sufficient here to suggest that such intrusive governmental monitoring and enforcement poses interesting constitutional questions that, through inference from the text of this Article, the IRS should find troubling.

113. The IRS took the position in *Driscoll* "that exclusions from income must be narrowly construed." Comm'r v. Schleier, 515 U.S. 323, 328 (1995) (citations omitted). Such a general rule is not automatically an important or compelling governmental interest.

114. The "'values underlying these two provisions [of the First Amendment] relating to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance.'" Simpson v. Wells Lamont Corp., 494 F.2d 490, 494 (5th Cir. 1974) (quoting Wisconsin v. Yoder, 406 U.S. 205, 214 (1972)). Moreover, "'[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" *Id.* (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

115. I.R.C. § 119(a) (2006) ("There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him, his spouse, or any of his dependents by or on behalf of his employer for the convenience of the employer . . . .").

116. Driscoll v. Comm'r, 135 T.C. 557, 572 n.4 (2010) (Gustafson, J., dissenting) ("If a minister who maintains his section 107 home in one location is required to be away from home, the value of his stay in a rectory or 'prophet's chamber' on church premises may be excludable under section 119."), *rev'd*, 669 F.3d 1309 (11th Cir. 2012).

ministry purposes.[117] As explained earlier, there are religious reasons for a minister to maintain multiple homes,[118] some of which may be provided on the premises of ministries. In *Driscoll*, the IRS focused its attention on a minister simply because he sought a parsonage exemption for two homes that were not physically connected to church structures.

This position is dangerously close to an Establishment Clause violation under *Larson v. Valente*.[119] The Court explained in *Larson*, "Madison's vision—freedom for all religions being guaranteed by free competition between religions—naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of official denominational preference."[120] The Court went on to state that "when we are presented with a . . . law granting a denominational preference, our precedents demand that we treat the law as suspect . . . ."[121] Finally, no law can withstand constitutional scrutiny that "'prefer[s] one religion over another.'"[122] Exempting several homes of a minister that are located on the premises of the ministry itself and then denying the same form of exemption to a minister of a religion that has some theological concern regarding on-site housing runs afoul of this constitutional mandate. The same holds true for the exemption to a minister who lives in both an on-site dwelling and maintains an independent parsonage. The IRS's artificial argument to disallow one but allow another creates a constitutional difficulty where none would otherwise have existed.

It is unclear why the IRS would choose to take such a narrow view of the exemption. As discussed previously, the recovery of potential revenue from second parsonages hardly seems worth the risk of falling into a constitutional conundrum with such an interpretation,[123] and there are already safeguards in place to protect against fraud and overcompensation. Additionally, there is a "considerable burden . . . on the state, in questioning a claim of a religious nature. Strict or narrow construction of a statutory

117. *Id.*
118. *See supra* text accompanying notes 79–81.
119. 456 U.S. 228 (1982).
120. *Id.* at 245.
121. *Id.* at 246.
122. *Id.* at 245 (quoting Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947)).
123. *See supra* note 112.

exemption for religious organizations is not favored."[124] There are a wide variety of theological determinations that may lead to the conclusion that multiple parsonages are necessary. The IRS is in no position to favor the conclusion of any particular faith even though the IRS would claim to be neutral toward such deliberations. If two faith groups conclude that a second parsonage is warranted, the first group should not be financially punished while the second group successfully avails itself of both §§ 107 and 119.

It is understandable that the government must draw the line somewhere. It has at least drawn a line at the top, disallowing unreasonable income. The threat of a single minister claiming multiple parsonages seems largely illusory in the face of what is essentially a salary cap. But between that salary cap and an absolutist approach that § 107 only supports the claim of one parsonage, there are a countless multitude of theological permutations leading to differing ministry approaches regarding parsonages. While determining the precise boundaries appears somewhat tenuous—and indeed it is—prudence suggests leaving ample flexibility to allow the various theological permutations to unfold. Anything short of a hands-off approach is fraught with constitutional danger. For example, it would not be for the government to troll through the religious beliefs of a particular ministry to determine whether a particular parsonage arrangement is within acceptable governmental parameters.[125]

VI. CONCLUSION

The parsonage exemption is the culmination of a legal tradition beginning thousands of years ago and woven into the fabric of American society from the beginning. It is a recognition that clergy bring some good to the world, and it is a restraint on the government's intrusion into the matters of the church. It is also, in its ideal form, a means of bringing equality between different denominations where before there was—unintentionally—denominational favoritism in the tax code. Unfortunately, the parsonage exemption is tainted by the

124. *Larson*, 456 U.S. at 243 (quoting Wash. Ethical Soc'y v. District of Columbia, 249 F.2d 127, 129 (D.C. Cir. 1957)).

125. Widmar v. Vincent, 454 U.S. 263, 272 n.11 (1981) (describing as "impossible" the task of determining "which words and activities fall within 'religious worship and religious teaching'") (citation omitted).

Treasury regulations that apply it. However, with the Supreme Court's decision in *Hosanna-Tabor*, the aspects of the parsonage exemption that remain problematic should be overturned, leaving an exemption that promotes greater religious equality. While the Eleventh Circuit's decision in *Driscoll* is a setback, the parsonage exemption is an important component in ensuring the fairness of the tax code and in avoiding the sort of Establishment Clause problems that so concern its detractors.

NO MORE WEIGHTING: ONE PERSON, ONE VOTE MEANS ONE PERSON, ONE VOTE

KENT D. KRABILL & JEREMY A. FIELDING*

* Kent D. Krabill and Jeremy A. Fielding practice trial and appellate law at Lynn, Tillotson, Pinker & Cox, LLP in Dallas, Texas. They currently represent the plaintiffs in Lepak v. City of Irving, No. 11-10194, 2011 WL 6217946 (5th Cir. Dec. 14, 2011), a case in which voters contend the electoral plan for electing Irving's city council violates the "one person, one vote" requirement.

I. INTRODUCTION

> [T]he right of suffrage can be denied by a . . . dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise. . . . To the extent that a citizen's right to vote is debased, he is that much less a citizen.
> —Chief Justice Warren[1]

The Equal Protection Clause of the Fourteenth Amendment has been interpreted as guaranteeing the right of all voters to an equally weighted vote.[2] To prevent violations of this constitutional right, the Supreme Court announced a rule it dubbed "one person, one vote,"[3] which required the "substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State."[4] Even though it plainly identified the required end of a state's districting efforts—equally weighted votes—the Court left open the question of which population apportionment base could or should be used by states as a means of achieving that equality.

For many years, with the notable exception of *Burns v. Richardson*,[5] the issue of which apportionment base to use in redistricting remained non-controversial. It was nearly always total population. The reason for this is straightforward: under ordinary demographic conditions where noncitizen populations are relatively small and spread more or less proportionately throughout the electoral area, total population is a reliable proxy for voter population. With the dramatic influx of concentrated illegal immigration in the late 1980s and 1990s, however, an increasing number of cities and counties began to face the unusual demographic circumstance where the ordinary correlation between total population and voter population began to break down. In such cities and counties, when districts were drawn using total population as the apportionment base, the result was districts containing a substantially unequal number of voters.

In three of these cities and counties, voters brought one

1. Reynolds v. Sims, 377 U.S. 533, 555, 567 (1964).
2. *See id.* at 565–66.
3. Gray v. Sanders, 372 U.S. 368 (1963).
4. *Reynolds*, 377 U.S. at 579.
5. 384 U.S. 73 (1966).

person, one vote challenges, contending that the resultant unequal weighting of their vote was a violation of their constitutional right to a vote that was "approximately equal in weight to that of any other citizen."[6] These challenges resulted in a series of three decisions by the Ninth Circuit, Fourth Circuit and Fifth Circuit, each upholding (albeit on different grounds) the constitutionality of the electoral scheme notwithstanding the fact that each resulted in substantial vote dilution.

This Article argues that each of these cases—*Garza v. County of Los Angeles*,[7] *Daly v. Hunt*,[8] and *Chen v. City of Houston*[9]—was wrongly decided. Though using different grounds to uphold the redistricting schemes at issue, each court employed the same flawed analytical framework, which improperly cast the one person, one vote rule as protecting the right of nonvoters to equal representation instead of the right of voters to an equally-weighted vote. Each also misread *Burns* as leaving the choice about whose right to protect—those of voters or those of nonvoters—to the political discretion of the state, conflating *Burns*'s discussion of states choosing the means of achieving the end of equally weighted votes (an exercise of discretion *Burns* approved of) with choosing the end itself (something *Burns* makes clear a state has no discretion over).[10] Each also erred in treating representational equality and electoral equality as morally and constitutionally equivalent, ignoring the constitutional primacy of voting rights over representational rights.

This Article first discusses the legal background and logic of the Supreme Court's one person, one vote jurisprudence. It then analyzes the holdings of *Garza*, *Daly*, and *Chen*. Finally, it discusses the reasons why *Garza*, *Daly*, and *Chen* were wrongly decided and cannot be squared with existing Supreme Court precedent.

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6. *Reynolds*, 377 U.S. at 92.
7. Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990).
8. Daly v. Hunt, 93 F.3d 1212 (4th Cir. 1996).
9. Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2000).
10. *See infra* subpart III(B).

II. ONE PERSON, ONE VOTE AND THE SUPREME COURT

A. *The Equal Protection Clause and Each Voter's Right to an Equally Weighted Vote*

The one person, one vote constitutional requirement has a long and prestigious pedigree. The Supreme Court first announced this rule in *Gray v. Sanders*, decided in 1963.[11] The Court made clear, however, that in so doing, it was not creating a new right, but merely expressly recognizing a principle at the heart of American constitutional democracy. *Gray* involved a Georgia county-based primary election scheme which effectively gave greater weight to the votes of citizens in less populous counties than citizens in counties with larger populations.[12] In striking down the scheme as unconstitutional, the Court held that "equality of voting power" was a basic requirement of the Equal Protection Clause,[13] reasoning that:

> If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable. How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.[14]

The *Gray* court also firmly grounded the "voter equality" requirement in the very essence of the American democratic system, observing that "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one

11. 372 U.S. 368.
12. *Id.*
13. *Id.* at 381.
14. *Id.* at 379–80 (internal citations omitted).

vote."[15]

One year later, in *Reynolds v. Sims,* the Court elaborated on this same theme, linking the one person, one vote requirement with the "constitutionally protected right to vote" itself.[16] Noting that the "right to vote" was one of the most "basic civil rights of man,"[17] the Court logically observed that this right could be denied "just as effectively" by "a debasement or dilution of the weight of a citizen's vote" as by "wholly prohibiting the free exercise of the franchise."[18] Emphasizing this point, the Court wrote:

> "There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted. It also includes the right to have the vote counted at full value without dilution or discount."[19]

Accordingly, the Court concluded that the Constitution not only protected the right to cast a vote, but also the right to have that vote weighted equally: "[s]imply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living on other parts of the State."[20]

In the many subsequent one person, one vote cases that followed, the Supreme Court repeatedly underscored the fact that the Equal Protection Clause and its one person, one vote requirement strictly prohibited states from diluting the weight of voters' votes. For instance, in *Moore v. Ogilvie,* the Supreme Court held that "'[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.'"[21] Thus, "all who participate in the election are to have an equal vote."[22] Similarly, in *Hadley v. Junior College District,* the Court reaffirmed that all "qualified voter[s]" have the "constitutional right to vote in elections without having [their] vote wrongfully denied,

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15. *Id.* at 381.
16. 377 U.S. 533, 561 (1964).
17. *Id.*
18. *Id.* at 555.
19. *Id.* at 555 n.29 (quoting South v. Peters, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).
20. *Id.* at 568.
21. 394 U.S. 814, 819 (1969).
22. *Id.* at 817 (quoting Gray v. Sanders, 372 U.S. 368, 379 (1963)).

debased, or diluted."[23] Accordingly, the states are "required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's."[24] And, most recently in *Bush v. Gore*, the Court declared:

> The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.[25]

B. *"Substantially Equal" by Which Population Measure?*

To prevent unconstitutional vote dilution, the *Reynolds* court held that state electoral districts "must be apportioned on a population basis."[26] But in requiring these districts be of "substantially equal" voter population, the Court never specifically identified which apportionment base(s) could or should be used to obtain the required voter equality.[27] *Reynolds*, for instance, referred approvingly to state legislative districts containing "identical number[s] of residents, or citizens, or voters."[28]

Three years later, the Court addressed this question in *Burns v. Richardson*.[29] *Burns* involved a one person, one vote challenge to Hawaii's legislative apportionment scheme. Hawaii's population featured large numbers of temporary residents—tourists and members of the military stationed on bases—who were counted in census population but largely ineligible to vote because of residency requirements.[30] Because these temporary residents were disproportionately located on the island of Oahu,

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23. 397 U.S. 50, 52 (1970).
24. *Id.* at 54.
25. Bush v. Gore, 531 U.S. 98, 104–05 (2000); *see also* Town of Lockport v. Citizens for Cmty. Action, 430 U.S. 259, 265 (1977) ("[I]n voting for their legislators, all citizens have an equal interest in representative democracy, and [the] concept of equal protection therefore requires that their votes be given equal weight."); Chapman v. Meier, 420 U.S. 1, 24 (1975) ("All citizens are affected when an apportionment plan provides disproportionate voting strength, and citizens in districts that are underrepresented lose something even if they do not belong to a specific minority group.").
26. Reynolds v. Sims, 377 U.S. 533, 568 (1964).
27. *Id.*
28. *Id.* at 577.
29. 384 U.S. 73 (1966).
30. *Id.* at 94.

Hawaii recognized that creating districts of equal total population would mean that Oahu electoral districts would contain substantially fewer numbers of voters than districts on other islands. To avoid this vote-dilutive result, Hawaii decided to use registered voters as the apportionment base.[31] The *Burns* plaintiffs challenged this use of registered voters, contending that *Reynolds* had required total population equality.

The Supreme Court rejected this argument. It acknowledged that *Reynolds* had required electoral districts to be "apportioned substantially on a population basis."[32] However, the Court pointed out that *Reynolds* had "carefully left open the question [of] what population was being referred to."[33] Indeed, *Reynolds* had instead discussed "[at] several points . . . substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population."[34] The Court explained this was because, so long as the resulting plan was one in which the "vote of any citizen is approximately equal in weight to that of any other citizen in the State[,]"[35] decisions about which specific apportionment base to use "involves choices about the nature of representation" that the Constitution left to the state's discretion.[36] Put differently, *Burns* held that though a state has no discretion in picking the end—which must always be an electoral scheme that protects "[t]he right of a citizen . . . to have his vote weighted equally with those of all other citizens"—it has substantial political discretion in devising the means to that end, e.g., which apportionment base it uses to achieve that result.[37] The Court then concluded that Hawaii's apportionment based on registered voters met the required one person, one vote end because the resulting voter equality "substantially approximated that which would have appeared had state citizen population been the guide."[38]

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31. For instance, the district court noted (correctly) that because "tourists and the military tend to be highly concentrated on Oahu and, indeed, are largely confined to particular regions of that island," using total population as the apportionment base would produce "grossly absurd and disastrous results." *Id.* at 94–95.

32. *Id.* at 91 (internal citations omitted).

33. *Id.*

34. *Id.*

35. *Id.* at 91 n.20 (internal citations omitted).

36. *Id.* at 92.

37. *Id.* at 91 n.20 (citing Reynolds v. Sims, 377 U.S. 533, 576 (1964)).

38. *Id.* at 96.

C. Garza, Daly, *and* Chen

In the twenty years that followed *Burns*, there were scant cases involving a one person, one vote challenge to a particular apportionment base. The reason for this is straightforward: Except when facing unusual demographic circumstances, total population is a very effective proxy for voter population. So long as the number of nonvoters is relatively small and is spread more or less proportionately throughout a state or city, equalizing total population will invariably also equalize voter population. But, when there are large numbers of nonvoters and when those nonvoters are disproportionately concentrated in certain areas, this correlation begins to break down. This, of course, was the problem that Hawaii faced in *Burns*, which led it to adopt registered voters as its apportionment base—since registered voters more closely correlated to voter population that total population.

For many years Hawaii was apparently quite alone in facing these unique demographic conditions. During the 1970s and 1980s, courts heard many one person, one vote challenges, but never one where the otherwise reliable correlation between total population and voter population failed. Accordingly, like *Reynolds*, these decisions refer to total population and voter population as more or less interchangeable population bases.[39] Yet, consistent with *Burns*, these cases always made clear that total population was an acceptable apportionment base because it resulted in the constitutionally mandated voter equality among districts. In *Connor v. Finch*, for instance, the Supreme Court emphasized this means versus ends distinction between total population and voter equality, noting that "[t]he Equal Protection Clause requires that legislative districts be of nearly equal population, so that each person's vote may be given equal weight in the election of representatives."[40]

This correlative harmony between total population and voter population began to break down in the late 1980s and early 1990s when, driven by a large influx of concentrated illegal immigration, certain cities and counties faced the same disconnect between total population and voter population that Hawaii had faced in *Burns*. As the noncitizen population soared

39. *See e.g., infra* notes 87–90 and accompanying text.

40. 431 U.S. 407, 416 (1977) (citing *Reynolds*, 377 U.S. at 533).

and concentrated itself in certain areas of these cities, districts otherwise equal in terms of total population began to have substantially unequal numbers of voters. Rather than adopt an alternate apportionment base that correlated with voter equality—as Hawaii had done—some of these cities continued to cling stubbornly to total population as their apportionment base. As a result, the voter populations of districts containing disproportionately larger numbers of noncitizens began to be substantially smaller than voter populations in neighboring districts.

Voters in three of these cities and counties—Los Angeles County, California; Mecklenburg County, North Carolina; and Houston, Texas—challenged these voting schemes, arguing that use of total population as an apportionment base resulted in the substantial dilution of their votes in violation of the one person, one vote requirement. The Ninth Circuit, Fourth Circuit, and Fifth Circuit each ultimately rejected these claims, though on different grounds. Each purported to rely upon *Burns* in support of their conclusion.

The first of these challenges was *Garza v. County of Los Angeles.*[41] In *Garza,* voters brought a Voting Rights Act challenge to Los Angeles County's districting scheme for its board of supervisors. The district court concluded the County was in violation of the Act and imposed its own reapportionment plan.[42] The resulting districts contained approximately equal numbers of total population; however, one of the districts contained a disproportionately large number of noncitizens.[43] As a result, the voter populations between this district and the remaining four were substantially unequal.[44] One district, for instance, contained nearly 1.1 million voters while the district containing large numbers of noncitizens contained only 707,000 voters.[45] That meant, of course, that the votes of voters in the former district were worth almost half as much as votes in the latter.[46] On appeal, the County argued that because the district court's plan "weights the votes of citizens in that district more heavily than

41. 918 F.2d 763 (9th Cir. 1990).
42. *Id.* at 773.
43. *Id.* at 773 nn.4–5 (see data on total population and number of voting citizens for District 1).
44. *Id.* at 779 n.2 (Kozinski, J., dissenting).
45. *Id.*
46. *Id.* at 780.

those of citizens in other districts," it violated the one person, one vote rule.[47]

The Ninth Circuit rejected this argument. Pointing to language in *Reynolds* in which the Supreme Court spoke approvingly of using total population as an apportionment base (and completely ignoring the fact *Reynolds* also spoke approvingly of using "citizens or voters" as the apportionment base[48]), the Ninth Circuit asserted *Reynolds* stood for the proposition that "apportionment for state legislatures *must* be made upon the basis of population."[49] Having thus converted *Reynolds*'s "may" into a "must," the Ninth Circuit then distinguished *Burns* by claiming it did not overrule this *Reynolds* total population requirement.[50] The Ninth Circuit did acknowledge that *Burns* "seems to permit states to consider the distribution of the voting population as well as that of the total population in constructing electoral districts."[51] It did not, however, address the obvious tension between this fact and its conclusion that total population "must" be used as the apportionment base. Instead, the Ninth Circuit attempted to re-characterize the one person, one vote rule as protecting not only the "voting power of citizens," but also the right of all persons (whether voters or not) to "equal representation."[52] And, in the event of a conflict between these two "coequal goal[s]," the Ninth Circuit held that the goal of equal representation is superior to the goal of voter equality.[53] Concluding it was impossible to draw Board of Supervisor districts that were equal in terms of total population and voter population, the Ninth Circuit held that total population trumped.[54] It affirmed the district court's reapportionment plan.

The Fourth Circuit was the next appellate court to tackle this issue. In *Daly v. Hunt*, voters challenged a districting scheme for the Mecklenburg County Board of Education.[55] There, as in *Garza*, the County had used total population as its

47. *Id.* at 773.
48. Reynolds v. Sims, 377 U.S. 533, 577 (1964).
49. *Garza*, 918 F.2d at 774 (emphasis added).
50. *Id.*
51. *Id.*
52. *Id.* at 775.
53. *Id.*
54. *Id.* at 774–75.
55. 93 F.3d 1212 (4th Cir. 1996).

apportionment base, which, because of apparently similar demographic features, also resulted in the unequal distribution of voters throughout the districts.[56] A group of voters sued, contending this scheme—which resulted in substantial vote dilution—was a violation of the one person, one vote rule. The district court agreed and enjoined the County from using the districting plan for elections.[57] In doing so, the district court relied heavily on Judge Kozinski's dissent in *Garza*, where he argued that the majority had erred in concluding that a voter's right to equal representation was superior to a voter's right to an equally weighted vote.[58]

On appeal, the Fourth Circuit reversed the district court. The Fourth Circuit disagreed with Judge Kozinski's conclusion that "the Supreme Court's prior one person, one vote cases suggest that the principle of electoral equality is superior to the principle of representational equality."[59] The Fourth Circuit also disagreed, however, with the *Garza* majority's holding that the reverse was true.[60] Instead, the Fourth Circuit contended that the Supreme Court's prior opinions "offer no clue as to which principle—electoral equality or representational equality—is more important in a democratic society."[61] What, then, should courts do when faced with a conflict between the two when both cannot be achieved simultaneously? Pointing to *Burns*'s discussion of the discretion afforded to cities and states in picking their apportionment base, the Fourth Circuit held that the decision of which base to use was one that "should be made by the state, not the federal courts, in the inherently political and legislative process of apportionment."[62]

The Fifth Circuit reached a similar conclusion in *Chen v. City of Houston*.[63] There, voters brought a one person, one vote challenge to Houston's city council electoral districting scheme. Like Los Angeles County in *Garza*, Houston used total

56. Unlike *Garza* and *Chen*, the *Daly* court does not discuss the specific demographic reasons for why using total population in Mecklenburg County resulted in districts containing unequal numbers of citizens. *See id.* at 1214.
57. Daly v. Hunt, 881 F.Supp. 218 (W.D.N.C. 1995).
58. *Id.* at 221–23 (discussing *Garza*, 918 F.2d at 780 (Kozinski, J., dissenting)).
59. *Daly*, 93 F.3d at 1223.
60. *Id.*
61. *Id.*
62. *Id.* at 1227.
63. 206 F.3d 502 (5th Cir. 2000).

population as its apportionment base.[64] And for similar demographic reasons, the resulting map featured districts containing substantially unequal numbers of voters.[65] Like Judge Kozinski in his *Garza* dissent and the Fourth Circuit in *Daly*, the Fifth Circuit characterized the issue as a clash between "electoral equality and representational equality."[66] The Fifth Circuit rejected out of hand *Garza*'s holding that representational equality trumps. And it came very close to agreeing with Judge Kozinski that electoral equality prevails in a conflict situation, calling his dissent "powerful" and "force[ful]."[67] Ultimately, however, the *Chen* court agreed with *Daly* that *Burns* had left the "choice" of which apportionment base to use up to the political discretion of the state and city.[68]

III. *GARZA*, *DALY*, AND *CHEN* RE-EXAMINED

Garza, *Daly*, and *Chen* were all incorrectly decided. Though reaching different conclusions, each suffers from the same three flaws.

First, each uses the same flawed analytical framework to analyze the issue. Specifically, each frames the case as a decision between two competing theories of equality. *Garza* concludes that representational equality trumps electoral equality.[69] *Daly* and *Chen* dodge the question by leaving it to the discretion of the state or city.[70] All three, however, assume that the one person, one vote rule is directed at achieving both representational equality and electoral equality—that satisfying the one person, one vote is a kind of constitutional either/or. This assumption is incorrect. The clear purpose of the one person, one vote rule is to protect the voter and her vote, not the resident and her right

64. *Id.* at 522.

65. The court noted:

> The heart of this one-person, one-vote claim is that the City, despite being aware that it contained pockets with extremely high ratios of noncitizens, improperly crafted its districts to equalize total population rather than citizen voting age population (CVAP) . . . . And using CVAP figures, it is clear that several Houston districts fall outside the ten percent threshold established as a safe-harbor for population variance in municipal election districts.

Id.

66. *Id.* at 525.

67. *Id.* at 524.

68. *Id.* at 528.

69. Garza v. County of Los Angeles, 918 F.2d 763, 774–75 (9th Cir. 1990).

70. Daly v. Hunt, 93 F.3d 1212, 1227 (4th Cir. 1996); Chen v. City of Houston, 206 F.3d 502, 527 (5th Cir. 2000).

of equal access to a representative. And the right of a voter to an equally weighted vote stands on its own constitutional grounds. This right does not evaporate when a city or state creates electoral districts containing equal numbers of total persons. There may indeed be a constitutional right to equal representation. But merely protecting this right does not give a city or state a free pass to then dilute the weight of its voters' votes.

Second, each misinterprets *Burns* as affording cities and states the discretion to choose between total population and voter population as its apportionment base, even if choosing total population leads directly to vote dilution. This reading of *Burns*, however, conflates the Court's discussion of acceptable means to an end (which apportionment base to use to equalize voters among districts) with the end itself (creating districts of equal voter population). *Burns* allows discretion in the choice of the means.[71] But it makes clear there can be no discretion in picking the required end, which is always "that the vote of any citizen is approximately equal in weight to that of any other citizen in the State."[72]

Third, each treats representational equality and electoral equality as morally and constitutionally equivalent. This is putting the cart before the horse. Even assuming there is a constitutional right to equal representation, in the hierarchy of constitutional rights, electoral equality clearly reigns supreme. The Supreme Court has noted the right to vote is "preservative of all other rights,"[73] and it is. Before there can be any meaningful representation, the right to vote must be protected and secured. In any "clash" between the right of a voter to an equally weighted vote and the right of a nonvoter to equal representation, the right of the voter trumps.

A. *One Person, One Vote Protects Voters and Stands on its Own Constitutional Grounds*

The "person" being protected by the one person, one vote requirement is the *voter*, not the nonvoter resident, and the thing being protected is the weight of that voter's vote, not a nonvoter

71. Burns v. Richardson, 384 U.S. 73, 92–93 (1966).
72. *Id.* at 91 n.20.
73. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

resident's access to representation. This is implicit in the very description of the doctrine. It is the one person, one vote requirement, not the "one resident, one equal share of access to representation" requirement. The Supreme Court's one person, one vote cases make this emphatically clear. Writing in *Reynolds*, Chief Justice Warren repeatedly discussed how the one person, one vote doctrine protected "citizens" and their "votes":

- "Weighting the *votes of citizens* differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable."[74]
- "With respect to the allocation of legislative representation, all *voters*, as *citizens* of a State, stand in the same relation regardless of where they live."[75]
- "Since the achieving of fair and effective representation for *all citizens* is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by *all voters* in the election of state legislators."[76]
- "Simply stated, an individual's *right to vote* for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with *votes of citizens* living on other parts of the State."[77]
- "[T]he basic principle of representative government remains, and must remain, unchanged—*the weight of a citizen's vote* cannot be made to depend on where he lives."[78]

In subsequent cases, the Court used similar categorical language to describe each citizen's right to an undiluted vote, calling it an "imperative,"[79] "a constitutional right,"[80] and stating that the Court could "see no constitutional way by which equality of voting power may be evaded."[81] The Court also made clear that this right stood on its own constitutional grounds, observing

74. Reynolds v. Sims, 377 U.S. 533, 563 (1963) (emphasis added).
75. *Id.* at 565 (emphasis added).
76. *Id.* at 565–66 (emphasis added).
77. *Id.* at 568 (emphasis added).
78. *Id.* at 567 (emphasis added).
79. Bd. of Estimate v. Morris, 489 U.S. 688, 692 (1989).
80. Hadley v. Junior Coll. Dist., 397 U.S. 50, 52 (1972).
81. *Id.* at 59.

that "[t]he personal right to vote is a value in itself."[82] As such, as it had in *Reynolds*, the Court underscored that diluting the weight of a voter's vote is a direct violation of the Fourteenth Amendment. The Fourteenth Amendment requires that electoral districts "be apportioned in a manner that does not deprive any voter of his right to have his own vote given as much weight, as far as practicable, as that of any other voter."[83] Finally, the Court has characterized violations of this constitutional right in the most serious of terms, describing the unequal weighting of votes as "run[ning] counter to our fundamental ideas of democratic government,"[84] "hostile to the one man, one vote basis of our representative government,"[85] and "strik[ing] at the heart of representative government."[86]

The *Reynolds* line of cases is instructive not only for what they say about how the one person, one vote requirement protects voters, but for what they do not say. For instance, *Moore* refers to a group of citizens as being impermissibly granted "greater voting strength," not a greater share of access to representation.[87] *Hadley* requires that districts contain "equal numbers of voters [that] can vote for [a] proportionally equal number[] of officials," not that equal numbers of residents receive access to proportionately equal representation.[88] *Lockport* states that when elected officials represent districts of unequal population, the Equal Protection Clause is violated because it "cannot tolerate the disparity in individual voting strength," not that it cannot tolerate the disparity in access to representation.[89] And *Connor v. Finch* teaches that districts must be of nearly equal population "so that each person's vote may be given equal weight," not so that each resident can have equal access to representation.[90]

These cases make clear that, contrary to the either/or framework of *Garza*, *Daly*, and *Chen*, the Equal Protection Clause's one person, one vote requirement has nothing

82. *Morris*, 489 U.S. at 698.
83. *Hadley*, 397 U.S. at 52.
84. Wesberry v. Sanders, 376 U.S. 1, 8 (1964).
85. Moore v. Ogilvie, 394 U.S. 814, 819 (1969).
86. *Id.* at 818 (quoting Reynolds v. Sims, 377 U.S. 533, 555 (1963)).
87. *Id.* at 819.
88. 397 U.S. at 56.
89. Town of Lockport v. Citizens for Cmty. Action, 430 U.S. 259, 265 (1977).
90. 431 U.S. 407, 416 (1977).

whatsoever to do with the rights of nonvoters to equal representation. Instead, this rule focuses solely and exclusively on ensuring that states do not encroach on a voter's "constitutional right to vote in elections without having his vote wrongfully denied, debased, or *diluted*."[91] The doctrine thus demands voter equality, not representational equality. And this demand cannot be met unless voters are equally distributed among districts, regardless of whether those same districts contain equal numbers of total population.

B. *Misinterpreting* Burns

Garza, *Daly*, and *Chen* also misinterpret *Burns*. Each reads *Burns* as holding that a city or state's choice of the apportionment base use is an "eminently political question that has been left to the political process"[92] and thus, not subject to "judicial involvement,"[93] even if the choice of total population as a base leads to substantial vote dilution. *Burns* does discuss the political deference state political subdivisions have in drawing electoral districts.[94] But *Burns* makes clear that this deference only applies to the choices states make regarding the *means* of equally distributing voters among its electoral districts.[95] Underscoring this point, the *Burns* Court wrote that the "overriding objective" of *Reynolds*'s insistence on "substantial equality of population among the various districts" was to ensure "that the vote of any citizen is approximately equal in weight to that of any other citizen in the State."[96] The Court observed there were many possible demographic apportionment bases that could produce the voter equality required by *Reynolds*—including registered voters, actual voters, total population, or total population figures adjusted to exclude specific subgroups like aliens, transients, or convicted criminals.[97] *Burns* held that the choice of these means to an end was left to the discretion of the city.[98] But *Burns* never discusses giving states the ability to choose whether to equalize voting power in the first place. To

91. *Hadley*, 397 U.S. at 52 (emphasis added).
92. Chen v. City of Houston, 206 F.3d 502, 528 (5th Cir. 2000).
93. Daly v. Hunt, 93 F.3d 1212, 1227 (4th Cir. 1996).
94. Burns v. Richardson, 384 U.S. 73, 84–85 (1966).
95. *Id.* at 86.
96. *Id.* at 91 n.20 (quoting Reynolds v. Sims, 377 U.S. 533, 576 (1964)).
97. *Id.* at 91–92.
98. *Id.*

the contrary, *Burns* specifically held that, however a state draws it districts, the apportionment process must protect the right of a citizen "to have his vote weighted equally with those of all other citizens."[99]

As noted above, the Court began its analysis by underscoring that there was no debate regarding the required end of any state districting process. It noted, however, that *Reynolds* had "carefully left open the question" of which apportionment base could be used in achieving that objective.[100] The *Burns* court held, however, that the choice of which of these possible apportionment bases to use as a means of equalizing voting populations among electoral districts "involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere."[101] Accordingly, the Court held that unless the state's choice of its apportionment base "is one the Constitution forbids," it was not subject to judicial interference.[102] The Court concluded that because Hawaii's use of registered voters as an apportionment base was an effective means for equalizing the number of voters among its districts, Hawaii's decision to use that base was permissible.[103]

The Supreme Court's conclusion in *Burns* is consistent with the Court's clear instruction in other one person, one vote cases. Those cases make clear that though a city has substantial leeway in constructing voting districts, it cannot do so in a manner that produces unconstitutional results.[104] As the Supreme Court noted in *Gray*, "[w]hen a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected

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99. *Id.* at 91 n.20 (quoting *Reynolds*, 377 U.S. at 576).

100. *Id.* at 91.

101. *Id.* at 92.

102. *Id.*

103. *Id.* at 96.

104. Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966) (quoting Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 51 (1959)).

> [O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment. That is to say, the right of suffrage is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed.

Id.

right."[105] Thus, "once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded."[106]

That the political discretion ordinarily afforded states and cities must yield in the face of constitution rights was recently reaffirmed in *Bush v. Gore*.[107] In *Bush*, the Court confronted a *Chen/Daly/Garza*-like clash between the discretion ordinarily granted states in administering and supervising the electoral process and the supremacy of the one person, one vote requirement. In that case, various counties in Florida had adopted "varying standards to determine what was a legal vote."[108] Some counties adopted very strict standards for discerning the intent of voters, only counting votes when the chad had completely detached from the punch card;[109] other counties adopted "a more forgiving standard," counting votes when the chad was merely "dimpled."[110]

The Court observed that this "uneven treatment" of votes would result in one group being "granted greater voting strength than another."[111] Because "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government," the Court concluded that this fact alone rendered the entire Florida recount scheme unconstitutional.[112] Citing to *Reynolds*, *Grey*, and several other one person, one vote cases that followed, the Court concluded that "having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."[113]

In reaching its ruling, the Court acknowledged the deference that states and cities normally possessed to "develop different systems for implementing elections."[114] But the Court firmly held that this political deference must yield to the fundamental right

105. Gray v. Sanders, 372 U.S. 368, 381 (1963) (citation omitted) (internal quotation marks omitted).
106. *Id.*
107. Bush v. Gore, 531 U.S. 98 (2000).
108. *Id.* at 107.
109. *Id.* at 106–07.
110. *Id.* at 107.
111. *Id.*
112. *Id.* at 107 (quoting Moore v. Ogilvie, 394 U.S. 814, 819 (1969)).
113. *Id.* at 104–05.
114. *Id.* at 109.

of a voter to an equally weighted vote.[115]

C. *The Right of a Voter to an Equally Weighted Vote Trumps the Right of a Nonvoter to Equal Representation*

Of all the rights enshrined in the Constitution, the Supreme Court has made it abundantly clear that none are more important than the right to vote. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."[116] The reason is self-evident. Without the right to vote, there can be no such thing as a representative government in the first place. This is why the right to vote is "preservative of all rights" and why "[o]ther rights, even the most basic, are illusory if the right to vote is undermined."[117]

The one person, one vote rule grows directly out of this reality. *Reynolds* justified the one person, one vote rule on the grounds that the right of suffrage can be denied "just as effectively" by "a debasement or dilution of the weight of a citizen's vote" as by "wholly prohibiting the free exercise of the franchise."[118] And, the Court observed, "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen."[119] Summarizing the Supreme Court's holdings on the subject, the Sixth Circuit observed: "[V]ote dilution is as nefarious as an outright prohibition on voting."[120]

"Representational equality" is an important and compelling principle. But it has nowhere near electoral equality's pedigree. There is good reason for this. In the hierarchy of constitutional rights, voting rights—because they are "preservative of all rights"—trump nearly everything, including any right to equal representation. By ignoring this reality and imposing literally no limits on how severely a city or state could dilute the weight of its voters' votes, *Garza, Daly*, and *Chen* set a dangerous precedent. In

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115. *Id.*

116. Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

117. *Id.* at 17; *see also* Ill. Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) ("[V]oting is of the most fundamental significance under our constitutional structure."); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

118. Reynolds v. Sims, 377 U.S. 533, 555 (1964).

119. *Id.* at 567; *see also* Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969) ("The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot.") (citing *Reynolds*, 377 U.S. at 555).

120. Duncan v. Coffee County, 69 F.3d 88, 93 (6th Cir. 1995).

those cases, vote dilution was as high as fifty percent.[121] That result is pernicious enough. But it is just the tip of the iceberg. Under the holdings of these cases, so long as the total populations between the districts are equalized, a city could arbitrarily "choose" to make one voter's vote worth two times, ten times, or even ten thousand times as much as another voter's vote. Under these cases, any of these "political choices" would be acceptable. Yet how could any of these results be squared with the Supreme Court's categorical holding that a voter has "a constitutional right to vote in elections without having his vote wrongfully denied, debased, or *diluted*"?[122]

IV. CONCLUSION

The dangerous precedent set in *Garza*, *Daly*, and *Chen*—that a city or state could arbitrarily "choose" to dilute the weight of its voters' votes—has resulted in voting schemes that are radically inconsistent with the voter's constitutional right to an equally weighted vote. This problem is not going away. As demographic changes continue to speed the breakdown of the correlation between total population and voter population, one person, one vote challenges will proliferate.[123] It is long past time for the Supreme Court to hear one of these challenges,[124] overrule *Garza*, *Daly*, and *Chen*, and reaffirm that, whatever apportionment base a city or state may choose, they are still "required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's."[125]

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121. Garza v. County of Los Angeles, 918 F.2d 763, 785 (9th Cir. 1990) (Kozinski, J. dissenting); Daly v. Hunt, 93 F.3d 1212, 1216 (4th Cir. 1996); Chen v. City of Houston, 206 F.3d 502, 504 (5th Cir. 2000).

122. Hadley v. Junior Coll. Dist., 397 U.S. 50, 52 (1970) (emphasis added).

123. *See, e.g.*, Lepak v. City of Irving, No. 11-10194, 2011 WL 6217946 (5th Cir. Dec. 14, 2011). This case was brought by voters in the City of Irving where the city drew districts roughly equal in total population, but where one district contained nearly twice as many voters as in neighboring districts.

124. Indeed, it has been over a decade since Justice Thomas recognized the need for the Court to step in and clarify the issue. *See* Chen v. City of Houston, 532 U.S. 1046 (2001) (Thomas, J., dissenting) ("I would grant certiorari on petitioners' one-person, one-vote claim, which asks what measure of population should be used for determining whether the population is equally distributed among the districts.").

125. *Hadley*, 397 U.S. at 54.

PRIVATE EMPLOYEES' SPEECH AND POLITICAL ACTIVITY: STATUTORY PROTECTION AGAINST EMPLOYER RETALIATION

EUGENE VOLOKH*

* Gary T. Schwartz Professor of Law, UCLA School of Law (volokh@law.ucla.edu); Academic Affiliate, Mayer, Brown LLP. Thanks to Charles Abernathy, Richard Carlson, Matt Finkin, and Charles Sullivan, and to Amy Atchison, June Kim, and Lynn McClelland of the UCLA Law Library for their invaluable research help.

I. INTRODUCTION

About half of Americans live in jurisdictions that protect some private employee speech or political activity from employer retaliation. Some of these jurisdictions protect employee speech generally. Others protect only employee speech on political topics. Still others protect only particular electoral activities such as endorsing or campaigning for a party, signing an initiative or referendum petition, or giving a political contribution. Moreover, though the matter is not clear, federal law may often protect private employees who speak out in favor of a federal candidate.[1] To my knowledge, these protections have not been systematically cataloged, and some have never been cited in a law review article.[2]

Some employee free speech protections were enacted following the Civil Rights Act of 1964, which banned employment discrimination based on race, religion, sex, and national origin, and are modeled on that statute. But many of the protections long preceded the Act, and similar state civil rights laws. Indeed, the first date back to 1868.

These early protections for private employee speech and political action were likely based on the very first American laws banning employment discrimination by private employers—voter protection laws, which barred employers from discriminating against employees based on how the employees voted.[3] (Recall that this was the era before the secret ballot.) As early as the 1700s, several colonies and states barred any "attempt to overawe, affright, or force, any person qualified to vote, against his inclination or conscience,"[4] and some also

1. *See infra* Part II.H.

2. *See, e.g.*, MINN. STAT. ANN. § 10A.36 (West 2012).

3. *See* A COMPILATION OF THE LABOR LAWS OF THE VARIOUS STATES AND TERRITORIES AND THE DISTRICT OF COLUMBIA 561–603 (Washington, Gov't Printing Office 1892) (indexing "Protection of employés as voters," p. 592, but no other antidiscrimination laws).

4. An Act to Ascertain the Manner and Form of Electing Members to Represent the Inhabitants of this Province, § 9, 1761 Ga. Laws 109; *see also* An Act to Ascertain the Manner and Form of Electing Members to Represent Inhabitants of this Province, § 14, 1721 S.C. Acts 115 (prohibiting the use of certain threats to influence elections); An Act to Regulate the General Elections of this Commonwealth, § 27, 1785 Pa. Laws 351 (same); An Act to Regulate Elections, ch. 50, § 17, 1800 Md. Laws 30 (same). Other states had similar though slightly differently worded statutes, which banned attempts to "directly or indirectly" influence votes by "bribery[,] menace or other corrupt means or device." An Act to Regulate Elections Within this State, ch. 16, 1778 N.Y. Laws 36; *see also* An Act Dividing the State into Districts for Electing Representatives, § 12, 1793 Vt. Acts &

barred, "after the . . . election is over, menac[ing], despitefully us[ing] or abus[ing] any person because he hath not voted as he or they would have had him."[5]

These voter protection laws seem to have covered threats not just of physical violence but also of legal coercion,[6] and they may have covered threats of economic retaliation as well—a similarly general 1854 English statute[7] was applied to threats of economic retaliation and not just those of physical attack.[8] The bans on

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Resolves 13 (prohibiting bribes and threats made to influence elections); An Act Regulating the General Elections of the Indiana Territory, § 14, 1811 Ind. Acts 234 (same); An Act to Support the Privilege of Free Suffrage in Election, §§ 4–5, 1814 La. Acts 98 (same). The New York and Vermont statutes expressly provided for enforcement by the victim, with half the penalty to be given to the victim. The other statutes were cast as normal criminal statutes, but at the time the norm for criminal law generally was that victims would act as prosecutors. A similar statute was passed in 1727 in another English colony, St. Kitts. ACTS OF ASSEMBLY, PASSED IN THE ISLAND OF ST. CHRISTOPHER; FROM 1711, TO 1735, INCLUSIVE 126 (London, John Baskett 1739). [Editors' Note: Throughout this Article, historical statutes are listed chronologically.]

5. An Act to Ascertain the Manner and Form of Electing Members to Represent Inhabitants of this Province, § 14, 1721 S.C. Acts 115; An Act to Ascertain the Manner and Form of Electing Members to Represent the Inhabitants of this Province, § 9, 1761 Ga. Laws 109; *see also* An Act to Regulate General Elections, § 17, 1837 Mich. Pub. Acts 206–07 (making it a crime to "on the day of election give any public threat . . . with a view to obtain any . . . votes for . . . [any] candidate"); An Act to Preserve the Purity of Elections, § 5, 1849 Iowa Acts 133 (making it a crime to threaten or compel any elector to vote against his inclination); An Act to Preserve the Purity of Elections, § 11, 1857 Wis. Sess. Laws 105 (likewise); An Act to Regulate Elections in this State, § 57, 1859 Minn. Laws 161 (likewise).

6. Consider Fargues McDowell's prosecution and conviction, described in *Right of Suffrage,* NILES' WEEKLY REGISTER, Nov. 25, 1815, at 213–14. McDowell operated a jail in which Jacob Parker was detained before trial. Though Parker had been unable to make bail, McDowell had given Parker a bail-like release (something that a jailer was apparently allowed to do), but then threatened to revoke it if Parker voted for a candidate of whom McDowell disapproved. McDowell was prosecuted under the South Carolina statute and convicted.

7. Corrupt Practices Prevention Act, 1854, 17 & 18 Vict., c. 102, § 5 (Eng.), *reprinted in* HENRY JEFFREYS BUSHBY, A MANUAL OF THE PRACTICE OF ELECTIONS IN THE UNITED KINGDOM app. at 28–29 (2d ed. 1865) (barring, in relevant part, "mak[ing] use of, or threaten[ing] to make use of any force, violence, or restraint, or inflict[ing], or threaten[ing], the infliction . . . of any injury, damage, harm, or loss, or in any other manner practis[ing] intimidation upon, or against, any person, in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrain[ing] from voting, at any election" or "by abduction, duress, or any fraudulent device or contrivance, imped[ing], prevent[ing], or otherwise interfer[ing] with the free exercise of the franchise of any voter").

8. Regina v. Barnwell, 5 Weekly Rep. 557 (1857); *see also* FRANCIS JAMES NEWMAN ROGERS, ROGERS' LAW AND PRACTICE OF ELECTIONS AND REGISTRATION 368 (8th ed. 1857) (likewise concluding that the statute covered "dismissal of a person employed," a "notice to quit given to a tenant," or "withdrawal of custom from a tradesman" based on the targets' votes); 1 REPORTS OF THE DECISIONS OF COMMITTEES OF THE HOUSE OF COMMONS IN THE TRIAL OF CONTROVERTED ELECTIONS, DURING THE SEVENTEENTH PARLIAMENT OF THE UNITED KINGDOM 90–91 (F.S.P. Wolferstan & Edward L'Estrange Dew eds., London V & R Stevens & G.S. Norton 1859) (reporting that a vote was disallowed on the grounds of "undue influence" because the voter was pressured by threat of loss of employment).

threats, from 1721 to the 1860s, were included alongside bans on bribery; given that offering to provide a financial benefit in exchange for a vote was forbidden, it makes sense that threatening to deny a financial benefit in exchange for a vote would have been forbidden as well.[9]

And some voter protection laws enacted in the mid-1800s explicitly covered threat of economic retaliation. The proposed federal criminal code drafted in 1828 by Edward Livingston—who had earlier participated in drafting the Louisiana Civil Code, was at the time a Congressman (and soon to be Senator) from Louisiana, and would later become Secretary of State—expressly covered "threats of withdrawing custom or dealing in business or trade . . . or any other threat of injury"[10] aimed at influencing votes. The 1832 proposed D.C. criminal code would have done the same.[11] Laws using this language were enacted in Mississippi (1839), Iowa (1850), the Nebraska Territory (1855), Illinois (1871), and Delaware (1881).[12]

Likewise, in 1839, Pennsylvania expressly barred threats of "loss of any appointment, employment or pecuniary benefit" aimed at "influenc[ing] any voter."[13] Also in 1839, Ohio made it

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9. *See* Message from His Excellency, Isaac Toucey to the Legislature of Connecticut (May 1846), *in* JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF CONNECTICUT, May 1846, at 25–26 (New Haven, Osborn & Baldwin 1846) (justifying the proposed Connecticut law banning threats of retaliation by employers on the grounds that such threats are "a compound of bribery, undue influence and intimidation").

10. EDWARD LIVINGSTON, A SYSTEM OF PENAL LAW FOR THE UNITED STATES OF AMERICA 45 (Washington, Gales & Eaton 1828). For more on Livingston, see U.S. Dep't of State Office of the Historian, *Biographies of the Secretaries of State: Edward Livingston*, http://history.state.gov/departmenthistory/people/livingston-edward. Livingston had a remarkable and varied political career, as Congressman from New York (and noted opponent of the Sedition Act), U.S. Attorney for the District of New York, and Mayor of New York City from 1795 to 1803, then state legislator, Congressman, and Senator from Louisiana from 1820 to 1832, and Secretary of State and Ambassador to France from 1831 to 1835, shortly before his death.

11. 2 PUBLIC DOCUMENTS PRINTED BY THE ORDER OF THE SENATE OF THE UNITED STATES 329 (Washington, Duff Green 1832).

12. Of Offenses Against the Rights of Suffrage, § 4, 1839 Miss. Laws 151, 152; IOWA CODE § 2700 (1851); Offenses Against the Right of Suffrage, ch. 8, § 136, 1855 Neb. Laws 244; An Act in Regard to Elections, § 82, 1871 Ill. Laws 393; An Act to Secure Free Elections, ch. 329, 16 Del. Laws 334 (1881). These statutes were limited to threats of discharge aimed at influencing a future election, and didn't expressly prohibit retaliatory discharge for a vote at a past election, though a retaliatory discharge might have been seen as covered on the grounds that it was a threat to other employees for the future. *See* Davis v. La. Computing Corp., 394 So.2d 678, 680 (La. Ct. App. 1981) ("[T]he actual firing of one employee for political activity constitutes for the remaining employees . . . a threat of similar firings."). The Delaware statute also expressly provided for civil liability for such behavior.

13. An Act Relating to the Elections of this Commonwealth, no. 192, ch. 8, § 123, 1839 Pa. Laws 546.

a crime for "any person [to] . . . use any threat or coercion to procure any voter in his employ . . . to vote contrary to the inclination of such [employee]."[14] Several years later, Connecticut (1846) and Massachusetts (1852) barred "threatening to discharge [an elector] from . . . employment" in order to influence a vote.[15]

By the 1860s, some states also barred discrimination based on past votes rather than just threats aimed at future votes.[16] This was especially visible in a burst of such lawmaking in the Reconstruction-era South, triggered by the Republican concern that southern employers were pressuring their employees to vote against the Republicans.[17] (In some instances, Union generals administering the military occupation of the South issued such rules as military orders, violations of which were triable before military commissions.[18])

It is this post-Reconstruction batch of voter protection laws

14. An Act to Punish Betting on Elections, § 1, 1838 Ohio Laws 79.

15. Act of June 15, 1846, ch. 20, 1846 Conn. Pub. Acts 20 (also contemplating private prosecution by the injured voter); An Act to Protect the Right of Suffrage, ch. 321, 1852 Mass. Acts 257. The Connecticut law came in response to a proposal from the governor. *See* Message from His Excellency, *supra* note 9, at 25. The Governor of Massachusetts had also proposed such a law as early as 1840, ACTS AND RESOLVES PASSED BY THE LEGISLATURE OF MASSACHUSETTS, IN THE YEAR 1840, at 311 (Boston, Dutton & Wentworth 1840), though the statute was not ultimately enacted until 1852.

16. *See, e.g.*, An Act in Addition to "An Act Concerning Crimes and Punishments," ch. 152, § 2, 1867 Conn. Pub. Acts 166 (expressly prohibiting "dismiss[ing] from . . . employment any operative on account of any vote he may have given").

17. *See* An Act to Regulate Elections in this State, § 89, 1868 Ala. Acts 286 (prohibiting an employer from "disturb[ing] or hinder[ing]" an employee exercising the right of suffrage); An Act Extending Protection to Laborers in the Exercise of Their Privilege of Free Suffrage, 1868 La. Acts 64 (making it a crime for employers to discharge their employees because of their political opinions, or to attempt to control the way they vote); Intimidation of Voters, N.C. CODE § 2715 (1883) (enacted 1868), *reprinted in* 2 WILLIAM T. DORTCH ET AL., THE CODE OF NORTH CAROLINA 195 (New York, Banks & Bros. 1883) (prohibiting employers from threatening their employees on account of their votes); An Act Providing for the Next General Election and the Manner of Conducting the Same, §11, 1868 S.C. Acts 135, 137 (special session) (same); An Act to Regulate the Conduct and to Maintain the Freedom and Purity of Elections, § 67, 1870 La. Acts 158 (same); An Act to Provide for the Mode and Manner of Conducting Elections, § 46, 1870 Tex. Gen. Laws 137 (same). All these expressly barred "threats of discharge from employment" aimed at influencing a person's vote; all except Alabama also banned discharge based on past votes. Mississippi already had a law banning threats of discharge from employment for votes, Of Bribery and Undue Influence, § 4, 1839 Miss. Laws 152; a proposal to specify in the state constitution that dismissal from employment based on one's past or future vote shall be a crime, JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MISSISSIPPI 352 (Jackson, E. Stafford 1868), apparently wasn't enacted.

18. *See, e.g.*, Major-Gen. Meade, Gen. Ord. No. 57, Apr. 10, 1868 (applicable to Georgia); Major-Gen. Canby, Gen. Ord. No. 45, Mar. 23, 1868, ¶ Tenth (applicable to North Carolina); Major-Gen. Canby, Gen. Ord. No. 99, Oct. 16, 1867, ¶ Ninth (applicable to South Carolina).

that led to the first protections that went beyond voting to speech. In 1868, Louisiana and South Carolina banned discrimination against most private employees based on "political opinion."[19] And several decades later, both the voter protection laws (which I will not focus on in this Article) and the statutes protecting political opinion and political activity began to spread to other states.

I am not sure such restrictions on private employers are a good idea. First, employers may have a legitimate interest in not associating themselves with people whose views they despise.[20] Second, employees are hired to advance the employer's interests, not to undermine it. When an employee's speech or political activity sufficiently alienates coworkers, customers, or political figures, an employer may reasonably claim a right to sever his connection to the employee. Perhaps such statutes should not be copied by other states, and perhaps they should even be repealed, which is what happened in 1929 when Ohio repealed its "political activities" statute.[21]

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19. The Louisiana law provided for a fine for any employers who "discharged from their employ any labor or laborers on account of their political opinions," though limited this only to discharge before the "expiration of the term of service" of the employee. An Act Extending Protection to Laborers in the Exercise of Their Privilege of Free Suffrage, 1868 La. Acts 64 (protecting laborers in the exercise of their privilege of free suffrage). This was more significant then than it would be now, because many employees were then, by default, seen as having one-year contracts, rather than contracts terminable at will. Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 122–23 (1976). The South Carolina law stated that any company or corporation that had a legislative charter could not "discharge, or threaten to discharge, from employment . . . any operative or employee, . . . for or on account of his political opinion, or for voting or attempting to vote as he or they may desire," and provided both for civil liability and for cancelation of the corporate charter. An Act Providing for the Next General Election and the Manner of Conducting the Same, §11, 1868 S.C. Acts 137 (special session). A similar law was proposed in Virginia in the Constitutional Convention on Dec. 9, 1867, but was "defeated after a most heated discussion." DAVID LLOYD PULLIAM, THE CONSTITUTIONAL CONVENTIONS OF VIRGINIA FROM THE FOUNDATION OF THE COMMONWEALTH TO THE PRESENT TIME 134 (1901); *see also* JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF VIRGINIA 22, 23 (Richmond, New Nation 1867) (describing the rejection of the proposal).

20. *See, e.g.*, *Voting by Ballot*, U.S. DEMOCRATIC REV., July 1854, at 19, 22, 24 (supporting the secret ballot, so as to diminish the risk that poor voters will be coerced to vote a particular way by their employers or by others, but arguing that bans on "discharging an operative from employment, or withdrawing . . . custom from a tradesman, or changing . . . tenants" based on "political considerations" improperly interfere with a property owner's rights).

21. An Act Prohibiting Employers from Interfering with the Political Activities of their Employes, § 5175-26a, 1917 Ohio Laws 601, *repealed by* Election Laws of the State of Ohio, § 4785-234, 1929 Ohio Laws 307, 412. *See also* OHIO REV. CODE ANN. § 2901.43 (West 1965) ("No person shall prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of any lawful issue [or candidate] . . . . No person shall injure any person or

But whether the statutes are sound or not, they strike me as worth investigating. I therefore thought it would be useful to publish a list of the statutes that I could find and a summary of some of the key court decisions interpreting those statutes.

II. THE STATUTES

I arrange the statutes roughly in descending order of the breadth of speech that they cover. I say "roughly" because some of the laws are hard to compare, and some of them have unclear scopes.

A. *Cross-Cutting Questions*

1. Criminal Liability, Civil Liability, or Both?

Some of the statutes expressly provide for civil liability, some for criminal liability, and some for both. But courts generally treat these sorts of criminal statutes as also generating a private right of action, either as a matter of statutory interpretation or as an application of the "wrongful discharge in violation of public policy" tort.[22]

2. Coverage for Existing Employees or Also for Applicants?

Some of the statutes expressly cover all employer decisions. Others only cover discharge or discipline of current employees rather than refusal to hire applicants. Note, though, that the California Supreme Court has read its statute as covering discrimination in hiring, even though the statutory text refers

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property on account of such support or advocacy."), *repealed by* Act of Dec. 14, 1972, § 2, 1971 Ohio Sess. Laws 1866, 2032.

22. *See, e.g.*, Shovelin v. Cent. N.M. Elec. Coop., 850 P.2d 996, 1008 (N.M. 1993) (dictum) (stating that a criminal statute banning firing employees because of the employees' political activity would "support a cause of action for retaliatory discharge" for such a firing); Culler v. Blue Ridge Elec. Coop., 422 S.E.2d 91, 92–93 (S.C. 1992) (inferring a civil cause of action based on the criminal prohibition against firing people for political beliefs); *cf.* Carl v. Children's Hosp., 702 A.2d 159, 165 (D.C. 1997) (Terry, J., for four Justices) (reasoning that a criminal statute barring "injur[ing any] witness in [his or her] person or property . . . on account of . . . testifying or having testified" in particular proceedings supports a civil cause of action for firing an employee based on such testimony); *id.* at 166 (Ferren, J., for two Justices) (endorsing this analysis). *Compare* Bell v. Faulkner, 75 S.W.2d 612, 614 (Mo. Ct. App. 1934) (refusing to infer a civil cause of action from a criminal statute banning firing an employee for his vote in an election), *with* Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859, 877 (Mo. Ct. App. 1985) ("[W]e believe that no modern Missouri court would, on the egregious facts presented in *Bell v. Faulkner*, decide the case against Bell as the court of appeals did in 1934.").

just to actions with regard to "employee[s]."[23]

3. Application Only to Established Policies, or Also to Individual Employment Decisions?

Some of the statutes expressly cover all employer actions, but others cover only policies restricting speech. Such policies need not be published ones; an accepted course of conduct would suffice.[24]

The question is whether the statutes that ban speech-restrictive "polic[ies]" should also apply to individual incidents of discrimination, animated by an employer's concerns at that moment rather than by some coherent general plan. The Louisiana Supreme Court has answered the question yes, holding that the ban on enforcing any "rule, regulation or policy" restraining political activity extends to individual firing decisions made even without any express policy. "[T]he actual firing of one employee for political activity constitutes for the remaining employees both a policy and a threat of similar firings."[25] On the other hand, the California Supreme Court has defined "policy" as "[a] settled or definite course or method adopted and followed" by the employer,[26] and a California federal district court has specifically concluded that an individual retaliatory decision does not suffice to show the existence of a "rule, regulation, or policy."[27]

4. Application Only to Threats, or Also to Employment Decisions Made Without Threats?

Some of the statutes expressly cover all employer actions, but others cover only "threat[s] . . . calculated to influence the political . . . actions" of other employees.[28] But, as the Louisiana case cited above notes, "the actual firing of one employee for political activity constitutes for the remaining employees both a policy and a threat of similar firings."[29] Once coworkers learn

23. Gay Law Students Ass'n v. Pac. Tel. & Tel. Co., 595 P.2d 592, 610 n.16 (Cal. 1979).

24. Lockheed Aircraft Corp. v. Superior Court, 171 P.2d 21, 24 (Cal. 1946).

25. Davis v. La. Computing Corp., 394 So.2d 678, 680 (La. Ct. App. 1981).

26. *Lockheed Aircraft Corp.*, 171 P.2d at 24.

27. Ross v. Indep. Living Res., No. C08-00854 TEH, 2010 WL 2898773, at *9 (N.D. Cal. July 21, 2010).

28. *See infra* note 103 and accompanying text.

29. *Davis*, 394 So.2d at 680.

that an employee was fired based on his speech or political activities, the coworkers will perceive that action as a threat, even if no express threatening words were used. This is especially so given that, as the Supreme Court has recognized, employees' economic dependence on the employer reasonably leads them to pick up even subtle signals when their jobs are at stake.[30]

5. Off-the-Job Speech or All Speech?

Some statutes expressly cover only off-the-job speech, while others have no such limitation. Should courts implicitly read in such a limitation? In *Dixon v. Coburg Dairy, Inc.*, later reversed on procedural grounds by an en banc decision, a Fourth Circuit panel held that one such statute does not include on-the-job speech.[31] A contrary view, the panel held, would have the "absurd result of making every private workplace a constitutionally protected forum for political discourse."[32]

But the Connecticut Supreme Court in *Cotto v. United Technologies Corp.* held that the absence of any statutory language limiting protection to off-the-job speech means that the statute may indeed apply to such speech.[33] Likewise, a California Court of Appeal decision suggested that the California statute generally applies to on-the-job speech.[34]

6. Implicit Exceptions for Speech and Political Activity That Sufficiently Undermines Employer Interests?

Some statutes expressly allow employers to restrict speech or political activity that sufficiently undermines employer interests. These will be discussed in the next subsection.

Other statutes, though, categorically cover speech without any express accommodation of employer concerns. In Louisiana, for example, even when "the 'business' justification for firing

30. NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969).

31. Dixon v. Coburg Dairy, Inc., 330 F.3d 250, 262 (4th Cir. 2003), *rev'd*, 369 F.3d 811 (4th Cir. 2004) (concluding that the state law claim should have been brought in state courts).

32. *Id.*

33. Cotto v. United Techs. Corp., 711 A.2d 1180, 1185–86 (Conn. App. Ct. 1998).

34. Cal. Teachers Ass'n v. Governing Bd. of San Diego Unified Sch. Dist., 45 Cal. App. 4th 1383, 1387 n.2 (1996). The court held that a specific state statute, CAL. EDUC. CODE § 7055 (2002), that allows certain public education agencies to restrict on-the-job "political activity" carves out an exception from the general California statute protecting such political activity. But the opinion suggests that the general statute would apply to on-the-job speech in workplaces that are not exempted by a specific statute such as § 7055.

plaintiff in this case is a real one"—such as that plaintiff's political advocacy "would antagonize persons who could withdraw business from plaintiff's employer"—"the policy of the statute is unmistakable: the employer may not control political candidacy of his employees. We see no exemption from the legislative purpose because of the nature of the employer's business."[35]

One federal district court took a contrary view, concluding that the California statute should be read as containing an implied exception for cases "when the employee's political activities are patently in conflict with the employer's interests."[36] But this was based on what strikes me as a misreading of an earlier California state precedent.[37] And California state courts have never read the statute as having such an implied exemption.

A few of the political activity protections come in antidiscrimination statutes that (1) ban discrimination based on various classifications, including political ideology or affiliation, and (2) carve out a "bona fide occupational qualification" (BFOQ) exception for certain antidiscrimination categories, such as sex and religion, but *not* for political ideology.[38]

Such drafting strongly suggests that there is indeed no exception from the political ideology discrimination ban. "*Expressio unius, exclusio alterius*";[39] the inclusion of sex and religion in the BFOQ provision suggests that the excluded antidiscrimination categories are not subject to a BFOQ defense. This is in fact how federal courts have reasoned in holding that race cannot be a BFOQ under Title VII, given that it is "conspicuously absent from the [BFOQ] exception" (which lists religion, sex, and national origin, but not race or color).[40]

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35. Davis v. La. Computing Corp., 394 So.2d 678, 679 (La. Ct. App. 1981).

36. Smedley v. Capps, Staples, Ward, Hastings & Dodson, 820 F. Supp. 1227, 1230 n.3 (N.D. Cal. 1993).

37. *Smedley* held that *Mitchell v. Int'l Ass'n of Machinists*, 196 Cal. App. 2d 796 (1961), suggested such a rule, but I do not see anything in *Mitchell* so stating.

38. *See, e.g.*, SEATTLE, WASH., MUN. CODE § 14.04.050(A) (2011) (stating that discrimination is not forbidden "in those instances where religion, sex, national origin, or age is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise," but not including political ideology or various other prohibited bases in the list); MADISON, WIS., MUN. CODE § 39.03(8)(e) (2010) (likewise).

39. *E.g.*, Bruesewitz v. Wyeth L.L.C., 131 S. Ct. 1068, 1076 (2011).

40. Miller v. Tex. State Bd. of Barber Exam'rs, 615 F.2d 650, 652 (5th Cir. 1980); *see also* Ferrill v. Parker Grp., Inc., 168 F.3d 468, 473 (11th Cir. 1999); Swint v. Pullman-

7. What Is the Scope of Explicit Exceptions for Speech and Political Activity That Sufficiently Undermines Employer Interests?

Some statutes do expressly allow employers to restrict employee speech when abstaining from the speech is a BFOQ,[41] when the speech is "in direct conflict with the essential business-related interests of the employer,"[42] or when the speech creates "reasonable job-related grounds for dismissal."[43] Do these exceptions cover speech that interferes with the employer's activities by leading customers or coworkers to dislike the employer—for instance, when the speech is critical of the employer, or when the speech offends some people?

Generally speaking, when the term "bona fide occupational qualification" is used with regard to sex discrimination or religious discrimination, customer or coworker hostility is *not* seen as sufficient to trigger the BFOQ exception. In the Equal Employment Opportunity Commission's words, "the preferences of coworkers, the employer, clients or customers" "do not warrant the application of the bona fide occupational qualification exception."[44] Thus, for instance, that some people are offended or alienated by an employee's religion does not justify the employer in firing the employee. When laws that ban

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Standard, 624 F.2d 525, 535 (5th Cir. 1980), *rev'd on other grounds*, 456 U.S. 273 (1982); Knight v. Nassau Cnty. Civil Serv. Comm'n, 649 F.2d 157, 162 (2d Cir. 1981); Burwell v. E. Air Lines, Inc., 633 F.2d 361, 370 n.13 (4th Cir. 1980).

41. *E.g.*, COLO. REV. STAT. ANN. § 24-34-402.5(1) (West 2012).

42. N.D. CENT. CODE ANN. § 14-02.4-03 (West 2011).

43. MONT. CODE ANN. § 39-2-903(5) (2011).

44. 29 C.F.R. § 1604.2(a)(1)(iii) (2012); *see also* Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276–77 (9th Cir. 1981) (preference of clients in South America for dealing with males cannot make sex into a BFOQ); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) (preference of airplane passengers for female flight attendants cannot make sex into a BFOQ); Bohemian Club v. Fair Emp't & Hous. Comm'n, 187 Cal. App. 3d 1, 21 (Cal. Ct. App. 1986) (client preference for male service personnel, based upon the supposed "inhibiting effect women employees might have on men" in a private club, cannot make sex into a BFOQ); Ray v. Univ. of Ark., 868 F. Supp. 1104, 1126–27 (E.D. Ark. 1994) (even if race could ever be a BFOQ, students' preference for police officers of their own race is insufficient); Bollenbach v. Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist., 659 F. Supp. 1450, 1472 (S.D.N.Y. 1987) (preference of religious parents for male school bus drivers doesn't make sex into a BFOQ); Kern v. Dynalectron Corp., 577 F. Supp. 1196, 1201 (N.D. Tex. 1983) ("mere customer preference of one religion over another is not enough to raise religious discrimination to the level of B.F.O.Q.," though Saudi law that imposes the death penalty for non-Muslims who go to Mecca does suffice to make religion a BFOQ for a job as helicopter pilot flying to Mecca). *But see* Brown v. F.L. Roberts & Co., Inc., 896 N.E.2d 1279, 1289 n.11 (Mass. 2008) ("We leave to another day whether or to what degree customer preference could allow an employer to discriminate based on religion. But see 804 Code Mass. Regs. § 3.00 (1995) (customer or coworker preference is not bona fide occupational qualification).").

discrimination based on off-duty conduct (including speech), speech, or political affiliation use the same phrase, this suggests that employers likewise may not fire an employee just because his off-duty actions offend customers or coworkers.

Nonetheless, some cases interpreting the statutes give employers a good deal of authority to restrict speech that turns customers against the employer. Thus, a district court interpreting the Colorado statute's exception for restrictions that "relate[] to a bona fide occupational requirement" held that (1) an employer could treat an employee's loyalty as a bona fide occupational requirement, and that (2) an employee's letter to a newspaper complaining about alleged mistreatment of employees and poor customer service breached such a duty, though (3) public complaints about safety would not breach the duty.[45]

Likewise, a New York appellate court read an exception for activity that "creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest" as allowing the German National Tourist Office to fire an employee for becoming known as the translator of some Holocaust revisionist articles.[46] Presumably the court's view was that the activity could lead to public hostility to the office, and that this hostility created a "conflict of interest" between the employee and the employer's "business interest."

Other cases, however, consider some speech to be protected even when it does injure the employer. The Colorado case mentioned above is a partial example, because it concluded that public complaints about safety would be protected against employer retaliation even when they injure the employer. Likewise, a Connecticut case held that a statutory exception for speech that "substantially or materially interfere[s] with the employee's bona fide job performance or the working

45. Marsh v. Delta Air Lines, Inc., 952 F. Supp. 1458, 1461–62 (D. Colo. 1997). As to nonspeech conduct, *see* Hougum v. Valley Mem'l Homes, 574 N.W.2d 812, 822 (N.D. 1998) (concluding that a mortuary chaplain's off-duty act of masturbating in a public restroom stall, if legal, might be covered by the BFOQ exception, on the grounds that the "activity undermined his effectiveness as a chaplain and therefore directly conflicted with [the employer funeral home's] business-related interests," and leaving the decision to the jury).

46. Berg v. German Nat'l Tourist Office, 248 A.D.2d 297 (N.Y. App. Div. 1998); Paul Schwartzman, *It Just Isn't Write[;] German Axed Over Hate Mag Article*, DAILY NEWS (N.Y.), May 11, 1995, at 6.

relationship between the employee and the employer"[47] did not cover an employee's report to a state agency of "allegedly wrongful or illegal conduct" by the employer's customer.[48]

The employee, a worker for a home nursing company that sold services to nursing facilities, reported substandard care at one of the facilities.[49] The court acknowledged that "[i]t may be true that [the employer's] business relationship with their customer was impacted negatively as a result of the reporting of violations by the plaintiff."[50] But, the court concluded, such speech is "the exact kind of 'expression[] regarding public concerns that are motivated by an employee's desire to speak out as a citizen' to which . . . this statute applies."[51]

8. Do General Bans on "Threats" Apply to Threats of Loss of Employment?

Though most of the statutes discussed below expressly bar discrimination in employment, or threats of loss of employment, some speak generally of threats, intimidation, or coercion. But in similar statutes, the terms "threats," "intimidation," and "coercion" have indeed been interpreted to include threat of economic retaliation.

Thus, for instance, federal law bans "intimidat[ing], threaten[ing], coerc[ing], or attempt[ing] to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person . . . to vote as he may choose."[52] The Fifth and Sixth Circuits have interpreted this law as prohibiting threats of economic retaliation.[53] Likewise, the Fair Housing Act makes it illegal "to coerce, intimidate, threaten, or interfere with any person . . . or on account of his having

47. Mendez v. Utopia Home Care, Inc., No. CV096006222, 2010 WL 4885347, at *3 (Conn. Super. Ct. Nov. 5, 2010) (quoting CONN. GEN. STAT. ANN. § 31-51q (West 2012)).

48. *Id.* at *4.

49. *Id.*

50. *Id.*

51. *Id.* at *5 (quoting Cotto v. United Techs. Corp., 738 A.2d 623, 632 (Conn. 1999)).

52. 18 U.S.C. § 594 (2006).

53. United States v. Bd. of Educ. of Greene County, 332 F.2d 40, 44, 46 (5th Cir. 1964) (concluding that the refusal to renew a year-to-year employment contract based on a person's exercise of her right to vote could be "intimidation"); United States v. Bruce, 353 F.2d 474, 476–77 (5th Cir. 1965) (likewise, as to property owners' decision to bar a person from their property, when this decision seriously interfered with the person's ability to work as an insurance premium collector); United States v. Beaty, 288 F.2d 653, 656 (6th Cir. 1961) (likewise, as to landlords' retaliation against their sharecropper tenants).

aided or encouraged any other person in the exercise or enjoyment [of housing nondiscrimination rights]."[54] Circuit courts have interpreted this as barring the firing of employees who rented to black and Mexican-American applicants,[55] and barring the denial of agency funds to an organization that complained about a discriminatory permit denial.[56]

B. *Engaging in Any Off-Duty Lawful Activity—Colorado and North Dakota*

On, then, to the specific laws, beginning with what seem like the broadest ones. Two state statutes generally bar employers from restricting employees' off-duty lawful activity. "Lawful activity off the premises of the employer" is broad enough to include speech, and court decisions have expressly interpreted such a statute to cover speech.[57]

> **Colorado:** [No employer may] terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours unless such a restriction:
>
> (a) Relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or
>
> (b) Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.[58]

> **North Dakota:** [No employer may discriminate against an

54. 42 U.S.C. § 3617 (2006).

55. Smith v. Stechel, 510 F.2d 1162, 1164 (9th Cir. 1975); *see also* United States v. Bowen Prop. Mgmt., 2005 WL 1950018, at *3 (E.D. Wash. Aug. 15, 2005) (finding a possibility of illegal coercion where an employee was allegedly terminated for helping others file Fair Housing Act complaints); Hall v. Lowder Realty Co., Inc., 160 F. Supp. 2d 1299, 1323 (M.D. Ala. 2001) (treating allegation that a real estate agency employer cut off customer calls to an agent employee as an allegation of coercion).

56. Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35 (2d Cir. 2002).

57. Marsh v. Delta Air Lines, Inc., 952 F. Supp. 1458 (D. Colo. 1997) (letter to the editor of a newspaper criticizing the employer); Gwin v. Chesrown Chevrolet, Inc., 931 P.2d 466 (Colo. App. 1996) (employee's demand to an off-the-job lecturer for a refund of money paid to attend the lecture); Angel v. Rayl, No. 04-CV-3420, 2005 WL 6208024 (Colo. Dist. Ct. Dec. 1, 2005) (dictum) ("read[ing] certain books," "see[ing] certain movies," "attend[ing] certain plays," "attend[ing] certain political or social-activism events," and "express[ing] certain opinions in letters-to-the-editor of the local newspaper").

58. COLO. REV. STAT. ANN. § 24-34-402.5(1) (West 2012) (enacted 1990).

> employee or applicant] because of . . . participation in a lawful activity that is off the employer's premises and that takes place during nonworking hours
>
> [a] [unless that participation is] in direct conflict with the essential business-related interests of the employer . . . [or]
>
> [b] contrary to a bona fide occupational qualification that reasonably and rationally relates to employment activities and the responsibilities of a particular employee or group of employees, rather than to all employees of that employer.[59]

Colorado also has another statute, discussed in Part II.F, protecting employees' "engaging or participating in politics."[60]

C. *Engaging in Activity That Doesn't Create "Reasonable Job-Related Grounds for Dismissal"—Montana*

Montana is the only state that generally bars employers from firing people absent good cause; this would include many dismissals based on an employee's speech or political activity.

> **Montana:** [An employer may not discharge an employee] if . . . the discharge was not for [reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reasons[61]] and the employee had completed the employer's probationary period of employment [or six months, if the employer did not establish a specific probationary period] . . . .[62]

This provision is limited to actual and constructive discharge, and is not violated by minor demotions, failures to promote, or failures to hire.[63] But, as described below in Part II.G, certain Montana employers are barred from all discrimination based on certain kinds of political activities.

D. *Exercising "Rights Guaranteed by the First Amendment"—Connecticut*

Connecticut bars employment discrimination based on any

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59. N.D. CENT. CODE ANN. § 14-02.4-03, -08 (West 2011) (enacted 1991).
60. COLO. REV. STAT. ANN. § 8-2-108 (West 2012) (enacted 1929).
61. MONT. CODE ANN. § 39-2-903(5) (2011) (enacted 1987).
62. MONT. CODE ANN. § 39-2-904(1)(b), (2)(b) (2011) (enacted 1987).
63. *Compare* Clark v. Eagle Sys., Inc., 927 P.2d 995, 999 (Mont. 1996) (holding demotion is not covered by statute), *with* Howard v. Conlin Furniture No. 2, Inc., 901 P.2d 116, 119 (Mont. 1995) (holding termination of managerial position and an immediate offer of a position with 75% pay cut is covered by statute).

"exercise . . . of rights guaranteed by the First Amendment."[64] Connecticut courts have interpreted this as largely applying the same rules to private employers as are applied to public employers under the First Amendment.[65] Connecticut courts apply the *Connick v. Myers* rule that employee speech is protected only if it is on "matters of public concern" and not motivated by the employee's personal employment grievance.[66] They also apply the *Pickering v. Board of Education* test, under which speech is unprotected if its value is exceeded by its potential to disrupt the employer's operation.[67] And they apply the *Garcetti v. Ceballos* rule, under which even otherwise public-concern and nondisruptive speech is unprotected when it is part of the employee's job duties.[68]

> **Connecticut:** [No employer may] discipline or discharge [an employee] on account of the exercise by such employee of rights guaranteed by the First Amendment . . . , provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer . . . .[69]

Courts have held that this statute does not apply to decisions denying promotion,[70] or to decisions denying tenure (even though this would generally lead to the expiration of the employee's contract).[71] A fortiori, the statute would not apply to decisions not to hire.

E. *Engaging in "Recreational Activities"—New York*

New York bars employer retaliation for off-duty "recreational activities," including, among other things, "reading and the viewing of television, movies, and similar material." A separate part of the statute, discussed in Part II.J below, expressly protects partisan political activities.

The New York law's protection for receiving speech suggests

64. CONN. GEN. STAT. § 31-51q (2012).
65. Cotto v. United Techs. Corp., 738 A.2d 623, 627 (Conn. 1999).
66. *Id.* at 632; Daley v. Aetna Life & Cas. Co., 734 A.2d 112, 124–25 (Conn. 1999).
67. *Cotto*, 738 A.2d at 649.
68. Perez-Dickson v. City of Bridgeport, 304 Conn. 483, 497–98 (2012).
69. CONN. GEN. STAT. § 31-51q (2012) (enacted 1983).
70. Bombalicki v. Pastore, 27 Conn. L. Rptr. 183 (Conn. Super. Ct. 2000).
71. Avedisian v. Quinnipiac Univ., 387 Fed. Appx. 59, 60 (2d Cir. 2010); McIntyre v. Fairfield Univ., 34 Conn. L. Rptr. 219 (Conn. Super. Ct. 2003); Douglas v. Bd. of Trs., No. CV 950372571, 1999 WL 240736, at *2 (Conn. Super. Ct. Apr. 8, 1999).

there is similar protection for conveying speech. Court decisions have indeed treated "recreational activities" as including arguing about politics at a social function[72] and participating in a vigil for a man killed because of his homosexuality.[73]

But one court has held that picketing is not sufficiently "recreational" to qualify.[74] Other New York courts have likewise held that certain non-speech activities—dating[75] and organizing and participating in "after-work celebrations with fellow employees"[76]—that might normally be seen as recreational nonetheless are not covered by the statute. This suggests that "recreational activities" might likewise be read narrowly in some speech cases.

> **New York:** (1) . . . (b) "Recreational activities" shall mean any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material . . . .
>
> (2) . . . (c) [No employer may discriminate against an employee or prospective employee] because of . . . an individual's legal recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property . . .
>
> (3)(a) [This section shall not be deemed to protect activity that] creates a material conflict of interest related to the employer's trade secrets, proprietary information or other

72. Cavanaugh v. Doherty, 243 A.D.2d 92, 100 (N.Y. App. Div. 1998) (treating an allegation that plaintiff was fired "as a result of a discussion during recreational activities outside of the workplace in which her political affiliations became an issue" as covered by the statute).

73. El-Amine v. Avon Prods., Inc., 293 A.D.2d 283 (N.Y. App. Div. 2002) (affirming denial of summary judgment in a § 201-d(2) case apparently brought based on plaintiff's "involvement in a vigil for Matthew Shepard, the gay college student who was brutally murdered in Laramie, Wyoming," Jennifer Gonnerman, *Avon Firing*, VILLAGE VOICE, Mar. 2, 1999).

74. Kolb v. Camilleri, No. 02-CV-0117A(Sr), 2008 WL 3049855, at *13 (W.D.N.Y. Aug. 1, 2008) ("Plaintiff did not engage in picketing for his leisure, but as a form of protest. While the Court has found such protest worthy of constitutional protection, it should not engender simultaneous protection as a recreational activity akin to 'sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material.'").

75. *E.g.*, Hudson v. Goldman Sachs & Co., 283 A.D.2d 246 (N.Y. App. Div. 2001) ("romantic relationships are not protected 'recreational activities'"); State v. Wal-Mart Stores, Inc., 207 A.D.2d 150 (N.Y. App. Div. 1995) ("dating is entirely distinct from . . . recreational activity") (internal quotation marks omitted). *But see id.* at 153 (Yesawich, J., dissenting) (arguing that dating should be seen as covered).

76. Delran v. Prada USA Corp., No. 101691/04, 2004 WL 5488006 (N.Y. Sup. Ct. Aug. 2, 2004).

> proprietary or business interest . . . .
>
> (4) [A]n employer shall not be in violation of this section where the employer takes action based on the belief . . . that: . . . (iii) the individual's actions were deemed by an employer or previous employer to be illegal or to constitute habitually poor performance, incompetency or misconduct.[77]

F. *Engaging in Political Activities—California, Colorado, Guam, Louisiana, Minnesota, Missouri, Nebraska, Nevada, South Carolina, West Virginia, Seattle (Washington), and Madison (Wisconsin)*

These states bar employers from retaliating against employees for engaging in political activities. "Political activities" is broader than just partisan or electoral activities, and courts interpreting the California statute have so held. "[P]olitical activities," the California Supreme Court has stated, "cannot be narrowly confined to partisan activity," but instead cover any activities involving the "espousal of a candidate or a cause," including participating in broad social movements such as the gay rights movement.[78] And a federal district court, following the California Supreme Court decision, has likewise read "political activities" to cover the holding of certain views on drug and alcohol policy.[79]

A few federal district courts in South Carolina have taken a narrower view: The South Carolina statute's protection of "political opinions" and "political rights and privileges guaranteed to every citizen by the Constitution," they have held, is limited to "matters directly related to the executive, legislative, and administrative branches of Government, such as political party affiliation, political campaign contributions, and the right to vote."[80] One district court held that the display of the Confederate flag is therefore not covered.[81] Another held the same about a statement that Muslims are disproportionately likely to be terrorists, and that terrorists are generally Muslims.[82]

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77. N.Y. LAB. LAW § 201-d (McKinney 2011) (enacted 1992).

78. Gay Law Students Ass'n. v. Pac. Tel. & Tel. Co., 595 P.2d 592, 610 (Cal. 1979).

79. Thompson v. Borg-Warner Protective Servs. Corp., No. C-94-4015 MHP, 1996 WL 162990, at *9 (N.D. Cal. Mar. 11, 1996).

80. Vanderhoff v. John Deere Consumer Prods., Inc., No. C.A.3:02-0685-22, 2003 WL 23691107, at *2 (D.S.C. Mar. 13, 2003).

81. *See* Dixon v. Coburg Dairy, Inc., 330 F.3d 250, 254 (4th Cir. 2003) (noting that the district court originally granted the employer's motion for summary judgment on this ground), *rev'd en banc*, 369 F.3d 811 (4th Cir. 2004) (concluding that the state law claim should have been brought in state court).

82. Powell v. Media Gen. Operations, Inc., 2011 WL 4501836 (D.S.C. Apr. 26, 2011) (Magistrate Judge's report and recommendation), *approved by* 2011 WL 4501564 (D.S.C.

This, though, seems inconsistent with the statutory language, which speaks of "political opinions" and "political rights and privileges guaranteed to every citizen by the Constitution and laws of the United States or by the Constitution and laws of this State."[83] Opining on broad current affairs topics has generally been seen as "political speech," even when the speech does not directly connect to an election.[84] And California courts have interpreted the similar terms "engaging . . . in politics" and "political activities" as covering "espousal of . . . a cause" as well as of a candidate, and including, for instance, the act of declaring oneself to be gay or lesbian.[85] Likewise, a Fourth Circuit panel opinion, later reversed on procedural grounds, concluded that display of the Confederate flag could constitute the exercise of "political rights."[86]

Even under the broad California view, though, some courts have held that activities aimed at improving labor conditions at the particular employer[87] and advocacy of forcible or violent conduct[88] do not qualify as "political" within the terms of the statute. Two related South Carolina federal district court cases

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Sept. 28, 2011), *settled while on appeal*, Order in Powell v. Media Gen. Operations, Inc., No. 11-2204 (Dec. 1, 2011). The speech in *Powell* took place right after the Fort Hood mass murder, which was committed by a Muslim U.S. soldier. Plaintiff told a coworker (who apparently wasn't a Muslim, Amended Complaint in *Powell* (filed Jan. 7, 2011)), "That's a shocker that a Muslim would be a terrorist!" The coworker responded, "Not all Muslims are terrorists." Plaintiff replied, "Well, that might be so, but it seems to me that all terrorists are Muslim." This, the court said, was not the expression of "political opinions" because it was not "of or relating to government, a government, or the conduct of government."

83. S.C. CODE ANN. § 16-17-560 (2011).

84. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 403 (2007) (describing the wearing of anti-war armbands as "political speech," even outside the context of an electoral campaign); Virginia v. Black, 538 U.S. 343, 365–66 (2003) (plurality opinion) (describing the burning of a cross as "a statement of ideology, a symbol of group solidarity" as "political speech"); United States v. Eichman, 496 U.S. 310, 315 n.4 (1990) (treating flag burning as "political speech").

85. Gay Law Students Ass'n. v. Pac. Tel. & Tel. Co., 595 P.2d 592, 610 (Cal. 1979).

86. Dixon v. Coburg Dairy, Inc., 330 F.3d 250, 262 (4th Cir. 2003) (treating the "political rights" language of the South Carolina statute as referring to Free Speech Clause rights generally, and concluding that the display of a Confederate flag "at a time when South Carolinians were vigorously debating whether that flag should fly atop their state capitol" would be protected by the statute against employer reprisal, if done outside work), *rev'd en banc*, 369 F.3d 811 (4th Cir. 2004) (concluding that the state law claim should have been brought in state courts).

87. Henry v. Intercontinental Radio, Inc., 155 Cal. App. 3d 707, 715 (1984) (suggesting that such speech might not be covered); *see also* Keiser v. Lake County Super. Ct., No. C05-02310 MJJ, 2005 WL 3370006, at *11 (N.D. Cal. Dec. 12, 2005) (organizing a nonprofit that "does not advocate a particular view or encourage support for a particular candidate" is not a "political activity" for Section 1101 purposes).

88. Lockheed Aircraft Corp. v. Superior Court, 171 P.2d 21, 24 (Cal. 1946).

have also held that testimony before a government agency, made in response to a request by that agency, does not qualify as "exercising a political right."[89] And a third South Carolina federal district court case concluded that an employee's "expressions of concern about his coworkers"—which consisted of statements that the coworker pharmacy technicians "lacked the necessary experience and competence to safely fill customers' prescriptions"—"were not political in nature" and thus were not covered.[90]

> **California:** No employer shall make, adopt, or enforce any rule, regulation, or policy:
>
> (a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office.
>
> (b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees.[91]
>
> No employer shall . . . attempt to coerce or influence his employees through or by means of threat of discharge . . . to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity.[92]

> **Colorado:** It is [a misdemeanor] for any . . . employer . . . to make, adopt, or enforce any rule, regulation, or policy forbidding or preventing any of his employees from engaging or participating in politics or from becoming a candidate for public office or being elected to and entering upon the duties

89. Love v. Cherokee County Veterans Affairs Office, C.A. No. 7:09-194-HMH, 2009 WL 2394369 (D.S.C. July 31, 2009); Tucker v. Cherokee County Veterans Affairs Office, C.A. No. 7:09-193-HMH, 2009 WL 2394374 (D.S.C. July 31, 2009).

90. Redden v. Walgreen Co., C.A. No. 8:10-CV-025040-JMC, 2011 WL 3204693, at *1, *3 (D.S.C. July 27, 2011).

91. CAL. LAB. CODE § 1101 (West 2012) (enacted 1915).

92. *Id.* § 1102 (West 2012) (enacted 1915). California Labor Code sections 96(k) and 98.6(a) allow the Labor Commissioner to "take assignments of" any employee claims "for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises," *id.* § 96(k), and bar employers from discriminating against "any employee or applicant for employment because the employee or applicant engaged in any conduct delineated in this chapter, including the conduct described in [section 96(k)] and [section 1101]." But California courts have concluded that the statutes create no new protections, but instead merely let the Labor Commissioner take assignments of any claims already secured by existing law, such as section 1101 claims or right to privacy claims. *See* Grinzi v. San Diego Hospice Corp., 120 Cal. App. 4th 72, 80–89 (Cal. Ct. App. 2004) (so holding as to both § 96(k) and § 98.6); *see also* Hartt v. Sony Elecs. Broad. & Prof'l Co., 69 Fed. Appx. 889, 890 (9th Cir. 2003) (taking this view, but considering only § 96(k)); Paloma v. City of Newark, No. A098022, 2003 WL 122790, at *12–13 (Cal. Ct. App. Jan. 10, 2003) (also taking this view but considering only § 96(k)); Barbee v. Household Auto. Fin. Corp., 113 Cal. App. 4th 525, 533–36 (Cal. Ct. App. 2000) (likewise); 83 Ops. Cal. Atty. Gen. 226, 228, 230 (2000) (taking this view as to § 96(k)).

of any public office.[93]

Guam: Every employer . . . is guilty of a misdemeanor who within ninety (90) days of any election . . . makes or communicates . . . threats, express or implied, intended or calculated to influence the political opinions or actions of the employees.[94]

Louisiana: Except as otherwise provided in R.S. 23:962, no employer having regularly in his employ twenty or more employees shall

[a] make, adopt, or enforce any rule, regulation, or policy forbidding or preventing any of his employees from engaging or participating in politics, or from becoming a candidate for public office . . .

[b] adopt or enforce any rule, regulation, or policy which will control, direct, or tend to control or direct the political activities or affiliations of his employees, [or] . . .

[c] coerce or influence, or attempt to coerce or influence any of his employees by means of threats of discharge or loss of employment in case such employees should support or become affiliated with any particular political faction or organization, or participate in political activities of any nature or character . . . .[95]

23:962: Any planter, manager, overseer or other employer of laborers who, previous to the expiration of the term of service of any laborer in his employ or under his control, discharges such laborer on account of his political opinions, or attempts to control the suffrage or vote of such laborer by any contract or agreement whatever, shall be fined not less than one hundred dollars, nor more than five hundred dollars and imprisoned for not more than one year.[96]

Minnesota: [It shall be a gross misdemeanor for a]n individual or association . . . [to] engage in economic reprisals or threaten loss of employment or physical coercion against an individual or association because of that individual's or association's political contributions or political activity. This subdivision does not apply to compensation for employment or

93. COLO. REV. STAT. ANN. § 8-2-108 (West 2012) (enacted 1929); *see also id.* § 8-2-102 (West 2012) (enacted 1897) (banning employers from discriminating or threatening to discriminate against employees for belonging to any "political party").

94. 3 GUAM CODE ANN. § 14111 (2012).

95. LA. REV. STAT. ANN. § 23:961 (2011) (enacted 1938).

96. LA. REV. STAT. ANN. § 23:962 (2011) (derived from language used in An Act Extending Protection to Laborers in the Exercise of Their Privilege of Free Suffrage, 1868 La. Acts 64).

loss of employment if the political affiliation or viewpoint of the employee is a bona fide occupational qualification of the employment.[97]

Missouri: [It shall be a misdemeanor o]n the part of any employer [to] mak[e], enforce[e], or attempt[] to enforce any order, rule, or regulation or adopt[] any other device or method to prevent an employee from

[a] engaging in political activities,

[b] accepting candidacy for nomination to, election to, or the holding of, political office,

[c] holding a position as a member of a political committee,

[d] soliciting or receiving funds for political purpose,

[e] acting as chairman or participating in a political convention,

[f] assuming the conduct of any political campaign,

[g] signing, or subscribing his name to any initiative, referendum, or recall petition, or any other petition circulated pursuant to law . . . .[98]

[It shall be a misdemeanor and civilly actionable for any employer to:]

(1) . . . discriminate or threaten to discriminate against any employee . . . by reason of his political beliefs or opinions; or . . .

(5) [d]iscriminate or threaten to discriminate against any . . . employee in this state for contributing or refusing to contribute to any candidate, political committee or separate political fund . . . .[99]

Nebraska: Any person who . . . attempts to influence the political action of his or her employees by threatening to discharge them because of their political action . . . shall be guilty of a Class IV felony.[100]

Nevada: It shall be unlawful for any . . . [employer] to make any rule or regulation prohibiting or preventing any employee from engaging in politics or becoming a candidate for any public office in this state.[101]

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97. MINN. STAT. ANN. § 10A.36 (West 2012) (enacted 1974).

98. MO. ANN. STAT. § 115.637(6) (West 2012) (enacted 1939).

99. MO. ANN. STAT. § 130.028 (West 2012) (enacted 1897).

100. NEB. REV. STAT. ANN. § 32-1537 (West 2012) (enacted 1909).

101. NEV. REV. STAT. ANN. § 613.040 (West 2012) (enacted 1915). It is not clear whether this also bars employers from *requiring* employees to make political contributions. *Compare* Nevadans for Fairness v. Heller, No. A385931, A386493, 1998 WL 357316, at *2 (Nev. Dist. Ct. June 10, 1998) (interpreting the statute as barring such requirements), *with* Spitzmesser v. Tate Snyder Kimsey Architects, Ltd., No. 210-CV-

South Carolina: It is unlawful for a person to . . . discharge a citizen from employment . . . because of political opinions or the exercise of political rights and privileges guaranteed to every citizen by the Constitution and laws of the United States or by the Constitution and laws of this State.[102]

West Virginia: [It is a misdemeanor for any employer or agent of an employer to] give any notice or information to his employees, containing any threat, either express or implied, intended or calculated to influence the political views or actions of the . . . employees . . . .[103]

Seattle (Washington): Employer[s may not discriminate . . . by reason of . . . political ideology . . .] . . . with respect to any matter related to employment.[104] "Political ideology" means any idea or belief, or coordinated body of ideas or beliefs, relating to the purpose, conduct, organization, function or basis of government and related institutions and activities, whether or not characteristic of any political party or group. This term includes membership in a political party or group and includes conduct, reasonably related to political ideology, which does not interfere with job performance.[105]

Madison (Wisconsin): [Employers may not] discriminate against any individual [in employment] . . . because of [such individual's] protected class membership . . . [including "political beliefs," defined as "one's opinion, manifested in speech or association, concerning the social, economic and governmental structure of society and its institutions," "cover[ing] all political beliefs, the consideration of which is not preempted by state or federal law"].[106]

The Colorado and Louisiana statutes also include clauses that

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01700-KJD-LRL, 2011 WL 2552606, at *3 (D. Nev. June 27, 2011) (reading the statute as not barring such requirements).

102. S.C. CODE ANN. § 16-17-560 (2011) (enacted 1950) (based on statute first enacted in 1868, *see* An Act Providing for the Next General Election and the Manner of Conducting the Same, 1868 S.C. Acts 135, 136 (special session)). *See, e.g.*, Culler v. Blue Ridge Elec. Coop., Inc., 422 S.E.2d 91, 93 (S.C. 1992) (reading the statute as covering an employee's refusal to make a campaign contribution).

103. W. VA. CODE ANN. § 3-8-11(b) (West 2012) (enacted 1915). *See also id.* § 3-9-15 (West 2012) (enacted 1937) (making it a misdemeanor for any employer or agent of an employer to make any statement to "employees, containing any threat, notice or information that if any . . . candidate is elected or defeated, work in the establishment will cease, in whole or in part, or other threats expressed or implied, intended to influence the political opinions or votes of his employees.").

104. SEATTLE, WASH. MUN. CODE. § 14.04.040 (2011) (enacted 1973).

105. *Id.* § 14.04.030(R).

106. MADISON, WIS. MUN. CODE §§ 39.03(1), (2)(cc), (8)(c), (8)(d)(1) (2010) (enacted 1975).

effectively state, "Nothing in this section shall be construed to prevent the injured employee from recovering damages from his employer for injury suffered through a violation of this section."[107] This language, borrowed from the California statute, is the language that California courts have interpreted as providing for tort liability for violations of the prohibition.[108] For other Colorado and Louisiana statutes that provide some protection for speech or political activity, see Part II.B and Part II.L, respectively.

A 1983 Third Circuit case, *Novosel v. Nationwide Ins. Co.*,[109] suggested that Pennsylvania would follow a similar rule as a common-law matter: The court held that, under Pennsylvania law, private employers could not fire an employee for "political expression and association" unless the employee's activities substantially interfere with the employee's job.[110] But more recent Pennsylvania state court decisions suggest that *Novosel* is no longer good law.[111]

G. *Holding or Expressing Political Ideas or Beliefs—New Mexico and (to Some Extent) Montana*

New Mexico bars discrimination based on "political opinions."[112] This could be read broadly, to include discrimination based on speech expressing political views, or narrowly to include only discrimination motivated by disapproval of an employee's beliefs and to exclude discrimination motivated by worry that the employee's speech expressing those beliefs is disruptive to the business.

> **New Mexico:** [It is a felony for any employer of an employee] entitled to vote at any election, [to] directly or indirectly discharg[e] or threaten[] to discharge such

107. COLO. REV. STAT. ANN. § 8-2-108 (West 2012); *see* LA. REV. STAT. ANN. § 23:961 (2011) ("Nothing herein contained shall in any way be construed to prevent the injured employee from recovering damages from the employer as a result of . . . the employer's violations of this Section.").

108. Lockheed Aircraft Corp. v. Superior Court, 171 P.2d 21, 25 (Cal. 1946).

109. 721 F.2d 894, 900 (3d Cir. 1983).

110. *See* CONN. GEN. STAT. § 31-51q (2012) for a similar rule.

111. *See* Fraser v. Nationwide Mut. Ins. Co., 352 F.3d 107, 122–23 (3d Cir. 2003) (noting that Pennsylvania courts have not endorsed *Novosel*, and concluding that "[a]s a result, we have essentially limited *Novosel* to its facts—a firing based on forced political speech"); Martin v. Capital Cities Media, Inc., 511 A.2d 830, 843–44 (Pa. Super. Ct. 1986) (seemingly reaching the opposite result from *Novosel*, but not expressly discussing *Novosel*).

112. N.M. STAT. ANN. § 1-20-13 (West 2012) (enacted 1912).

> employee because of the employee's political opinions or belief[s] or because of such employee's intention to vote or refrain from voting for any candidate, party, proposition, question, or constitutional amendment.[113]
>
> [It is a felony for any employer of an employee] entitled to vote at any [municipal] election [to] directly or indirectly discharg[e] or penaliz[e] or threaten[] to discharge or penalize such employee because of the employee's opinions or beliefs or because of such employee's intention to vote or to refrain from voting for any candidate or for or against any question.[114]

Montana also imposes a similar rule for government contractors, and for health care facilities (including private facilities[115]); the language seems broad enough to bar both discrimination against patrons and discrimination against employees or applicants for employment:

> **Montana:** Every state or local contract or subcontract for construction of public buildings or for other public work or for goods or services must contain a provision that all hiring must be on the basis of merit and qualifications and a provision that there may not be discrimination on the basis of race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin by the persons performing the contract.[116]

All phases of the operation of a health care facility must be without discrimination against anyone on the basis of race, creed, religion, color, national origin, sex, age, marital status, physical or mental disability, or political ideas.[117]

The Montana Constitution provides that "Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas,"[118] but it's not clear whether the ban on discrimination "in the exercise of . . . civil . . . rights" include discrimination in employment.[119]

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113. *Id.*
114. N.M. STAT. ANN. § 3-8-78(A) (West 2012) (enacted 1912).
115. MONT. CODE ANN. § 50-5-101(23)(a) (2011).
116. MONT. CODE ANN. § 49-3-207 (2011) (enacted 1975).
117. MONT. CODE ANN. § 50-5-105 (2011).
118. MONT. CONST. art. 2, § 4.
119. *Compare* Foster v. Albertsons, Inc., 835 P.2d 720, 723 (Mont. 1992) (noting that the trial court had quoted the constitutional provision in the jury instructions in a private

H. *Supporting or Advocating for a Federal Candidate—Federal Law (Probably, in Some Circuits)*

The Civil Rights Act of 1871 may prohibit some kinds of employer retaliation based on an employee's speech supporting or advocating for a federal candidate. Section 2 of the Act, now codified at 42 U.S.C. § 1985, provides in relevant part, that it is civilly actionable for "two or more persons" to "conspire" (and to act pursuant to the conspiracy):

> to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy . . . .[120]

In interpreting a closely analogous portion of the same statute, the Court has held that "injur[ing] any citizen in person or property" includes getting the person fired from his job,[121] and that an agreement among two or more managers of a company to get the employee fired from the company may constitute an actionable "conspir[acy]."[122] It thus follows that it is civilly actionable (and likely criminal[123]) for two or more managers to have an employee fired for supporting or advocating for the election of a federal candidate.

In several circuits, this conclusion may usually be blocked by the "intra-corporate conspiracy" doctrine, under which a conspiracy is not actionable if the conspirators consist of employees of the same corporation (plus perhaps the

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employment sex discrimination case), *with* MONT. DEP'T OF LAB. & INDUS., HUMAN RIGHTS BUREAU, http://erd.dli.mt.gov/human-rights-bureau.html (last visited Feb. 19, 2012) (stating that Montana law bans discrimination based on political beliefs or ideas only in "governmental services and employment").

120. 42 U.S.C. § 1985(3) (2006).

121. Haddle v. Garrison, 525 U.S. 121, 126 (1998). The conclusion in *Gill v. Farm Bureau Life Ins. Co.*, 906 F.2d 1265, 1269 (8th Cir. 1990), that § 1985 applies only to serious violence and not just cancellation of an insurance agent's contract by his insurance company, is thus no longer good law after *Haddle*. (Note that *Haddle*'s logic applies not just to employment contracts but to other valuable contracts as well.)

122. *Haddle*, 525 U.S. at 123.

123. 18 U.S.C. § 241(2006); *see* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 275 (1993) (noting that 18 U.S.C. § 241 is "the criminal counterpart of § 1985(3)"); *Ex parte* Yarbrough, 110 U.S. 651 (1884) (discussing a prosecution under the criminal counterpart of what is now § 1985(3)); United States v. Goldman, 25 F. Cas. 1350 (C.C. D. La. 1878) (two-judge court) (same); United States v. Butler, 25 F. Cas. 213 (C.C. D. S.C. 1877) (Waite, C.J., riding circuit and writing for a two-judge court) (same).

corporation itself) who are conspiring to have the corporation perform an action, such as firing someone.[124] But in the Third and the Tenth Circuits,[125] and possibly also in the D.C., First, and Ninth Circuits,[126] this doctrine doesn't apply to § 1985 claims, so when two or more managers conspire to get an employee fired based on his support or advocacy of a federal candidate, § 1985 offers a remedy.

Now a bit more detail. Section 1985 prohibits five different forms of conspiracies:

(a) "to prevent, by force, intimidation, or threat, any person from accepting or holding [or exercising] any office . . . under the United States," or "to injure him in his person or property on account of his lawful discharge of the duties of his office";[127]

(b) "to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, . . . or to injure such party or witness in his person or property on account of his having so attended or testified";[128]

(c) "[to] imped[e], hinder[], obstruct[], or defeat[] . . . the due course of justice in any State . . . , with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws";[129]

(d) "[to] depriv[e], either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws";[130] or

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124. Grider v. City of Auburn, 618 F.3d 1240, 1261–62 (11th Cir. 2010); Hartline v. Gallo, 546 F.3d 95, 99 n.3 (2d Cir. 2008); Amadasu v. Christ Hosp., 514 F.3d 504, 507 (6th Cir. 2008); Benningfield v. City of Houston, 157 F.3d 369, 378 (5th Cir. 1998); Hartman v. Bd. of Trs. of Cmty. Coll. Dist. No. 508, 4 F.3d 465, 469–71 (7th Cir. 1993); Richmond v. Bd. of Regents of Univ. of Minn., 957 F.2d 595, 598 (8th Cir. 1992); Buschi v. Kirven, 775 F.2d 1240, 1252–53 (4th Cir. 1985).

125. Brever v. Rockwell Int'l Corp., 40 F.3d 1119, 1127 (10th Cir. 1994); Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1256-59 & n.121 (3d Cir. 1978) (en banc), *vacated on other grounds*, 442 U.S. 366 (1979).

126. Bowie v. Maddox, 642 F.3d 1122, 1131 (D.C. Cir. 2011) (declining to decide the question); Mustafa v. Clark County Sch. Dist., 157 F.3d 1169, 1181 (9th Cir. 1998) (same). I know of no case on the subject in the First Circuit.

127. 42 U.S.C. § 1985(1) (2006).

128. 42 U.S.C. § 1985(2) (2006).

129. *Id.*

130. 42 U.S.C. § 1985(3) (2006).

(e) "to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy."[131]

All these provisions apply to private actors and not just to government officials.[132] But, as the Court recognized in *Kush v. Rutledge*, these five kinds of conspiracy belong to two families. Provisions (c) and (d) "contain[] language requiring that the conspirators' actions be motivated by an intent to deprive their victims of the equal protection of the laws,"[133] and at the same time deal with activity that "is not institutionally linked to federal interests and . . . is usually of primary state concern." Because of this, the Court did not want the provisions to be read as "creat[ing] an open-ended federal tort law applicable 'to all tortious, conspiratorial interferences with the rights of others,'" and therefore required a showing of "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."[134]

On the other hand, provisions (a), (b), and (e) do not mention "equal protection," and do not require either state action or a class-based animus. These provisions "relate to institutions and processes of the Federal Government—federal officers, [(a)]; federal judicial proceedings, [(b)]; and federal elections, [(e)]. The statutory provisions dealing with these categories of conspiratorial activity contain no language requiring that the conspirators act with intent to deprive their victims of the equal protection of the laws."[135]

In *Kush*, the Court therefore expressly held that § 1985 provides a cause of action for "an alleged conspiracy to intimidate potential witnesses in a federal lawsuit," a provision (b) claim, without any state action or class-based animus.[136] And the Court's reasoning applies as much to provision (e) claims, which involve retaliation for supporting a federal candidate, as it

131. *Id.*
132. Griffin v. Breckenridge, 403 U.S. 88, 101 (1971).
133. *Id.* at 725.
134. *Kush*, 460 U.S. at 725–26 (quoting *Griffin*, 403 U.S. at 101, 102).
135. *Id.* at 725.
136. *Id.* at 720, 726–27.

does to provision (b) claims, which involve retaliation for being a witness in a federal case.

Likewise, the Court's holding in *Haddle v. Garrison*, which held that two managers conspiring to get an employee fired because he was a witness in a federal case was actionable under 42 U.S.C. § 1985, would apply equally to provision (e) and provision (b) claims. "[L]oss of at-will employment," the Court held, may be treated as "injur[ing]" a person "in his person or property," even though at-will employment isn't technically a "constitutionally protected property interest" for many purposes.[137]

The only court to seriously consider the argument in this subsection, the Eighth Circuit, has (twice) rejected the argument. The provision (e) retaliation-for-support-or-advocacy claim, the court reasoned, is limited to situations involving "State Action," because only state action can violate a person's First Amendment right.[138]

But this is a misreading of § 1985: The provision (e) "support or advocacy" claim—which covers actions "injur[ing] any citizen in person or property on account of . . . support or advocacy [toward or in favor of the election of any federal candidate]"—is not limited to violations of the First Amendment. It does not require, for instance, depriving someone of "equal privileges and immunities under the laws" (a provision (c) claim). It does not require governmental interference with "support or advocacy."[139] It is justified by the federal Elections Clause power, aimed at protecting federal elections, and not by any Fourteenth Amendment Enforcement Clause power.[140] Nor does it extend as far as the First Amendment does: It is limited to support or advocacy of the election of federal candidates, not speech on other matters.

Rather, the provision (e) claim, like the provision (b) claim involved in *Haddle*, is a free-standing federal statutory protection against conspiracies—whether private or governmental—aimed at retaliating against a person for a certain kind of conduct. In

137. Haddle v. Garrison, 525 U.S. 121, 122–23, 125–26 (1998).

138. Federer v. Gephardt, 363 F.3d 754, 758–59 (8th Cir. 2004); Gill v. Farm Bureau Life Ins. Co., 906 F.2d 1265, 1270–71 (8th Cir. 1990).

139. *See, e.g.*, *Ex parte* Yarbrough, 110 U.S. 651, 655, 665–66 (1884) (stressing that what is now the "support or advocacy" clause of § 1985 is not limited "to acts done under State authority"); United States v. Goldman, 25 F. Cas. 1350 (C.C. D. La. 1878) (two-judge court) (applying the statute to private action); United States v. Butler, 25 F. Cas. 213 (C.C. D. S.C. 1877) (Waite, C.J., riding circuit and writing for a two-judge court) (same).

140. *Yarbrough*, 110 U.S. at 655, 660–62, 665–66; *Goldman*, 25 F. Cas. at 1354.

provision (b), that conduct is being a witness in a federal case. In provision (e), that conduct is giving "support or advocacy in a legal manner" "in favor of the election" of a federal candidate. Under *Haddle*, such conspiracies to retaliate include conspiracies to get someone fired (though if the conspiracies are purely within one corporation, they may not be actionable in those circuits that adhere to the intracorporate conspiracy doctrine).

I. *Belonging to, Endorsing, or Affiliating With a Political Party—District of Columbia, Iowa, Louisiana, Puerto Rico, Virgin Islands, Broward County (Florida), Urbana (Illinois)*

These laws bar employers from discriminating against employees based on party membership. Most of them also bar discrimination based on the party that the employees "endorse" (D.C., Broward, Urbana) or "affiliate" with (Puerto Rico, Virgin Islands), which seems to cover speech expressing support for the party.

> **District of Columbia:** [No employer may discriminate against employees or prospective employees] based upon the actual or perceived . . . political affiliation [defined as "the state of belonging to or endorsing any political party"] of any individual . . . .[141]

> **Iowa:** A person commits the crime of election misconduct in the first degree if the person willfully [i]ntimidates, threatens, or coerces, or attempts to intimidate, threaten, or coerce, a person . . . [t]o exercise [or not exercise] a right under chapters 39 through 53 [including declaring party affiliation, IOWA CODE ANN. §§ 43.41-.42].[142]

> **Louisiana:** No person shall knowingly, willfully, or intentionally: [i]ntimidate . . . , directly or indirectly, any voter or prospective voter in . . . any matter concerning the voluntary affiliation or nonaffiliation of a voter with any political party.[143]

> **Puerto Rico:** Any employer who performs any act of prejudicial discrimination against [an employee because he

141. D.C. CODE §§ 2-1401.02(25), 2-1402.11(a) (2001) (enacted 1973); *see* Blodgett v. Univ. Club, 930 A.2d 210, 221–22 (D.C. 2007) (holding that § 2-1402.11(a) is indeed limited to discrimination based on political party membership, and not based on political opinions or affiliations generally).

142. IOWA CODE ANN. § 39A.2(c)(4) (West 2012) (enacted 1994). For an explanation of why this statute, which generally bans threats, likely also applies to threats of loss of employment, see Part II.A.8.

143. LA. REV. STAT. ANN. § 18:1461.4(A)(1) (2011) (enacted 2010).

is] . . . affiliated with a certain political party, shall be guilty . . . of a misdemeanor . . . .[144]

Virgin Islands: It shall be an unlawful discriminatory practice . . . [f]or an employer, because of . . . [the] political affiliation of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.[145]

Broward County (Florida): It is a discriminatory practice for an employer: . . . [t]o fail or refuse to hire, to discharge, or to otherwise discriminate against an individual, with respect to compensation or the terms, conditions, or privileges of employment, because of a discriminatory classification[146] [including "political affiliation," defined as "belonging to or endorsing any political party"[147]] . . . [except] where these qualifications are bona fide occupational qualifications reasonably necessary to the normal operation of that particular business or enterprise."[148]

Urbana (Illinois): It shall be an unlawful practice for an employer . . . [to discriminate against any employee or applicant] based wholly or partially on[149] [an employee's belonging to or endorsing any political party or organization or taking part in any activities of a political nature[150]] . . . [except] where such factors are bona fide occupational qualifications necessary for such employment.[151]

Louisiana law also provides many employees protection against dismissal for political activities and not just for party membership.[152]

J. *Engaging in Electoral Activities—Illinois, New York, Washington*

New York and Washington expressly bar employers from discriminating against employees for their election-related

144. P.R. LAWS ANN. tit. 29, § 140 (2011) (enacted 1942); *see* Santiago v. People, 154 F.2d 811, 813 (1st Cir. 1946) (applying § 140 as written).
145. V.I. CODE ANN. tit. 10, § 64-1(a) (2011) (enacted 1974).
146. BROWARD COUNTY, FLA. ORDINANCE NO. 2011-19 § 16½-33(a)(1) (enacted 1978).
147. *Id.* § 16½-3(qq).
148. *Id.* § 16½-33.1(a)(3).
149. URBANA, ILL. CODE OF ORDINANCES § 12-62(a) (2011) (enacted 1975).
150. *Id.* § 12-39.
151. *Id.* § 12-62(f)(2).
152. *See supra* Part II.F.

speech and political activities.[153] Illinois law would likely be interpreted the same way, given the likelihood that threats of dismissal from employment would qualify as "intimidation" or "threat" (see Part II.A.8).

> **Illinois:** Any person who, by force, intimidation, threat, deception or forgery, knowingly prevents any other person from (a) registering to vote, or (b) lawfully voting, supporting or opposing the nomination or election of any person for public office or any public question voted upon at any election, shall be guilty of a . . . felony[154] [and shall be subject to civil liability[155]].

> **New York:** (1) (a) "Political activities" shall mean (i) running for public office, (ii) campaigning for a candidate for public office, or (iii) participating in fund-raising activities for the benefit of a candidate, political party or political advocacy group . . . .
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> (2)(a) [No employer may discriminate against an employee or prospective employee because of] an individual's [legal] political activities outside of working hours, off of the employer's premises and without use of the employer's equipment or other property [except when the employee is a professional journalist, or a government employee who is partly funded with federal money and thus covered by federal statutory bans on politicking by government employees] . . . .[156]
>
> (3)(a) [This section shall not be deemed to protect activity which] creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest . . .
>
> (4) [A]n employer shall not be in violation of this section where the employer takes action based on the belief . . . that: . . . (iii) the individual's actions were deemed by an employer or previous employer to be illegal or to constitute habitually poor performance, incompetency or misconduct.[157]

> **Washington:** No employer . . . may discriminate against

153. Richardson v. City of Saratoga Springs, 246 A.D.2d 900, 902 (N.Y. App. Div. 1998); Nelson v. McClatchy Newspapers, Inc., 936 P.2d 1123, 1127 (Wash. 1997).

154. 10 ILL. COMP. STAT. ANN. § 5/29-4 (West 2012) (enacted 1973). Use of intimidation and threats to *try* to prevent a person from speaking out on candidates or ballot measures would thus also be criminal attempt to violate the statute, even if the person refuses to be prevented from speaking. 720 ILL. COMP. STAT. ANN. § 5/8-4(a) (West 2012).

155. 10 ILL. COMP. STAT. ANN. § 5/29-17 (West 2012) (enacted 1973).

156. *See Richardson*, 246 A.D.2d at 902 (applying this to cover expressions of support for a political candidate).

157. N.Y. LAB. LAW § 201-d (McKinney 2012) (enacted 1992).

> an . . . employee . . . for . . . in any way supporting or opposing [or not supporting or opposing] a candidate, ballot proposition, political party, or political committee.[158]

K. *Signing Initiative, Referendum, Recall, or Candidate Petitions—Arizona, D.C., Georgia, Iowa, Minnesota, Missouri, Ohio, Oregon, Washington*

These laws are narrow, but have become especially relevant given the recent debates about retaliation against people who signed anti-same-sex marriage initiative petitions. For an explanation of why the laws that ban threats and intimidation, without mentioning employment, likely apply to threats of dismissal for employment, see Part II.A.8 above.

> **Arizona:** A person who . . . threatens any other person to the effect that the other person will or may be injured in his business, or discharged from employment, or that he will not be employed, to sign or subscribe, or to refrain from signing or subscribing, his name to an initiative or referendum petition [or recall] . . . is guilty of a . . . misdemeanor.[159]

> **District of Columbia:** Any person who . . . by threats or intimidation, interferes with, or attempts to interfere with, the right of any qualified registered elector to sign or not to sign any initiative, referendum, or recall petition, or to vote for or against, or to abstain from voting on any initiative, referendum, or recall measure . . . shall be [guilty of a misdemeanor].[160]

> **Georgia:** A person who, by menace or threat either directly or indirectly, induces or compels or attempts to induce or compel any other person to sign or subscribe or to refrain from signing or subscribing that person's name to a recall application or petition . . . shall be guilty of a misdemeanor.[161]

> **Iowa:** A person commits the crime of election misconduct in the first degree if the person willfully . . . [i]ntimidates, threatens, or coerces, or attempts to intimidate, threaten, or coerce, a person . . . [t]o sign [or refrain from signing] a petition nominating a candidate for public office or a petition requesting an election for which a petition may legally be

158. WASH. REV. CODE ANN. § 42.17A.495(2) (West 2012) (enacted 1993).
159. ARIZ. REV. STAT. ANN. §§ 19-116, -206 (2012) (enacted 1970 and 1973 respectively).
160. D.C. CODE § 1-1001.14(b)(3) (2012) (enacted 1978).
161. GA. CODE ANN. § 21-4-20(b) (West 2011) (enacted 1979).

submitted.[162]

Louisiana: No person shall knowingly, willfully, or intentionally . . . [i]ntimidate . . . directly or indirectly, any voter or prospective voter in matters concerning voting or nonvoting or voter registration or nonregistration, or the signing or not signing of a petition, including but not limited to any matter concerning the voluntary affiliation or nonaffiliation of a voter with any political party.[163]

Minnesota: A person may not use threat, intimidation, coercion, or other corrupt means to interfere or attempt to interfere with the right of any eligible voter to sign or not to sign a recall petition of their own free will.[164]

Missouri: [It shall be a misdemeanor o]n the part of any employer [to] mak[e], enforc[e], or attempt[] to enforce any order, rule, or regulation or adopt[] any other device or method to prevent an employee from . . . signing, or subscribing his name to any initiative, referendum, or recall petition, or any other petition circulated pursuant to law . . . .[165]

Ohio: No person shall, directly or indirectly, by intimidation or threats, influence or seek to influence any person to sign or abstain from signing, or to solicit signatures to or abstain from soliciting signatures to an initiative or referendum petition.[166]

Oregon: [No person may] directly or indirectly subject any person to undue influence [defined to include "loss of employment or other loss or the threat of it"] with the intent to induce any person to . . . [s]ign or refrain from signing a prospective petition or an initiative, referendum, recall or candidate nominating petition.[167]

Washington: Every person is guilty of a gross misdemeanor who . . . [i]nterferes with or attempts to interfere with the right of any voter to sign or not to sign an initiative or referendum [or recall] petition or with the right to vote for or against an initiative or referendum measure [or recall] by threats,

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162. IOWA CODE ANN. § 39A.2 (West 2012) (enacted 1994).
163. LA. REV. STAT. ANN. § 18:1461.4(A)(1) (2011) (enacted 2010).
164. MINN. STAT. ANN. § 211C.09 (West 2012) (enacted 1996).
165. MO. ANN. STAT. § 115.637(6) (West 2012) (enacted 1939).
166. OHIO REV. CODE ANN. § 731.40 (West 2011) (based on statute originally enacted in 1929); *see also id.* § 305.41 (same, though limited to referenda).
167. OR. REV. STAT. ANN. §§ 260.665(1)–(2) (West 2012) (enacted 2009).

intimidation, or any other corrupt means or practice . . . .[168]

L. *Giving Campaign Contributions—Louisiana, Massachusetts, and Oregon*

These statutes are limited to discrimination based on making a contribution. (More states ban discrimination based on a refusal to make a contribution.[169])

> **Louisiana:** No person based on an individual's contribution, promise to make a contribution, or failure to make a contribution to influence the nomination or election of a person to [any political office] shall directly or indirectly affect an individual's employment by means of [discrimination in favor or against the person in employment, or threat of such discrimination].[170]

> **Massachusetts:** No person shall, by threatening to [discriminate against or in favor of an employee] . . . attempt to influence a voter to give or to withhold his vote or political contribution. No person shall, because of the giving or withholding of a vote or a political contribution, [discriminate against or in favor of an employee].[171]

> **Oregon:** [No person may] directly or indirectly subject any person to undue influence [defined to include loss of employment or other loss or the threat of it] with the intent to induce any person to . . . [c]ontribute or refrain from contributing to any candidate, political party or political committee.[172]

Louisiana also has a more general protection for political activity, discussed in Part II.F, which would likely include campaign contributions.

M. *Exercising the "Elective Franchise" or "Suffrage," Which Might Include Signing Referendum or Initiative Petitions—Hawaii, Idaho, Kentucky, Tennessee, West Virginia, Wyoming, and Guam*

Some jurisdictions ban retaliation or threat of retaliation related to the "free exercise of the elective franchise" or to

168. WASH. REV. CODE §§ 29A.84.250(4), .220(5) (2012) (enacted 1913).
169. *See infra* note 197.
170. LA. REV. STAT. §§ 18:1461.1(A)(2) (federal offices), :1483, :1505.2 (other offices) (2011) (enacted 1997).
171. MASS. GEN. LAWS ANN. ch. 56, § 33 (West 2012) (enacted 1994).
172. OR. REV. STAT. ANN. §§ 260.665(1)–(2) (West 2012) (enacted 1971).

"suffrage." This might just mean with regard to voting,[173] a prohibition that would rarely be triggered because voting is now generally secret.

But it could also be read as extending to the signing of referendum or initiative petitions, and perhaps to other forms of political activity. Thus, for instance, the Wyoming Supreme Court has described—albeit in a slightly different context—the signing of initiative and referendum petitions as "relat[ing] to the elective franchise."[174] Maryland's highest court likewise concluded that "the right to have one's signature counted on a nominating petition [for a candidate] is integral to that political party member's right of suffrage[,]"[175] which suggests that signing a referendum petition is also included within the right of suffrage. An Oregon Attorney General's opinion took the same view as to the signing of recall petitions,[176] as did an Ohio court decision (though with regard to the phrase "exercising [the] elective franchise").[177]

The Idaho Supreme Court concluded that "[t]he right of citizens to organize, and give expression and effect to their political aspirations through political parties is inherent in, and a part of, the right of suffrage."[178] The Nebraska Supreme Court held that "the right of persons to combine according to their political beliefs and to possess and freely use all the machinery for increasing the power of numbers by acting as a unit to effect a desired political end" is "[i]nherent[]" in the right to "exercise

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173. *See, e.g.*, BLACK'S LAW DICTIONARY 1571 (9th ed. 2009) (defining "suffrage" as "[t]he right or privilege of casting a vote at a public election"); *see also* Guveiyian v. Keefe, No. 97-CV-5210, 1998 WL 273015, at *3 (E.D.N.Y. Jan. 12, 1998) (concluding that "suffrage" is limited to the "privilege of voting," and does not include "the right to support, approve and campaign on behalf of political candidates and to participate in the election of candidates to political office").

174. Thomson v. Wyo. In-Stream Flow Comm., 651 P.2d 778, 790 (Wyo. 1982) (concluding that the state constitutional provision that "[t]he legislature shall pass laws to secure the purity of elections, and guard against abuses of the elective franchise" authorizes the legislature to require that initiative and referendum petitions be signed by "qualified registered voters" and not just qualified voters, because "[i]nitiative and referendum relates to the elective franchise").

175. Md. Green Party v. Md. Bd. of Elections, 832 A.2d 214, 228 (Md. 2003); *see also* Nader for President 2004 v. Md. State Bd. of Elections, 926 A.2d 199, 211 (Md. 2007) (following *Md. Green Party*).

176. 24 Or. Op. Att'y Gen. 313 (1949) (treating "sign[ing] a recall petition" as "merely exercising [one's] constitutional right of suffrage").

177. State *ex rel.* Barrett v. Leonard, 6 Ohio Supp. 345, 347 (1941) ("Now, what is meant by the expression 'exercising his elective franchise'? One of the ways in which a person may exercise his elective franchise is to sign nominating petitions.").

178. Am. Indep. Party in Idaho, Inc. v. Cenarrusa, 442 P.2d 766, 768 (Idaho 1968).

of the elective franchise."[179] And several cases have generally endorsed the proposition that "[t]he right of suffrage includes the right to form political parties."[180]

For an explanation of why the statutes that generally ban threats also likely apply to threats of loss of employment, see Part II.A.8.

> **Hawaii:** Every person who, directly or indirectly, personally or through another, makes use of, or threatens to make use of, any force, violence, or restraint; or inflicts or threatens to inflict any injury, damage, or loss in any manner, or in any way practices intimidation upon or against any person in order to induce or compel the person to vote or refrain from voting, or to vote or refrain from voting for any particular person or party, at any election, or on account of the person having voted or refrained from voting, or voted or refrained from voting for any particular person or party; or who by abduction, distress, or any device or contrivance impedes, prevents, or otherwise interferes with the free exercise of the elective franchise [shall be deemed guilty of a crime].[181]

> **Idaho:** Every person who, by force, threats, menaces, bribery, or any corrupt means, either directly or indirectly attempts to influence any elector in giving his vote, or to deter him from giving the same, or attempts by any means whatever, to awe, restrain, hinder or disturb any elector in the free exercise of the right of suffrage . . . is guilty of a misdemeanor.[182]

> **Kentucky:** No person shall coerce or direct any employee to vote for any political party or candidate for nomination or election to any office in this state, or threaten to discharge any employee if he votes for any candidate, or discharge any employee on account of his exercise of suffrage . . . .[183]

> **Pennsylvania:** Any person or corporation who, directly or

179. State *ex rel.* Baldwin v. Strain, 42 N.W.2d 796, 799 (Neb. 1950).

180. Hoskins v. Howard, 59 So. 2d 263, 270 (Miss. 1952); Cooper v. Cartwright, 195 P.2d 290, 293 (Okla. 1948); *Ex parte* Wilson, 125 P. 739, 740 (Okla. Crim. App. 1912); State *ex rel.* McGrael v. Phelps, 128 N.W. 1041, 1041 (Wis. 1910) (syllabus by the Court); *see also* State *ex rel.* Ekern v. Dammann, 254 N.W. 759, 761 (Wis. 1934) (quoting *McGrael*, 182 N.W. at 1041).

181. HAW. REV. STAT. § 19-3 (West 2011) (first enacted before the annexation of Hawaii, in 1894).

182. IDAHO CODE ANN. § 18-2305 (West 2012) (enacted 1972).

183. KY. REV. STAT. ANN. § 121.310(1) (West 2011) (enacted 1942) (based on statute originally enacted 1900). A different portion of this section was held unconstitutional by *Ky. Registry of Election Fin. v. Blevins*, 57 S.W.3d 289 (Ky. 2001), but that decision did not discuss the portion quoted in the text.

indirectly . . . by abduction, duress or coercion, or any forcible or fraudulent device or contrivance, whatever, impedes, prevents, or otherwise interferes with the free exercise of the elective franchise by any voter, or compels, induces, or prevails upon any voter to give or refrain from giving his vote for or against any particular person at any election . . . shall be guilty of a misdemeanor . . . .[184]

Tennessee: It is unlawful to discharge any employee on account of such employee's exercise or failure to exercise the suffrage, or to give out or circulate any statement or report calculated to intimidate or coerce any employee to vote or not to vote for any candidate or measure.[185]

West Virginia: Any person who shall, directly or indirectly, by himself, or by any other person on his behalf, make use of, or threaten to make use of, any force, violence or restraint, or inflict, or threaten to inflict, any damage, harm or loss, upon or against any person, or by any other means attempt to intimidate or exert any undue influence, in order to induce such person to vote or refrain from voting, or on account of such person having voted or refrained from voting, at any election, or who shall, by abduction, duress or any fraudulent device or contrivance, impede or prevent the free exercise of the suffrage by any elector, or shall thereby compel, induce or prevail upon any elector either to vote or refrain from voting for or against any particular candidate or measure . . . [i]s guilty of a misdemeanor.[186]

Wyoming: [Criminal intimidation] consists of [i]nducing, or attempting to induce, fear in an . . . elector by use of threats of force, violence, harm or loss, or any form of economic retaliation, for the purpose of impeding or preventing the free exercise of the elective franchise . . . .[187]

Guam: Every person is guilty of a felony who, by force, threats, menace, bribery or any corrupt means, either directly or indirectly, attempts to influence any voter in giving his vote, or to deter him from giving it, or attempts by any means whatever to threaten, restrain, hinder, or disturb any voter in the exercise of the right of suffrage.[188]

184. 25 PA. CONS. STAT. ANN. § 3547 (West 2012) (enacted 1937).
185. TENN. CODE ANN. § 2-19-134(b) (West 2012) (enacted 1972).
186. W. VA. CODE ANN. § 3-8-11 (West 2012) (enacted 1995).
187. WYO. STAT. ANN. § 22-26-111 (West 2011) (enacted 1973).
188. 3 GUAM CODE ANN. § 14107 (2012).

III. FEDERAL LIMITS ON THESE STATUTES

Some federal rules may allow some employers to limit employees' speech or political activities, notwithstanding contrary state statutes.

A. Unions have the federal statutory right to fire union employees who openly disagree with the union's political activities.[189]

B. State law claims for firing caused by union-related political activity are preempted by federal labor law.[190]

C. Newspapers may have the First Amendment right to bar their reporters from engaging in any political activity.[191] Likewise, other organizations that create speech products may be free to refuse to include speakers whose outside speech undermines the organization's message.[192]

IV. OTHER KINDS OF PROTECTIONS

I list here some narrower protections, which I thought were too narrow to discuss in detail:

A. Illinois and Michigan bar employers from "gather[ing] or keep[ing] a record of an employee's associations, political activities, publications, communications or nonemployment activities, unless the employee submits the information in writing or authorizes the employer in writing to keep or gather the information." An exception exists for "activities that occur on the employer's premises or during the employee's working hours

189. Hubins v. Operating Engineers Local Union No. 3, 2004 WL 2203555, at *8 (N.D. Cal. Sept. 29, 2004); Thunderburk v. United Food & Commercial Workers' Union, 92 Cal. App. 4th 1332, 1343–46 (2001).

190. Bimler v. Stop & Shop Supermarket Co., 965 F.Supp. 292, 298–99 (D. Conn. 1997); Rodriguez v. Yellow Cab Coop., Inc., 206 Cal. App. 3d 668, 673–80 (1988); Henry v. Intercontinental Radio, Inc., 155 Cal. App. 3d 707, 713–15 (1984).

191. Nelson v. McClatchy Newspapers, Inc., 936 P.2d 1123, 1127 (Wash. 1997); *see also* Cotto v. United Techs. Corp., 738 A.2d 623, 627 n.5 (Conn. 1999) (acknowledging that in some circumstances, the statute "may conflict with the employer's own free expression rights"). *But see* Ali v. L.A. Focus Publ'n, 112 Cal. App. 4th 1477, 1488 (2003) (rejecting the claim that a newspaper "has the unfettered right to terminate an employee for any [outside-the-newspaper] speech or conduct that is inconsistent with the newspaper's editorial policies.").

192. Redgrave v. Boston Symphony Orchestra, Inc., 855 F.2d 888, 892, 904–06 (1st Cir. 1988) (suggesting that symphony might well have a First Amendment right to refuse to let plaintiff narrate a performance, even if the reason for the refusal stemmed from plaintiff's past speech and would therefore presumptively violate the Massachusetts Civil Rights Act); Gombossy v. Hartford Courant Co., 2010 WL 3025512, *4 (Conn. Super. Ct. June 29, 2010) (concluding that the First Amendment allowed a newspaper to fire someone based on his past articles for the newspaper); Epworth v. Journal Register Co., 12 Conn. L. Rptr. 585 (1994) (likewise).

with that employer which interfere with the performance of the employee's duties or the duties of other employees or activities, regardless of when and where occurring, which constitute criminal conduct or may reasonably be expected to harm the employer's property, operations or business, or could by the employee's action cause the employer financial liability."[193]

B. Illinois, Montana, Nevada, North Carolina, and Wisconsin ban employers from restricting employees' off-duty use of lawful products,[194] a category that is broad enough to cover blogging software, Twitter, political signs, and other products used to speak. But even if the statutes apply to such products, they likely apply only in situations where the employer punishes an employee for (say) blogging as such, and not the much more common situations where an employer punishes an employee for communicating—through whatever medium—certain messages that the employer disapproves of.[195]

C. New Jersey, Oregon, Wisconsin, and the Virgin Islands bar employers from "requir[ing] . . . employees to attend an employer-sponsored meeting or participate in any communications with the employer or its agents or representatives, the purpose of which is to communicate the employer's opinion about religious or political matters." These statutes generally define "political matters" to "include political party affiliation and decisions to join or not join or participate in any lawful political, social, or community organization or

193. 820 ILL. COMP. STAT. ANN. 40/9 (West 2012); *see* MICH. COMP. LAWS ANN. § 423.508(8) (West 2012) (containing substantially similar language).

194. 820 ILL. COMP. STAT. ANN. 55/5 (West 2012); MONT. CODE ANN. §§ 39-2-313(2), -313(3) (2011); NEV. REV. STAT. ANN. § 613.333(1)(b) (West 2011); N.C. GEN. STAT. ANN. § 95-28.2(b) (West 2011); WIS. STAT. ANN. §§ 111.321, 111.35(2) (West 2011).

195. *McGillen v. Plum Creek Timber Co.*, 964 P.2d 18, 23–24 (Mont. 1998), held that placing a fictitious newspaper ad as a prank was not covered, but was ambiguous as to the reason. The Montana Supreme Court wrote that the lower court "noted that 'lawful product,' as defined in § 39-2-313, MCA, means a product that is legally consumed, and includes food, beverages, and tobacco," and "found that the placing of a newspaper ad did not fall within the definition." The Supreme Court also "agree[d] with the District Court that it could not rule as a matter of law that . . . placing a fictitious ad in his supervisor's name was a legitimate use of a lawful product that would preclude [the employer] from firing him. The purpose of § 39-2-903(5), MCA, is to protect an employee from discharge for the use of a legal product, such as alcohol or tobacco, off the employer's premises."

It is not clear, though, whether the matter would be different when the conduct involves "us[ing]" (the Montana statute says "consumed, used, *or* enjoyed" [emphasis added]) a blogging software product, rather than just submitting an ad to a newspaper, which does not involve the use of such a product. Nor is it clear whether the matter would be different if the conduct did not involve a falsehood, and was thus more likely to be seen as "a legitimate use" of the blogging software product.

activity."[196]

D. Several states bar employers from discriminating against employees who refuse to give campaign contributions.[197]

E. Some states bar employers from retaliating against employees for becoming political candidates or officeholders, or for their votes as elected or appointed officials.[198]

F. Sixteen states bar written threats that are displayed in the workplace—but not oral or individualized threats—that are "intended or calculated to influence the political opinions or actions of his employees." Often, these statutes expressly cover statements such as "If Candidate X is elected, we will close this plant," but they also seem to cover threats that people who engage in certain "political . . . actions" will be fired. Some of these states limit the prohibition to statements within 90 days before an election.[199]

G. As the Introduction mentioned, many states ban employers from discriminating against employees based on the employees' votes, or threatening such discrimination.[200] North Carolina goes

196. N.J. STAT. ANN. §§ 34:19-9 to -11 (West 2012); OR. REV. STAT. ANN. § 659.785 (West 2012); V.I. CODE ANN. tit.24, § 620 (2010); WIS. STAT. ANN. §§ 111.32, 111.321 (West 2011).

197. ALA. CODE §§ 10A-21-1.01(b)(1), -(b)(3), 17-5-17 (2012); IDAHO CODE ANN. § 67-6605 (West 2012); LA. REV. STAT. ANN. §§ 18:1461.1(A)(2), :1483, :1505.2 (2011); MASS. GEN. LAWS ANN. ch. 56, § 33 (West 2012); MO. ANN. STAT. §§ 130.028.1(2)–(3) (West 1997); N.H. REV. STAT. ANN. § 664:4-a(II) (2012); S.C. CODE ANN. § 8-13-1332(2) (2011); TEX. ELEC. CODE ANN. § 253.102 (West 2011); WASH. REV. CODE ANN. § 42.17A.495(2)(a) (West 2011); WIS. STAT. ANN. § 12.07(4) (West 2011); WYO. STAT. ANN. § 22-26-111(a)(ii) (West 2011); *see also* KY. REV. STAT. ANN. § 121.045 (West 2011) (prohibiting employees from accepting employment with the understanding that they will contribute to candidates); N.C. GEN. STAT. ANN. § 163-278.19(b) (West 2011) (same as Virginia, as to corporate segregated funds); VA. CODE ANN. § 24.2-949.1 (West 2011) (prohibiting political action committees from contributing of spending money received through the threat of job discrimination) .

198. CONN. GEN. STAT. ANN. § 2-3a (West 2012); N.D. CENT. CODE ANN. § 12.1-14-02 (West 2011); OR. REV. STAT. ANN. § 260.665(2) (West 2012); WYO. STAT. ANN. §§ 22-26-116, -118 (West 2011); *see also* Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859 (Mo. Ct. App. 1985) (adopting this as a common law rule).

199. ARIZ. REV. STAT. ANN. § 16-1012 (West 2012); CAL. ELEC. CODE § 18542 (West 2012); COLO. REV. STAT. ANN. § 1-13-719 (West 2012); IND. CODE ANN. § 3-14-3-21 (West 2012); MD. CODE ANN., ELEC. LAW § 13-602(a)(8) (West 2011); MONT. CODE ANN. §§ 13-35-226(1)–(2) (2011); N.J. STAT. ANN. § 19:34-30 (West 2011); N.Y. ELEC. LAW § 17-150 (McKinney 2011); OHIO REV. CODE ANN. § 3599.05 (West 2011); 25 PA. CONS. STAT. ANN. § 3547 (West 2011); R.I. GEN. LAWS ANN. § 17-23-6 (West 2011); S.D. CODIFIED LAWS § 12-26-13 (2011); TENN. CODE ANN. § 2-19-135 (West 2011); UTAH CODE ANN. § 20A-3-502 (West 2011); W. VA. CODE ANN. § 3-9-15 (West 2011); WIS. STAT. ANN. § 12.07 (West 2011).

200. *See, e.g.*, ALA. CODE § 17-17-44 (2012); FLA. STAT. ANN. § 104.081 (West 2012); IDAHO CODE ANN. § 18-2319 (2012); MASS. GEN. LAWS ANN. ch. 56, § 33 (West 2011); MICH. COMP. LAWS § 168.931 (2012); MINN. STAT. § 211B.07 (2012); MISS. CODE ANN. § 97-13-37 (West 2011); TENN. CODE ANN. § 2-19-134 (West 2012); TEX. ELEC. CODE ANN. §

so far as to bar "discharg[ing] or threaten[ing] to discharge from employment . . . any legally qualified voter on account of any vote such voter may cast or consider or intend to cast,"[201] which might extend to discrimination for expressing support for a candidate.

H. Many states have statutes that protect employees from retaliation for complaints to government officials about illegal conduct.[202]

V. CONCLUSION

I leave to others the evaluation of whether the laws I described above are wise—and, if so, which of the many models cataloged in this Article should be followed by other states. For now, I have simply tried to provide a listing of the various options that have so far been implemented, and a brief summary of what some of their ambiguous terms might mean.

276.001(a)(2) (West 2012); Vulcan Last Co. v. State, 217 N.W. 412 (Minn. 1928).

201. N.C. GEN. STAT. ANN. § 163-274(a)(6) (West 2011).

202. *See* Claudia G. Catalano, Annotation, *What Constitutes Activity of Private-Sector Employee Protected Under State Whistleblower Protection Statute Covering Employee's "Report," "Disclosure," "Notification," or the Like of Wrongdoing—Nature of Activity Reported*, 36 A.L.R. 6TH 203 (2008).

SHOWCASE PANEL IV: A FEDERAL SUNSET LAW

THE FEDERALIST SOCIETY 2011 NATIONAL LAWYERS CONVENTION

PANELISTS:

HON. FRANK H. EASTERBROOK
PROF. WILLIAM N. ESKRIDGE, JR.
MR. PHILIP K. HOWARD
PROF. THOMAS W. MERRILL
HON. JEFFREY S. SUTTON, *MODERATOR*

JUDGE SUTTON: My name is Jeff Sutton. I sit on the United States Court of Appeals for the Sixth Circuit, and I'm fortunate to moderate the final showcase panel of the 2011 Convention. Our topic is a federal sunset law. More specifically, should Congress pass a general federal sunset law providing that most—or at least many—federal laws expire after, say, twenty years unless both houses of Congress and the President reenact the law?

The concept of a general federal sunset law is relatively new; the concept of a statute that comes with an expiration date is not. The Sedition Act of 1798 contained a clause terminating the Act in 1801[1]—after the 1800 election and after, as it turned out, President Adams left office. Perhaps a little more legitimately, our first national banks contained sunset provisions. The First Bank of the United States was chartered in February 1791.[2] The charter lasted twenty years.[3] In 1811, Congress debated whether to renew the charter, and the measure failed by one vote in the House.[4] The charter expired. In April 1816, Congress chartered the Second National Bank of the United States,[5] the one at issue in *McCulloch v. Maryland*.[6] It, too, had a twenty-year expiration date,[7] and Congress did not renew the charter again. However, after the charter expired in 1836, the bank continued for five years as a private institution and then, in 1841, went bankrupt.[8] There was not a third national bank, but relatedly, in 1913, Congress passed the Federal Reserve Act of 1913.[9] It did not have a sunset provision and, as of yet, has not gone bankrupt. So the concept of a sunset provision is not new, but the idea behind a general federal sunset provision that applies to most laws is relatively new.

We have a terrific group of panelists to discuss the topic. None of them needs a flattering introduction, and none of them wants one. I asked. Let me briefly identify them in the order in which

1. Sedition Act, ch. 74, § 4, 1 Stat. 596, 597 (1798).
2. Act of Feb. 25, 1791, ch. 10, 1 Stat. 191 (1791).
3. *Id.* at 192.
4. 22 Annals of Cong. 826 (1811).
5. Act of Apr. 10, 1816, ch. 44, 3 Stat. 266 (1816).
6. 17 U.S. (4 Wheat.) 316 (1819).
7. §7, 3 Stat. at 269.
8. Arthur E. Wilmarth, Jr., *Wal-Mart and the Separation of Banking and Commerce*, 39 CONN. L. REV. 1539, 1557 (2007).
9. Federal Reserve Act, ch. 6, 38 Stat. 251, 275 (1913).

they will speak: Professor Tom Merrill, the Charles Evans Hughes Professor of Law at Columbia, who has written many articles and books; Philip Howard, a partner at Covington & Burling, who has written many articles and books; Professor William Eskridge, the John A. Garver Professor of Jurisprudence at Yale, who has written many articles and books; and the Chief Judge of the Seventh Circuit, Frank Easterbrook, who has written many articles and books, and even a few opinions.

Professor Merrill.

PROFESSOR MERRILL: Thank you very much, Judge.

Sunset provisions come in various forms. They can apply to entire statutes, to particular statutory provisions, to agency regulations and programs, or to administrative agencies themselves. Thomas Jefferson, in a letter to James Madison, even proposed that the Constitution include a sunset provision that would require adopting a new one in nineteen years,[10] which Jefferson regarded as a single generation. Thankfully, that sunset provision was not adopted.

In addition to taking various forms, sunset provisions also result from different motivations. Modern sunset provisions date to the late 1960s and were inspired by a political scientist, Theodore Lowi, who authored a book with the intriguing title, *The End of Liberalism.*[11] The "liberalism" Lowi wanted to end is more accurately described as interest group pluralism. Lowi wanted to replace interest group pluralism with a kind of progressive populism. One reform he proposed to promote this transformation was what he called a "tenure of statutes" act, which would put a termination date on all statutes creating federal administrative agencies. Such a reform, he argued, would help break up the capture of administrative agencies by interest groups. As an agency's termination date approached, he argued, the agency would have to justify its existence to the legislature, and a hopelessly captured agency would inevitably fall short.

Shortly afterwards, Common Cause—a moderately influential reform group at the time—seized upon Lowi's idea, changed the name from "tenure of statutes act" to "sunset law," and began

10. Letter from Thomas Jefferson, Ambassador of the United States to France, to James Madison, United States Representative (Sept. 6, 1789), *available at* http://hdl.loc.gov/loc.mss/mtj.mtjbib004503.

11. THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY (1969).

lobbying legislatures to adopt it.[12] Several proposals for general sunset laws were introduced in Congress, but ultimately none were enacted.[13] A bill called the Sunset Act of 1978, cosponsored by Senators Ed Muskie of Maine and Charles Percy of Illinois, survived the Senate[14] but died in the House.[15] The Sunset Act would have provided a general ten-year sunset provision for every federal agency program.[16]

Common Cause had much more success at the state level. Starting with Colorado in 1976, by 1981 Common Cause had persuaded thirty-six states to adopt some type of sunset-review statute.[17] After that, the phenomenon waned, and by 1990 a significant number of the thirty-six states had abandoned sunset review, either formally by repealing their laws or informally by ceasing to actively pursue sunset review.[18] Since 1990, interest has continued to diminish, to the point where one cannot find a more current tally of the states, if any, that still engage in sunset review.

As the 1970s turned into the 1980s, the motivation for adopting sunset provisions began to shift. Concern that government agencies were pawns of corporations gave way to concern that they were bloated bureaucracies wasting taxpayers' money. Lowi's desire to recapture government from interest groups and return it to the people gave way to the goals of the deregulation movement. As a result, the sunset provision was reconceived as a device for eliminating unnecessary agencies and their regulations.[19] This appears to be the primary motivation for most of the sunset laws enacted by the states around this time.

A third rationale for sunset laws—what can be called experimentalism—also emerged in the 1970s and continues to this day. Sunset provisions can serve as a mechanism for

12. Chris Mooney, *A Short History of Sunsets*, LEGAL AFFAIRS, Jan.–Feb. 2004, *available at* http://www.legalaffairs.org/issues/January-February2004/story_mooney_janfeb04.msp.

13. *Id.*

14. Sunset Act, S. 2, 96th Cong. (1979).

15. Sunset Act, H.R. 2966, 96th Cong. (1979).

16. *Id.*

17. Richard C. Kearney, *Sunset: A Survey and Analysis of the State Experience*, 50 PUB. ADMIN. REV. 49, 49–50 (1990).

18. *Id.* at 50.

19. *See* Bruce Adams, *Sunset: A Proposal for Accountable Government*, 28 ADMIN. L. REV. 511, 519–27 (1976) (lauding sunset laws as a means of checking agency activity and giving examples of then-pending sunset legislation).

convincing those who are skeptical about the merits of a proposed law or program to try it out on a temporary basis. A sunset provision turns a proposal for a new agency or program into an experiment that can be revisited in a few years, after experience has accumulated, making the merits of the idea easier to assess. A series of research and development tax credits adopted in the 1990s, as well as the USA PATRIOT Act adopted shortly after the 9/11 terrorist attacks, included sunset provisions to garner the votes of some who questioned the proposals' value.[20]

A fourth and relatively recent motivation for sunset provisions carries enormous political ramifications: the use of sunset provisions to bring tax legislation into compliance with congressional budget resolutions. Both the 2001 and 2003 Bush tax cuts included ten-year sunset provisions to reduce Congressional Budget Office estimates of their costs to the levels required by budget resolutions.[21] This has greatly affected current politics, to the general advantage of the Democrats. Congressional Republicans generally favor continuation of the tax cuts, while the Democrats and the current White House generally favor repealing the cuts, at least for higher-income taxpayers. Yet in order to prevent taxes from reverting to levels prevailing before the Bush tax cuts, the congressional Republicans must convince President Obama to sign new legislation delaying or modifying the restoration of pre-Bush-level taxes. This has given the Democrats the upper hand in the bargaining, since doing nothing yields a result more congenial to their preferences. Here we see how sunset provisions can alter the balance of political forces in important and often unseen ways.

Finally, some commentators support sunset provisions as a means to clear the books of obsolete laws.[22] These commentators

20. USA PATRIOT ACT of 2001, Pub. L. No. 107-56, § 224, 115 Stat. 272, 295 (codified as amended at 18 U.S.C. § 2510 (2006)).

21. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 901, 115 Stat. 38, 150 (codified as amended at 26 U.S.C. § 1 (2006)); Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, § 303, 117 Stat. 752, 764 (codified as amended at 26 U.S.C. § 1 (2006)).

22. *See generally, e.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); Guido Calabresi, *The Nonprimacy of Statutes Act: A Comment*, 4 VT. L. REV. 247 (1979); Jack Davies, *A Response to Statutory Obsolescence: The Nonprimacy of Statutes Act*, 4 VT. L. REV. 203 (1979).

argue that, over time, statute books get filled up with outmoded provisions that are rarely enforced but can have a chilling effect and perhaps lead to prosecutorial abuse.[23] Professor—now Judge—Guido Calabresi argued that judges should exercise a general power to sunset laws based on desuetude.[24] The extent to which obsolete laws present a widespread social problem is debatable; in any event, this particular rationale for sunset provisions has yet to generate much political support.

Are sunset laws a good or bad idea? Unfortunately, hard evidence of sunset provisions' practical efficacy is scarce. The most comprehensive study, done by political scientist Richard Kearney in 1990, examined state sunset laws passed in response to the Lowi–Common Cause initiative starting in 1976.[25] The study indicated that sunset laws, when first adopted, achieved moderate success in eliminating dubious occupational licensing commissions, such as those devoted to overseeing massage therapists, lightning rod salesmen, and sprinkler and irrigation fitters.[26] However, he found that larger agencies were uniformly successful in justifying their continued existence by mustering interest group testimonials and compiling elaborate studies suggesting that they do good deeds.[27] Kearney was cautiously optimistic in citing evidence that sunset laws improve legislative oversight of agencies. But the fact that by 1990 states had begun to repeal sunset laws and had ceased actively pursuing sunset review made him less optimistic about the future.[28]

At the federal level, one can find examples of both failure and success. The Commodity Futures Trading Commission (CFTC), created in 1974, provides an example of failure.[29] Because of the

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23. *See, e.g.*, David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261, 304–05 (2010) (asserting that defamation laws are obsolete and that such laws serve only to chill speech); Jeremy C. Smith, Comment, *The USA PATRIOT Act: Violating Reasonable Expectations of Privacy Protected by the Fourth Amendment Without Advancing National Security*, 82 N.C. L. REV. 412, 450 (2003) (lamenting that the electronic monitoring provisions of the USA PATRIOT Act both lend themselves to abuse and are not checked by the sunset provision in section 224).

24. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

25. Kearney, *supra* note 17.

26. *Id.* at 50.

27. *Id.*

28. *Id.* at 56.

29. *See, e.g.*, Mark D. Young, *A Test of Federal Sunset: Congressional Reauthorization of the Commodity Futures Trading Commission*, 27 EMORY L.J. 853 (1978) (describing how the reauthorization process allowed the CFTC to continue intact despite its many problems).

controversy that surrounded establishing the CFTC, and the salience the sunset idea enjoyed at the time, the mandate for the CFTC included a sunset provision.[30] During the sunset review four years later, witness after witness excoriated the agency for its pathetic performance: the agency was disorganized, slow, and had overlooked major commodity trading scandals.[31] The SEC smelled blood and argued that the major functions of the CFTC should be transferred to the SEC.[32] The Treasury Department in turn claimed that *it* should be in charge of futures trading and Treasury bonds.[33] Nevertheless, the CFTC rallied. The commissioners testified at great length about their activities and promised to do better in the future.[34] Both the OMB and the GAO contributed ponderous studies concluding that the agency's real problem was inadequate funding.[35] Most interestingly, the various brokers and dealers regulated by the CFTC all came forward in support of reauthorization.[36] In the end Congress agreed to reauthorize the agency with only minor changes to its mandate.[37] In subsequent years, reauthorization of the CFTC has become routine.[38]

On the other hand, the independent counsel provisions of the Ethics in Government Act of 1978 provide an example of sunset success.[39] This Act, which originated as part of the post-Watergate reforms in the 1970s, contained a five-year sunset provision.[40] It was reauthorized multiple times, usually with the

30. Commodity Futures Trading Commission Act of 1974, Pub. L. 93-463, § 101(a), 88 Stat. 1389, 1391 (codified as amended at 7 U.S.C. § 16(d) (2006)).

31. Young, *supra* note 29, at 862–66.

32. *Id.* at 870–71.

33. *Id.* at 878–79.

34. *Id.* at 872.

35. *Id.* at 873, 880–81.

36. *Id.* at 897 & n.216.

37. Futures Trading Act of 1978, Pub. L. No. 95-405, 92 Stat. 865 (1978).

38. While the CFTC has been reauthorized every time it has come up for renewal, such reauthorization has not been without its bickering. *See* Roberta S. Karmel, *The Future of the Securities and Exchange Commission as a Market Regulator*, 78 U. CIN. L. REV. 501, 514 & n.77 (2009) (characterizing CFTC reauthorization hearings as "costly and time consuming").

39. *See* Thomas W. Merrill, *Beyond the Independent Counsel: Evaluating the Options*, 43 ST. LOUIS U. L.J. 1047, 1081 (1999) (arguing for expiration of the independent counsel provisions); Michael B. Rappaport, *Replacing Independent Counsels with Congressional Investigations*, 148 U. PA. L. REV. 1595, 1595 (2000) (indicating that Congress did, in fact, allow the provisions to expire).

40. Ethics in Government Act of 1978, Pub. L. No. 95-521, § 601, 92 Stat. 1824, 1873 (codified as amended at 28 U.S.C. § 598 (2006)).

enthusiastic support of congressional Democrats.[41] In 1988 the Act's constitutionality was challenged in *Morrison v. Olson.*[42] Justice Scalia cogently explained why appointing unaccountable prosecutors to investigate executive officials is bad policy, but he could not persuade any of his colleagues to join his opinion.[43] Nevertheless, after Ken Starr's investigations of the Whitewater and Monica Lewinsky scandals, Democrats suddenly had a change of heart. Had the Act lacked a sunset provision, Congress probably could not have mustered the will to repeal the Act, because voting for repeal could have been characterized as voting against the investigation of executive wrongdoing. But with the sunset provision, Congress found it easy to let the law lapse by doing nothing, which occurred in 1999.[44] There has been no significant effort to revive it since then.

To draw general conclusions about the practical efficacy of sunset provisions would require significantly more data than these episodic examples. However, a political science approach might explain why the sunset provision worked with respect to the Ethics in Government Act but failed in the CFTC context. The Ethics in Government Act created no permanent bureaucracy; independent counsels came and went. Moreover, the statute addressed an intermittent problem, executive wrongdoing, around which no interest groups were likely to coalesce. In other words, no institutional presence would argue for the independent counsel's continued existence. In this context, the fate of the independent counsel idea was determined solely by the perceptions of the political parties about its benefits and costs. The independent counsel's position was perpetuated through reauthorization as long as one political party, the Democrats, found its existence to be advantageous. But once the Democrats realized that an independent counsel is a double-edged sword, partisan support for the statute collapsed.

In contrast, the CFTC is a standing bureaucracy. This means that there has always been a permanent institutional presence in

41. *See* Katy J. Harriger, *The History of the Independent Counsel Provisions: How the Past Informs the Current Debate*, 49 MERCER L. REV. 489, 512, 515 (1998) (describing the reauthorizations and noting that many Democrats viewed the independent counsel arrangement as a necessity while many Republicans considered it unconstitutional).

42. 487 U.S. 654 (1988).

43. *Id.* at 697–734 (Scalia, J., dissenting).

44. *See* Rappaport, *supra* note 39, at 1595 (noting that Congress did not reenact the law).

support of reauthorization. Also, there are many interest groups that have a stake in the agency's perpetuation. They too can be counted to weigh in on the side of reauthorization. These institutional forces mean that the political parties would have to reach an extraordinarily strong consensus in support of sunset for the agency. That is likely to be a rare event.

Because of the scarcity of data regarding sunset provisions' practical efficacy, examining comparable legal phenomena might help assess the claim that sunset provisions reduce unnecessary regulatory activity. The major environmental statutes provide a potential source of additional data. The Clean Air Act and the Clean Water Act do not contain sunset provisions, but they were drafted to require reauthorization; both Acts contained hard deadlines that required legislative renewal.[45] These did not threaten programs with termination unless they were renewed, but they forced Congress to revisit the basic policy issues at periodic intervals. The effect of these reauthorization exercises has been to greatly magnify the length and complexity of these laws. The original Clean Air Act of 1963 took up ten pages in the Statutes at Large.[46] The 1970 Amendments took up thirty-eight pages.[47] The 1977 revision, made necessary by the reauthorization requirement, ballooned to 112 pages.[48] The fourth iteration, adopted in 1990, again made necessary by reauthorization, expanded to 313 pages.[49] During each revision of the Act, Congress was faced with more specific controversies that had arisen under the previous versions of the Act. The need for reauthorization provided an irresistible temptation to weigh in on these controversies by drafting more detailed statutory directives. Like layers of sedimentary rock, each version of the Act built upon the framework adopted before, but added new mandates and new instances of micromanagement until the final product became a regulatory

45. *See, e.g.*, Clean Air Act of 1963, Pub. L. No. 88-206, § 1, 77 Stat. 392, 401 (providing for funding authorization only through June 1967); Federal Water Pollution Control Act Amendments of 1972, Pub. L. No 92-500, § 2, 86 Stat. 816, 839 (1972) (authorizing funding only through June 1975).

46. 77 Stat. at 392–401.

47. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, §§ 1–7, 84 Stat. 1676, 1676–1713 (codified as amended in scattered titles of the U.S.C.).

48. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, §§ 101–406, 91 Stat. 685, 685–796 (codified as amended in scattered titles of the U.S.C.).

49. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, §§ 101–1101, 104 Stat. 2399, 2399–2712 (codified as amended in scattered titles of the U.S.C.).

monstrosity. This gives us another reason to worry about sunset provisions, at least as applied in a regulatory area with strong, entrenched interests. Forcing the legislature to revisit and reenact the authorizing legislation in such a context can lead to micromanagement by the legislature rather than an honest assessment of the need for continued regulation. But again, to test this hypothesis would require greater empirical data than are currently available.

Thank you.

MR. HOWARD: Thank you. I'm here, I'm told, to take the pro side of sunset laws, so I thought I would describe the problem before I propose what I feel are the solutions.

There are four problems with the current state of American positive law, in my view. The first is that there's a natural tendency of law to pile up over the decades. This is not a problem that our Founders foresaw. They had checks and balances to keep Congress from making too many laws in order to preserve the field of freedom. They didn't really anticipate, other than the Jeffersonian comment Professor Merrill referred to earlier, that after two hundred years, and particularly the last fifty or sixty years, the law would pile up like sediment in the harbor until everyone was more or less paralyzed.

It turns out that it's much more difficult to repeal a law than it is to pass it in the first place, because, once enacted, an army of special interests surrounds each law. Exhibit A would be the Davis–Bacon Act[50] signed into law by Hoover—requiring union wages on federal contracts—and the farm subsidies from the New Deal.[51] They actually do expire every five years, but it's not even on the table to take them off the table; they keep being reenacted.[52] And so, over time, the laws have piled up and we don't have a mechanism for dealing with the issue.

The second problem is that all laws have unintended consequences, and the more specific they are—and laws have

50. Davis–Bacon Act of 1931, ch. 411, 46 Stat. 1494 (codified as amended at 40 U.S.C. §§ 3141–48 (2006)).

51. Perhaps the most (in)famous of these is the Agricultural Adjustment Act, the second iteration of which functions as a residual statute for modern agricultural subsidies. Agricultural Adjustment Act of 1938, ch. 30, 52 Stat. 31; *see also* Food, Conservation, and Energy Act of 2008, Pub. L. 110-234, § 1602, 92 Stat. 923, 1001 (suspending portions of the 1938 Act between 2008 and 2012).

52. Phoenix X. F. Cai, *Think Big and Ignore the Law: U.S. Corn and Ethanol Subsidies and WTO Law*, 40 GEO. J. INT'L L. 865, 880 (2009).

become dramatically more specific over the course of our lifetime—the more quickly they become obsolete. Consider something like special education laws. We would all probably be in favor of a law that requires education for special-needs children, but the people who passed the law did not contemplate where we are today: that twenty percent of the K-12 budget in this country is used for special education,[53] but less than one half of one percent of school budgets is used for gifted children,[54] and almost nothing for pre-K education.[55] Is that a reasonable allocation of our educational priorities? I don't think so, but no one is even asking the question. The law was passed with an open-ended mandate, and everyone accepts it as a state of nature.

The third problem that occurs is that we have limited resources. Budget priorities change, and yet the budgets are cast in legal concrete. People get elected to Congress or become governors and find that the great majority, eighty to ninety percent of the budget, is actually preset; it's not even voted on most of the time because of these laws passed in previous generations, which don't come up for reconsideration.[56]

Finally, over time, there is a lack of coherence to law when it piles up. I don't think it's too much of an overstatement to say that American federal laws and regulations more closely resemble a junk pile than a code for the conduct of our society. I'm not a "deregulator." I think government regulation has a very important role in our society, but you have to be sympathetic to Senator Cornyn when he points out that there are eighty-two separate federal programs to improve teacher quality.[57]

I recently had one of my researchers count the number of words of binding federal law and regulation: 140 million words

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53. JUAN DIEGO ALONSO & RICHARD ROTHSTEIN, URBAN POL'Y INST., BRIEFING PAPER NO. 281, WHERE HAS THE MONEY BEEN GOING? A PRELIMINARY UPDATE 5 (2010).

54. NAT'L ASS'N FOR GIFTED CHILD., 2010–2011 STATE OF THE STATES IN GIFTED EDUCATION 1 (2011).

55. PRE[K]NOW, THE PEW CENTER ON THE STATES, VOTES COUNT: LEGISLATIVE ACTION PLAN ON PRE-K FISCAL YEAR 2011, at 2 (2010).

56. *See* Charles Tiefer, *"Budgetized" Health Entitlements and the Fiscal Constitution in Congress's 1995–1996 Budget Battle*, 33 HARV. J. ON LEGIS. 411, 416 (1996).

57. *During National Sunshine Week, Sen. Cornyn Introduces Amendment To Create Federal Sunset Commission Based On Texas Model*, TEX. INSIDER (Mar. 17, 2011, 2:15 PM), http://www.texasinsider.org/?p=44054.

and counting. These laws and regulations are highly specific.[58]

So, what we have is something that might be characterized as democracy by dead people. We have all these laws and regulations written by people who are no longer with us. Of course, our Founders are also no longer with us, but they didn't give us highly specific laws that told us how to spend our money; they gave us general principles about the conduct of society. The laws and regulations we're talking about dictate the budget, dictate priorities, dictate virtually everything important about the conduct of our society. So, in my view, the goal of a spring cleaning, or sunsetting, is absolutely vital to solving many of the problems on the table, but the solution is not even on the agenda. Everyone treats anything that has gone through the democratic process as if it's one of the Ten Commandments, except it's more like one of the ten *million* commandments.

So what's the solution? First, no "procedure" is a solution. The experience with sunset laws, which are one of the solutions, is that they depend on who is applying them. Texas has apparently done a pretty good job; it has eliminated fifty-four agencies and consolidated twelve since the law was passed in 1978.[59] The law says that all departments expire every dozen years.[60] In most states, sunset laws have not worked at all. The legislatures just reauthorize all the laws periodically and nothing comes up for any substantive debate. Now one could put in a little more of an action-forcing mechanism by doing what Judge Calabresi had suggested, which is to give federal courts the power. But as Professor Merrill said, nobody took him up on that idea. And I suppose you could make it a constitutional requirement to have sunset laws, but then we get into all kinds of questions of standing. If you think we have too much litigation now, imagine everybody suing to try to overturn some statute they didn't like.

It's very hard to have effective action-forcing mechanisms for sunset laws, but there are examples of successes. England recently adopted some sunset laws.[61] Most German provincial

58. Philip K. Howard, *Starting Over with Regulation: Why Are Government Rules so Complex? A Guide to a Radically Simpler System*, WALL ST. J. (Dec. 3, 2011), http://online.wsj.com/article/SB10001424052970203833104577070403677184174.html.

59. VIRGINIA A. MCMURTRY, CONG. RESEARCH SERV., RL34551, A FEDERAL SUNSET COMMISSION: REVIEW OF PROPOSALS AND ACTIONS 2 (2008).

60. TEX. GOV'T CODE ANN. § 325.015 (West 2011).

61. *Into the Sunset: Time Limits on Government Agencies*, ADAM SMITH INST., http://www.adamsmith.org/80ideas/idea/4.htm, ("In the United Kingdom in 2001, for

states have sunset laws, which seem to work sort of practically.[62] So there are examples, and I have painfully gone through, in the last few days, several thick notebooks of all of them. They are not useless, but they're also not ultimately efficacious because of their dependence on our public values. If we actually think it's important to set new priorities, then a sunset law will work. Things will come up for debate again, and we will actually change the way laws work. But if it's not a priority of the public or of our political leaders, then sunsetting won't work.

There are other, smaller provisions that have the effect of working as sunsets. Senator Warner has proposed something called a PAYGO provision, which would, in his proposal, apply only to regulations.[63] Basically, this provides that you can't adopt a new regulation unless you get rid of an old one.[64] England adopted a similar program last year, called "One-In, One-Out," which has a wonderful acronym, "OIOO."[65] That's actually worked; they claim that it's working. It's only a year old, but there is a political will to try to keep the number of regulations down.

Chris DeMuth, back around 1980, proposed a regulatory budget idea that would actually make Congress have not only its affirmative spending budget but a regulatory budget, where it would calculate how much regulations were requiring private entities to spend, budget the money, and allocate it.[66] It was actually quite sensible, at least conceptually, but there are many practical problems involved. I was prepared to promote that idea until I heard him this morning say it was completely impractical and would never work. So thirty years later, I guess Chris has reconsidered.

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example, the passage through Parliament of a controversial anti-terrorism measure was eased when the government announced that the new powers it gave to the police and other agencies would be subject to a sunset limitation and review.") (last visited May 23, 2012).

62. BASTIAN JANTZ & SYLVIA VEIT, SUNSET LEGISLATION AND BETTER REGULATION: EMPIRICAL EVIDENCE FROM FOUR COUNTRIES 16–18 (2010).

63. Mark Warner, *To Revive the Economy, Pull Back the Red Tape*, WASH. POST (Dec. 13, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/12/AR2010121202639.html.

64. *Id.*

65. *Operating a 'One In, One Out' Rule for Regulation*, DEP'T FOR BUS., INNOVATION, & SKILLS, http://www.bis.gov.uk/policies/bre/one-in-one-out (last visited May 23, 2012).

66. CHRISTOPHER DEMUTH et al., THE REGULATORY BUDGET AS A MANAGEMENT TOOL FOR REFORMING REGULATION (1979), *available at* http://www.christopherdemuth.com/regulatory-budget-book-executive-summary.html.

The final variation on the theme, which is the one I plan to promote and that, I think, makes the most sense given where we are today, might be called a sunset "law" rather than sunset "laws." I think we need a major recodification of the laws of the United States, at least those that have budgetary implications.

Laws aren't working the way they should, and it's not mainly because we're addressing the wrong goals; it's because the laws are out of date. The Clean Air Act is very old; it's very clunky. As one example, we could replace hundreds—perhaps even thousands—of pages of rules under that act with a carbon tax. OSHA has thousands of rules that tell everybody exactly what to do, including a rule that says stairwells shall be lit by either natural or artificial illumination.[67] That's really helpful. [Laughter] Most of OSHA's rules—not all of them, but most of them—could probably be encompassed within a general regulatory principle: "Facilities and equipment shall be reasonably suited for the use intended, in accord with industry standards."[68] This would give a measure of authority to inspectors to go in and have arguments about that and issue tickets, and would substitute these very thick rulebooks with a dispute resolution mechanism. We could go down the line looking at the regulations of all the other federal agencies.

You can open up any volume of the Code of Federal Regulations, almost any volume of the U.S. Code, and ask the question, "Is this a public priority?" Often the answer will be "yes." And secondly, "Is this the sensible way of doing it?" The answer to that will almost always be "no." No one tasked with writing the legal system, the statutory and regulatory system that we have today, would design it this way. It doesn't work very well. It's crippling our society economically, or at least hindering it, not for reasons stated by the Republican candidates and, again, not because they're addressing the wrong goals, but because our system is way too specific. It's a version of central planning.

I think we need to do what Justinian did a long time ago[69] and Napoleon did not so long ago[70] and, at least in one area, what

67. 29 C.F.R. § 1926.26 (2011).

68. Philip K. Howard, *Starting Over with Regulation: Why Are Government Rules so Complex? A Guide to a Radically Simpler System*, WALL ST. J. (Dec. 3, 2011), http://online.wsj.com/article/SB10001424052970203833104577070403677184174.html.

69. *Id.*

70. Philip K. Howard, *One Nation, Under Too Many Laws*, WASH. POST, DEC. 12, 2010,

the Uniform Commercial Code did maybe half a century ago,[71] which is to impose a sunset law. We need to go and look at everything and take a decade and have a whole series of commissions in different areas and rationalize this incredibly complicated, uncoordinated, expensive, and often counterproductive system of law that we've built up mainly over the last half century, and make some sense of it.

Thank you.

PROFESSOR ESKRIDGE: I really appreciate the opportunity to be on today's panel. As two of the panelists have already remarked to you, I've been outed as an intruder panelist. The panelist who was supposed to be addressing you was Judge Guido Calabresi, the famous uncle of Steven Calabresi, a founder of the Federalist Society. I feel very guilty that I'm going to deprive you of that experience, but I shall try to be illuminating.

I'm going to tell the story of one statute, and I think it suggests some points that might be generalized, very cautiously, exactly as Tom and Philip would suggest. This is the story of one of our more famous sunsetting statutes that has not been mentioned, and that is the Voting Rights Act of 1965.[72] It was adopted in the wake of some very tense interactions between civil rights demonstrators and southern sheriffs, and in light of the fact that millions of Americans were formerly disenfranchised, particularly Americans of color in the South. The original statute, passed in 1965, had a number of provisions; I'm going to focus on three. Section 2 of the Act, as is well-known, barred as a matter of federal statutory law electoral and voting practices that discriminated explicitly based upon race.[73] A second provision, Section 4, suspended, but only in the South, all literacy tests, which were one of the mechanisms by which voters of color were excluded and where white voters were usually not excluded, however illiterate.[74] Finally, Section 5 of the statute created a mechanism for preclearing electoral changes, again, largely limited to the South, either through the Department of Justice

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http://www.washingtonpost.com/wp-dyn/content/article/2010/12/10/AR201012100 7132.html.

71. *Id.*

72. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973–1973p (Supp. IV 1969)).

73. *Id.* § 2, 79 Stat. at 437.

74. *Id.* § 4, 79 Stat. at 438.

or through the district court of the District of Columbia.[75]

The Voting Rights Act is not a long statute—yet it is one of the most aggressive, innovative, and regulatory statutes in the recent history of the United States. It had a five-year sunset attached to it,[76] and it's arguable that the sunset was one of the features that allowed the statute makers to escape the southern filibuster and other points of opposition. This possibility illustrates one way that sunset provisions might contribute to greater, rather than less, federal regulatory intervention: sunsets may facilitate progress of aggressive legislation through the many vetogates that the Framers and Congress have constructed to make the legislative process more difficult.

In any event, the Act came up for reauthorization in 1970,[77] 1975,[78] 1982,[79] and then again in 2006,[80] and I think each reenactment is somewhat instructive. When the Voting Rights Act came up for reauthorization in 1970, it was a very different political environment. Lyndon Johnson was not President; Richard Nixon was. The Congress looked very different in 1970, in part because of the Voting Rights Act. Representing southern states in Congress were more moderate Democrats and integrationist Republicans, and fewer openly segregationist Democrats. Nonetheless, it was far from clear that the Act was going to be reauthorized; the Nixon Administration was dragging its feet, as were many representatives and senators.

But it ultimately did get reauthorized; indeed, it was significantly expanded. Section 4 was expanded in the 1970 version to suspend literacy tests outside the South, an important move toward statutory abolition of literacy tests.[81] Section 5 preclearance was also liberalized, with an implicit congressional endorsement of the liberal interpretation that had been adopted

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75. *Id.* § 5, 79 Stat. at 439.

76. 42 U.S.C. § 1973b(a).

77. Pub. L. No. 91-285, 84 Stat. 314 (codified as amended at 42 U.S.C. §§ 1971, 1973–1973bb-4 (1970)).

78. Pub. L. No. 94-73, 89 Stat. 400 (codified as amended at 42 U.S.C. §§ 1971, 1973–1973bb-1 (1976)).

79. Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. §§ 1971, 1973–1973bb-1 (1982)).

80. Pub. L. No. 109-246, 120 Stat. 577 (codified as amended at 42 U.S.C. §§ 1971, 1973 –1973bb-1 (2006)).

81. Pub.L. No. 91-285, § 4, 84 Stat. 314, 315 (expanding the literacy test suspension nationwide, subject to specified statutory conditions); *see also id.* § 6 (adding new § 201, which implemented the nationwide suspension of literacy tests).

by the U.S. Supreme Court in 1969.[82] The 1970 reauthorization preempted state residency requirements for the electors choosing the President and Vice President.[83] In one of the boldest exercises of federal voting rights authority, the 1970 Act authorized eighteen year olds to vote in all state as well as federal elections.[84] As this account makes clear, sunsetting not only failed to reduce the extraordinary federal regulation of state voting law, but dramatically (and in one instance unconstitutionally) expanded federal regulation.

The phenomenon of sunset-induced expansion continued when the Voting Rights Act again came up for reauthorization in 1975. With virtually no objection from southern representatives, Section 4's nationwide literacy test prohibition became permanent.[85] So, by statute, literacy tests were preempted from 1975 on. A new section was also added in 1975—Section 203—which now extends the vote dilution protections of the Act to language minorities and imposes affirmative requirements on communities with language minorities to assist them in effectuating their right to vote.[86] The 1970 Act was revised to provide detailed rules for implementing the federal requirement that eighteen year olds could vote.[87]

The 1975 reauthorization provided for its own sunset after seven years.[88] One feature of sunsetting, of course, is that you can make the expiration date anytime you want. So the next time it came up for reauthorization was during the Reagan Administration in 1982. Moderately conservative Republicans controlled the Senate, and of course President Reagan was a conservative Republican in the White House. So you would think

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82. *Id.* § 5, 84 Stat. 315 (expanding § 5); Allen v. State Bd. of Elections, 393 U.S. 544 (1969).

83. *Id.* § 6, 84 Stat. 317–18 (creating a new § 202, preempting state residency requirements for election of President and Vice President).

84. *Id.* § 6, 84 Stat. 318–19 (adding a new Title III to assure 18-year-olds the right to vote in all elections). The state election requirement was invalidated in Oregon v. Mitchell, 400 U.S. 112 (1970) but then reimposed through the Twenty-Sixth Amendment.

85. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, §§ 201–02, 89 Stat. 400-01 (codified as amended at 42 U.S.C. § 1973b (1976)).

86. *Id.* §§ 203, 301, 89 Stat. 400, 401, 404–05 (adding new substantive as well as enforcement provisions for allowing bilingual and non-English speaking voters to participate).

87. *Id.* § 407, 84 Stat. 314 (amending Title III in the wake of the Twenty-Sixth Amendment).

88. *Id.* § 101, 89 Stat. 400, 400.

that this would have been an occasion for deregulation.

Instead, exactly the opposite happened in 1982. Not only was the Voting Rights Act reauthorized after a great deal of political drama, but Section 2 was radically expanded—the biggest expansion of Section 2 in the history of the statute—to include the extension of the antidiscrimination rule to voting rules and practices that have a disparate *impact* on minorities and not just that are targeted against minorities.[89] Also, Section 5 was amended to override Supreme Court interpretations that had limited the Department of Justice's and the district court's ability to veto some of the non-retrogressive southern changes in voting rules.[90]

In the 1990s and during the new millennium, the Department of Justice, spurred on in part by the 1982 amendments and in part by partisan pressures, has interpreted the Voting Rights Act even more dynamically than it did in the 1960s and 1970s.[91] In 2006, a conservative Republican President, a conservative Republican Senate, and a conservative Republican House of Representatives acted virtually unanimously to not only reauthorize this massive federal intervention, but also to further expand Section 5—for example, overruling a series of Supreme Court cases that had interpreted Section 5 more cautiously in light of its original meaning.[92] At no point in the 2006 legislative process was there serious consideration given to the actual repeal of Section 5 or the Voting Rights Act in Congress.

So what do we learn from this history of the nation's most famous experiment in sunsetting? I want to suggest three tentative hypotheses. (These are not firm conclusions because this is just a case study and not an empirical examination of all sunsetting statutes.)

Point number one is that sunsetting often does not work to reduce the size of government, especially when the agency and

89. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. §§ 1971, 1973–1973bb-1 (1982)).

90. S. REP. NO 97-417, at 5–15 (1982).

91. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (codified as amended at 42 U.S.C. § 1971 (2006)).

92. S. REP. NO. 109-295, at 5 (2006) ("Section 5 responds to, in part, two Supreme Court decisions that interpreted the criteria for preclearance of voting changes under Section 5 of the Voting Rights Act of 1965: Reno v. Bossier Parish School Board, 528 U.S. 320 (2000) (Bossier Parish II), and Georgia v. Ashcroft, 539 U.S. 461 (2003).").

the program that are being reviewed under a sunset provision are characterized by the following features:

- Tom's "army of bureaucrats," where a respected and well organized department devotes energy and resources to carrying out an important statutory mission.
- Supportive interest groups, which protect the statute against attack and stand ready to support its reauthorization; and
- Bipartisan political support, which often occurs because the statute has been implemented by executive agencies and presidencies of different political parties over the years.

All three of these conditions were met in the case of the Voting Rights Act. Even though there have been cogent academic and regional criticisms of Section 5 of the Act under today's circumstances (when minority voters participate in great numbers), the Act has been entrenched by these various constituencies.

These factors particularly come into play when there are credible—as there are in this case—reliance interests based upon the statute. A whole structure of voting rights law (especially for the South) is now based on the statute. A whole structure of bureaucrats, interest groups, lawyers, whatnot—even law professors—is grounded upon the statute. This is almost an endowment effect. Take out the "almost"; there *is* an endowment effect that inheres when you have so many groups that are involved in so many of these statutory debates that they've come to rely on it. So that's point number one, that there will very often be conditions, particularly for the big-ticket programs, where sunsetting won't work.

Here's the second point, even more stunning and depressing from the deregulatory perspective: sunsetting can also increase regulatory ambition and agency authority. In other words, sunsetting in many instances, particularly the kind that I've identified, might lead to more than the rolling over of easy-to-criticize programs—programs that go too far. Section 5 is obsolescent; voting practices are actually better today than they were in 1965, and yet it rolled through by virtually unanimous majorities. And—and this is the key point now—the Voting Rights Act was actually *liberalized.* Its regulatory ambit was expanded. In other words, not only might sunsetting—the opportunity for the Congress to revisit a program—fail to weed out the programs that need to be retired, but it actually might

expand them, for the reasons we have been discussing.

My third point is that, notwithstanding these problems, sunsetting can still serve several useful purposes. To begin with, sunsetting can facilitate experimentation. I think the idea of suspending state literacy tests was a good idea in 1965. Yet it was subject to some powerful normative arguments. For an informed voting public, you may think, literacy tests might be useful: Why shouldn't the state be able to exclude voters who are, on the whole, unlikely to be well-informed? On the other hand, literacy tests in our history have been administered in discriminatory ways. How discriminatory are such tests in practice? Would suspension of literacy tests degrade the democratic process? These are empirical questions—ones that sunsetting might help us answer by providing time-limited experiments.

This was precisely the pitch made in the 1965 Act. Literacy tests were suspended in the South, and indeed, Armageddon did not come. Elections unencumbered by literacy tests worked fine. Voting worked much better in the South without literacy tests discriminatorily applied—and the anti-democratic features of southern politics were diminished as voters of color flocked to the polls in the ensuing decades. The more they were talked about and the more they were studied, the better the evidence was that literacy tests were not necessary in the South and other parts of the country. Also, a degree of political consensus was achievable on the issue of literacy tests, which I might add had been upheld by the Warren Court. Liberals as well as conservatives had upheld them against federal attack. And yet conservatives as well as liberals, southerners as well as northerners, were able to agree that literacy tests could be retired, permanently, in the 1970s.

Additionally, sunsetting can have a healthy deregulatory purpose; it can end some obsolescent agencies or programs. My friendly suggestion is that sunsetting is not a one-size-fits-all solution. It may work better for some statutory schemes than for others.

Finally, there's much to be said here for democracy. One of the realities you have to confront is that when Congress passes these statutes, however specific or general they are, Congress sets afloat a ship in an ocean that Congress is not necessarily going to control. The steering of the ship is not by members of Congress; it's mainly by agencies, with judges often playing an important

role as well. So the interaction of agency interpretations, judicial pushback, agency response, and group responses to all of this creates a very, very different statute. There is a genuine danger in our republic where the dynamic lawmaking, which is inherent in our separation of powers, removes important statutory mandates like the Voting Rights Act from the democratic process and from any sense of democratic accountability. People like Tom Merrill and Bill Eskridge—and Guido Calabresi if you wanted to include him—can criticize the way Congress operates. But Congress does have the imprimatur of the Constitution, and also the cachet that derives from the members' democratic accountability to their constituencies. So, if Congress chooses to liberalize the Voting Rights Act, as it has done repeatedly since 1965, the members are often reflecting democratic preferences and can certainly be held accountable to the voters for their decisions.

Thank you.

JUDGE EASTERBROOK: The discussion on this panel so far has concerned sunset clauses in specific statutes. But the general subject of this panel was: What we should think about an across-the-board federal sunset law? In other words, how about something that would be framework legislation, generally applicable the same way the Administrative Procedure Act is generally applicable. Similarly, we have a four-year statute of limitations for every statute that doesn't have its own, and we have generally applicable inverse preemption in the insurance industry under the McCarran–Ferguson Act. All of those framework laws are overridden on occasion, but most of the time they're not. History tells us that the framework laws govern most of the situations within their scope. So learning that sunset clauses may have made the Voting Rights Act worse by making it a must-pass statute that attracts Christmas-tree amendments doesn't necessarily tell us the effect of a comprehensive sunset statute.

Law reviews are just full of lawyers' talk about this subject, and the précis for this panel sets out one of the lines of argument: that a sunset law will promote the cause of classical liberalism by reducing the volume of permanent laws, thus reducing the force of the dead hand in legislation. On this understanding, statutes stick around because the legislature lacks the time needed to revisit them regularly, and, even when it has the time, people

who occupy veto positions—think committee chairs—can block change even when a majority of Congress or a state legislature would like to change.

There's also a contrary possibility that the same reasons that make laws more likely to expire under a general sunset regime—as the special prosecutor statute eventually did under its statute-specific clause—make it easier to pass laws in the first place. Laws come about when interest groups that gain from statutes can overcome the opposition of those who will lose by the legislation. Sunset laws, if they're effective—if they actually work at getting rid of laws—would reduce, somewhat, the expected loss from any given proposal, and therefore would reduce the opposition to the interest-group agenda. Bill Eskridge suggested that maybe the Voting Rights Act was in that category; it couldn't have been passed without the sunset. So we have two potential effects: Sunset laws may get rid of old laws and promote the cause of classical liberalism, but they also may make it easier to enact new laws and promote the cause of interest groups. Which one of these effects predominates? Unfortunately, we have a lot of anecdotes. We have a lot of stories about what happens with specific statutes that did or did not get sunsetted, but very little data.

The difficulty with looking at individual programs such as the independent counsel law or the Voting Rights Act is that some or all of the things that happened at their reauthorization times might have happened without a sunset clause. We don't know; it's hard to run the counterfactual. To tell, we need large samples of laws and we need variance across jurisdictions. I went in search of studies of sunset laws. As Tom Merrill recounted, a lot of states have passed sunset laws. It's not only states; I'm about to describe a sunset law adopted by the World Trade Organization.

It turns out, however, not to be easy to find studies of these things. For roughly every one hundred law review articles in which there is a lot of lawyer's talk about what could happen, I found about one empirical study that poses the question: What did happen? In fact, I found only three, and I'm now going to describe them for you.

The World Trade Organization adopted a five-year sunset rule for antidumping clauses. I'm sure you're all acquainted with antidumping clauses; they're a form of trade barrier in which

corporations in one nation complain that their competitors in other nations are charging too little for their products. Normally, we think that the antitrust laws are going to get prices down; the role of antidumping laws is to get prices up. Treaties allow importing nations to impose limits, quotas, or countervailing duties in the event of dumping, which protects producers at the expense of consumers. These duties tend to stick around and produce pointless burdens, so a sunset was created in the interest of freer trade. There are thousands of these cases, so it turns out that a statistical analysis is possible.

A study found that, at the sunset review, many duties are allowed to expire. In fact, more countervailing duties are allowed to expire than continue.[93] That result is statistically significant, and that sounds encouraging, doesn't it? But it also turns out that the only duties that are allowed to expire are the unimportant ones. The ones that really injure consumers remain, and on average, they get worse at the five-year review. The net effects are unclear, but this study is not encouraging. This study, like the other two I'm going to mention, was entirely ex post. That is, it asked: What happens to duties that already exist? It did not ask whether the prospect of a five-year sunset makes the adoption of countervailing duties more likely in the first place. This means that we don't know the full effects even of the WTO sunset clause. This is, I think, the best empirical study of any sunset law, and we just don't know the full effects.

But here's another study about regulatory systems. Most states require real estate brokers to be licensed. The stated public rationale for this is that it improves the quality of service. The unstated possibility is that this allows the incumbents to reduce the amount of new competition and jack up their prices. In some states, this licensing scheme is subject to sunset. What is the effect? So far, in every state that's reviewed these schemes at a sunset time, the program of licensing and the agency that administers the program have been reauthorized one hundred percent of the time.[94] But there is a small effect. In the year of the review, the agency is a little bit more willing to allow new

93. Olivier Cadot et al., Anti-Dumping Sunset Reviews: The Uneven Reach of WTO Disciplines (Nov. 2007) (unpublished paper), *available at* http://works.bepress.com/ocadot/4/.

94. Mary K. Marvel, *The Impact of Sunset Review: A Study of Real Estate Licensing*, 58 PUB. CHOICE 79 (1988).

competition. So maybe they're more sensitive to the public during the year of the review, and consumers get a small benefit maybe one year in five. But the program is there. The dominant force is that the program sticks around and the power of exclusion remains. It's not as good as free competition, but it turns out to be somewhat better for consumers than states that lack sunset review.

Now, finally, expenditures—thirty states have some form of sunset review of their expenditures.[95] You can think of that as a kind of program-specific, zero-based budgeting exercise at intervals between four years and twelve years, depending on the state. What's the effect of this? Well, once again, programs never end, and agencies never close. But again—just as with real estate brokers—in the year of reauthorization, there's some, though small, reduction in expenditures and some, though small, increase in bureaucratic efficiency. The review process seems to override just a little bureaucratic inertia—not much, but the direction is a good one.

This study made one other interesting finding. Twelve states that have had sunset laws have allowed those laws to sunset. It seems that the only category of laws that sunset laws regularly eliminate is sunset laws themselves. Apparently, even mild belt-tightening leads to powerful opposition.

The bottom line of all of this is unclear. We know that some kinds of sunset laws have some modest benefits ex post; the emphasis must be on "modest." But we don't know the ex ante effects. We don't know whether the prospect of sunset will lead to more, or more intrusive, legislation by reducing the opposition to it. And we do not know the consequences of requiring legislators to spend more of their time on the reauthorization of existing programs. If legislators have to spend more of their time thinking about whether to renew the Voting Rights Act and the Commodity Futures Trading Commission and other things, presumably they have less time for other things, and that could mean less new mischief. But of course, it also could mean having less time and energy to resist and oppose interest groups' proposals for new mischief. It also could lead to

95. Jonathan Kerry Waller, The Expenditure Effects of Sunset Laws in State Governments 3 (May 2009) (unpublished D.Phil. dissertation, Clemson University) (on file with Clemson University Libraries).

more delegation. If a legislature's time is consumed by sunset reviews, one possible response is to delegate more to agencies that rely on staffs and, of course, the interest groups.

One common finding that you can read about in *The Journal of Law & Economics,* which I used to edit, is that administrative delegations regularly provide benefits for interest groups at the expense of the general welfare. You should recall some examples from the regulation panel earlier today, which illustrated how agencies tend to take powers to and beyond their limits. None of the studies I've mentioned test for this effect, which should give us all some pause. Perhaps we need a different form of sunset, a rule that agencies must rescind their rules unless, within five years, a cost-benefit study vindicates them. But we don't know the effect of that either.

So, I have been urging caution, and the uncertainty puts me in mind of Edmund Burke's maxim, "Don't talk to me of reform, things are bad enough as they are."

And there, I shall stop.

JUDGE SUTTON: Thanks to all four of you for those excellent presentations. Let me give some of the earlier panelists a chance to respond. Philip has one or two things to add.

MR. HOWARD: First, on the idea of caution—I'm not an academic, so I just start where we are, which is a real mess. You can't approve a power line without seven to ten years of review. You can't maintain control of the classroom if you're a teacher because of the way Due Process rules have evolved. The health care system is drowning in bureaucracy. I see a dysfunctional system, in part, as a result of all these laws written in the past.

I take Judge Easterbrook's point about unintended consequences of sunset laws; I think every point he made is valid. Unfortunately, the tens of thousands of laws on the books have had similar unintended consequences and now they're sitting there. So the question is: What do you do with it? And we don't have any debate on the table about how to clean it out.

The idea of an omnibus sunset law, as I said, is not a panacea. But I do think one has to achieve a new public purpose to clean out the law, and that new public purpose should probably be reflected in law.

I also don't think Professor Eskridge's excellent recounting of how the Voting Rights Act evolved undercuts the idea of reviewing laws at all. The law was effective, and they decided to

make it more effective and to expand the parts that they found effective. I'm not advocating getting rid of all laws; I'm advocating seeing how they work. Sometimes they might work better—great; let's expand them. Again, I don't think there's a panacea, but I don't think this is an academic or abstract issue in our country now. All these laws are on the books, and they are establishing how our society works day to day. In my view, they're not working very well.

JUDGE SUTTON: Bill, do you want to respond?

PROFESSOR ESKRIDGE: I think the Voting Rights Act, Philip, does have this cautionary story. A lot of people, including me, think that Section 5 is not nearly as justified today as it was in 1965, when only minorities of voters of color were allowed to vote in the South. It's a classic example of what you're complaining about. It's a classic example of Guido Calabresi's obsolescence theory because, today, the voting numbers are pretty comparable for persons of European, African, and Latino ancestry. And indeed, the minority voting numbers in the South, which is the only jurisdiction covered by Section 5, are better than they are in certain parts of California and states outside the South that are not covered by Section 5.[96] So, at the very least, it seems to me there needs to be a rethinking of Section 5.

Moreover, I believe every time Congress has revisited Section 5, it has reaffirmed liberal judicial interpretations that expand it. In other words, as the problem is becoming less, Section 5 is getting broader. And in the 2006 reauthorization, there was a big expansion of Section 5 to override Supreme Court cases that had narrowed it.[97] So this is a perfect example of a statute that I think is obsolescent in part and where the sunsetting process has actually exacerbated the obsolescence and not solved it.

The irony is that the Roberts Court seems to be on the verge of playing the Guido Calabresi role. Implicitly, the Roberts Court

96. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009) ("[T]he racial gap in voter registration and turnout is lower in the States originally covered by § 5 than it is nationwide."); *see also* H.R. REP. NO. 109-478, at 12–18 (2006) ("The Committee finds that the number of African-Americans who are registered and who turn out to cast ballots has increased significantly over the last 40 years, particularly since 1982. In some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters.").

97. S. REP. NO. 109-295, at 5 (2006) ("Section 5 responds to, in part, two Supreme Court decisions that interpreted the criteria for preclearance of voting changes under Section 5 of the Voting Rights Act of 1965: Reno v. Bossier Parish School Board, 528 U.S. 320 (2000) (Bossier Parish II), and Georgia v. Ashcroft, 539 U.S. 461 (2003).").

is going to be embracing Guido Calabresi's theory if they strike down Section 5 as unconstitutional. The Rehnquist and the Roberts Courts both cut back on Section 5 fairly steadily—not in huge ways but they cut back on it—and their cutbacks have basically been overridden by Congress as part of the sunsetting process, so the stakes are now higher. And they've suggested in the *Northwest Austin* case, where they engaged in a ridiculous exercise of statutory interpretation, that they are willing to reconsider the constitutionality, and there might indeed be five votes to strike it down.[98]

98. *Nw. Austin*, 557 U.S. at 193.

DICK CHENEY AND THE ROBUST CONCEPTION OF PRESIDENTIAL POWER

IN MY TIME: A PERSONAL AND POLITICAL MEMOIR. Dick Cheney. New York: Threshold Editions, 2011. 565 pages. $35.00.

Reviewed by PEJMAN YOUSEFZADEH*

* J.D., Pepperdine University School of Law; A.M., A.B., University of Chicago

I. INTRODUCTION

The memoirs of former Vice President Dick Cheney[1] are not short on personal vignettes aimed at capturing the attention of the reader and giving a sense of the author's life and times. They do not shy away from efforts to depict the author's political career in the most flattering light. The writing style is very much Cheney's, given the terseness with which Cheney relates the stories he tells.

The memoirs advance arguments that are important to Cheney, arguments that have defined his political career. One in particular is consistently referenced and emphasized: an expansive view of executive power. Cheney has done nothing to disguise or camouflage his beliefs on the subject throughout his political career.

This Book Review discusses Cheney's conception of executive power. It reflects on the fact that despite Cheney's Nixon Administration experience with agencies whose missions and activities went against his small-government instincts, Cheney did not become a skeptic of executive power. On the contrary, even as a member of Congress, he sought to safeguard executive power against what he—and others around him—saw as encroachment by Congress. This Book Review also highlights two notable instances in which Cheney, as a member of the Executive Branch, sought to protect presidential power—and one instance in which he worked to preserve the autonomy of the *Vice* President from the President and his staff.

II. CHENEY'S EARLIEST POLITICAL EXPERIENCES

Cheney's introduction to politics and political life came as a congressional fellow for William A. Steiger, who served as a Republican member of the U.S. House of Representatives from 1967 until his death in 1978.[2] Cheney's early association with Congress through the fellowship program and his most seminal early exposure to the Executive Branch could have made him a skeptic of presidential power. Working as an aide to Donald Rumsfeld, who was selected by President Nixon in 1969 to head the Office of Economic Opportunity (OEO),[3] Cheney witnessed

1. DICK CHENEY, IN MY TIME: A PERSONAL AND POLITICAL MEMOIR (2011).
2. *Id.* at 41–45, 48.
3. *Id.* at 44.

examples of government activity that ran counter to his small-government instincts:

> I remember, for example, one OEO proposal that promised to help migrant workers by moving them from Florida to South Carolina and teaching them to grow azaleas. It sounded great until someone asked how many azalea growers there already were in South Carolina and how many azalea growers South Carolina could realistically support. The answer was that the market was already operating efficiently and at full capacity. The proposed plan could have wiped out the entire azalea industry in the state.[4]

After having served with Rumsfeld at OEO, Cheney migrated to the Cost of Living Council (CLC), which Rumsfeld was asked to run by President Nixon.[5] As assistant director of the CLC, Cheney was given the opportunity to see firsthand yet another example of government intervention in the marketplace that might have diminished any enthusiasm he had for a powerful Executive Branch. Cheney describes how the CLC was tasked with crafting and implementing wage and price controls:

> The Democratic majority in Congress was urging the president to use powers they had given him when they passed the Economic Stabilization Act, legislation that effectively authorized him to commandeer the economy by imposing controls on wages, prices, salaries, and rents. The Democrats voted these extraordinary powers confident that no Republican president, much less a solid free market one named Richard Nixon, would ever use them, and in the meantime, they could criticize him for not taking action. But Nixon took them up on their offer, and on Sunday night, August 15, 1971, he announced a freeze for ninety days on all wages and prices. The Cost of Living Council was created to monitor the freeze and to achieve an orderly return to the free market when the ninety-day period was over.[6]

Imposing and maintaining the freeze was just one part of the CLC's mandate. Phase Two, according to Cheney, involved

> rules covering all sorts of things, from permitted increases in union contracts to the price of dill pickles, for the period until market forces ruled again .... We set up in Rumsfeld's outer

4. *Id.* at 56.
5. *Id.* at 59.
6. *Id.* at 59–60.

> office, and as others paced and dictated, I sat at one of the secretary's desks and typed everything on an IBM Selectric typewriter. By nine the next morning, when the secretaries arrived and emptied the ashtrays and replenished the coffee, we had written the regulations that would now be governing a majority share of the U.S. economy . . . . We drew distinctions between apples and applesauce; popped and unpopped corn; raw cabbage and packaged slaw; fresh oranges and glazed citrus peel; garden plants, cut flowers, and floral wreaths. We regulated seafood products "including those which have been shelled, shucked, iced, skinned, scaled, eviscerated, or decapitated." We covered products custom-made to individual order, including leather goods, fur apparel, jewelry, and wigs and toupees.[7]

Both the OEO and the CLC were instruments of government expansion. As Cheney mentions, the Democrats did not believe that President Nixon would empower the CLC to the degree he did, and as for OEO, the expectation was that the Nixon Administration would defang the agency, not strengthen it.[8] But Richard Nixon, a solid free market president, embraced the exercise of presidential powers through OEO and CLC. While Cheney "had grown wary of government economic control"[9] as a consequence of his experience at CLC, the Nixon Administration's robust use of OEO and CLC as vehicles for policymaking did little to diminish Cheney's enthusiasm for the presence of a powerful executive.

Although Cheney never allowed his aversion to government intervention in the economy to translate into an aversion to the presence of a powerful executive that could bring about those interventions, it is equally worth noting that Cheney's aversion to government intervention in the economy has been consistently pronounced. As dark clouds were gathering over the economy in late 2007, Cheney remained more concerned about "Washington's impulse to fix" the economy.[10] In an interview in

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7. *Id.* at 60.

8. *Id.* at 44. "The announcement of Rumsfeld's nomination was met with skepticism and surprise. Nixon had campaigned against OEO and Rumsfeld had voted against it [as a congressman]. It was widely thought that Nixon wanted someone to oversee the dismantling of the agency, but that was a mistaken assumption." *Id.*

9. *Id.* at 62. Cheney goes on to observe that "when something as big and ham-handed as the federal government tries to run something as complex and dynamic as the American economy, the result is sure to be a train wreck." *Id.*

10. Nina Easton, *Why is Dick Cheney Smiling?*, CNNMONEY (Nov. 25, 2007, 5:18 PM), http://money.cnn.com/2007/11/22/magazines/fortune/cheney.fortune/index.htm.

his White House office Cheney clarified:

> "The fact is, the markets work, and they are working . . . . And people—some of the big companies obviously—have taken risks. Risk means risk. And there's an upside as well as a downside in some of the choices they've made. We have to be careful not to have this set of developments lead us to significantly expand the role of government in ways that may do damage long-term for the economy."[11]

Having declared this, Cheney makes clear his support of the Troubled Asset Relief Program (TARP) in his memoirs, stating:

> [A]s I write this in 2011, it is clear that TARP was a success. According to economist Robert Samuelson, of the $245 billion invested in banks, Treasury has already recovered approximately $244 billion. Treasury expects ultimately to record an overall profit from the bank investments portion of TARP of approximately $20 billion.[12]

This attitude contrasts, however, with Cheney's view of language in the TARP legislation that had to do with loan packages for automobile companies whose survival was threatened at the time the economic crisis hit:

> Early in my congressional days, I had opposed the 1979 Chrysler loan guarantee, and I had continued throughout my career to be philosophically opposed to bailing out specific companies or industries. I believed our intervention in the financial sector was justified, because the federal government was responsible for maintaining the strength and viability of our economy, including our financial system and currency. Providing sufficient support to avoid the collapse of our banking system was something only the federal government could do. But, all things considered, companies in the private sector should be judged in the marketplace. Having the government intervene was not, in my opinion, a good idea.[13]

This last passage is quite useful in reconciling Cheney's views. He is against generalized government intervention in the economy, believing that government should not choose winners and losers among "specific companies or industries."[14] However, in the event of an economic crisis, when government is the only

11. *Id.* (quoting Vice President Cheney).
12. CHENEY, *supra* note 1, at 510.
13. *Id.* at 511.
14. *Id.*

entity available with the power to prevent the onset of a severe recession or depression, Cheney believes that government should act to prevent an economic calamity. And of course, the most powerful actor in government is—or ought to be—the President. Cheney remarks that because of the wariness of TARP evinced by many members of Congress, the Bush Administration "briefly contemplated not seeking congressional authority[,]" preparing to rely instead on provisions of the Federal Deposit Insurance Corporation Improvement Act of 1991 "that would allow for a major injection of funds directly into the banking system with the approval of the president, the secretary of the Treasury, and a majority of the Federal Reserve Board should there be a threat to the integrity of our financial system."[15] Only when Federal Reserve Chairman Ben Bernanke made clear that he would feel much more comfortable with congressional approval did the Bush Administration decide not to use executive power in unilateral fashion to put TARP into effect.[16]

III. CHENEY'S ADVOCACY OF PRESIDENTIAL POWER AS A MEMBER OF CONGRESS

After a brief stint in the private sector,[17] Cheney's service in the Executive Branch resumed when he was first asked to serve as deputy chief of staff,[18] and later as chief of staff[19] in the Ford administration. Upon Ford's defeat at the hands of Jimmy Carter in 1976, Cheney moved back to his home state of Wyoming and ran for Congress, winning his first election in 1978 as Wyoming's sole member of the U.S. House of Representatives.[20] In his memoirs, Cheney evinces a great of deal pride in his congressional career, and his association with the House in particular, stating that "[f]or the next ten years, I would be recognized on the floor of the United States House of Representatives as 'the Gentleman from Wyoming.' I would have a lot of titles after that, but never one of which I was prouder."[21]

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15. *Id.* at 507. *See also* Federal Deposit Insurance Corporation Improvement Act of 1991, § 102(a), 12 U.S.C. § 1825(c)(5)(C) (2006) (allowing the FDIC to borrow directly from the Department of the Treasury).
16. CHENEY, *supra* note 1, at 507.
17. *Id.* at 64.
18. *Id.* at 70.
19. *Id.* at 92.
20. *Id.* at 124.
21. *Id.*

But his pride notwithstanding, even as a member of Congress, Cheney was a strong advocate of presidential power.

As a congressman, Cheney participated in continuity-of-government exercises that "dealt with contingency responses to an attack on the United States that decapitated our government."[22] The exercises were designed to help the United States government draw up responses to scenarios that featured the killing of both the President and the Vice President, along with members of Congress—scenarios that weighed on the minds of policymakers given that the Cold War was still in effect.[23] In his memoirs, Cheney does not mention what influence these exercises had on his conception of executive power. However, Barton Gellman notes a particular theme that ran through the continuity-of-government exercises in which Cheney was involved, and in which Cheney's longtime aide, David Addington,[24] played a part:

> Back when Cheney played [the] White House chief of staff in the 1980s exercises, Addington was one of his advisers. Rand Beers, then at the State Department, worked on a parallel team under mock chief of staff Donald Rumsfeld, who was then in the private sector. Each of three teams, deploying simultaneously from Andrews Air Force Base, included a cabinet member to play the president. The Speaker and President pro tem were never brought along, Beers said. "They were always dead" in the exercise scenarios. "There was always the question" of whether the legitimate line of succession "means that the Speaker becomes the president. I don't remember if we ever answered that specifically. From my perspective it was an interesting intellectual issue, but it wasn't an issue I had to worry about."[25]

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22. *Id.* at 129.

23. *Id.*

24. Addington's association with Cheney included serving as staff attorney on the joint House-Senate committee investigation of the Iran-Contra scandal (where Cheney served as the ranking minority member on the House side), Minority Report, *in* REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, S. REP. NO. 100-216, H.R. REP. NO. 100-433, at 432 (1987); serving as special assistant while Cheney was Secretary of Defense, CHENEY, *supra* note 1, at 162; heading up Cheney's presidential exploratory committee in advance of the 1996 election, *id.* at 244; and serving as Cheney's chief legal counsel and vice presidential chief of staff, Biography of David Addington, THE HERITAGE FOUND., http://www.heritage.org/about/staff/a/david-addington (last visited May 31, 2012).

25. BARTON GELLMAN, ANGLER: THE CHENEY VICE PRESIDENCY 156 (The Penguin Press 2008).

According to Gellman, the question of presidential succession was not merely "an interesting intellectual issue" for Addington:

> The Constitution does not specify the order of succession, leaving it to Congress to say "what officer shall then act as President" if the vice president is dead or disabled. Congress made its last major rewrite in 1947. After the vice president, the succession moves to the Speaker of the House and the President pro tempore of the Senate, followed by cabinet secretaries in the order in which their departments were established, beginning with State, Treasury, and Defense. Addington, colleagues said, did not think a member of the House or Senate could qualify as a constitutional "officer."[26]

The issue of whether a member of Congress could be in the line of succession to the presidency was important for Addington—and possibly for Cheney—in other ways as well:

> There was a practical aspect to the discussion, one colleague said, "when Strom was alive." He meant Senator Strom Thurmond, the Senate's president pro tempore, whose faculties were diminished long before he died at age one hundred. "We had discussions of whether we really considered Strom Thurmond to be in the succession, and David made the point that members of the legislative branch shouldn't even be in the succession."[27]

In the aftermath of the September 11 terrorist attacks, "the U.S. government activated contingency plans to disperse its leaders to hardened locations outside Washington," including Speaker of the House Dennis Hastert, and President pro tempore of the Senate Robert C. Byrd.[28] The Bush Administration "requested secret funding to replace the Roosevelt-era White House bunker, the Presidential Emergency Operations Center . . . . Plans called for a new facility with upgraded technology, accessible from the White House but dug deeper and located more securely."[29] Just as notable was the selection of personnel to be in the bunker in order to ensure the continuity of government in the event of a decapitating attack:

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26. *Id.* at 155. The congressional "rewrite" in question was the Presidential Succession Act of 1947, Pub. L. No. 80-199, 61 Stat. 380 (codified as amended at 3 U.S.C. § 19 (2006)).

27. GELLMAN, *supra* note 25, at 155.

28. *Id.* at 156.

29. *Id.*

> There was always one eligible successor to the president in the bunker. Not once was that "standby president" the Speaker or president pro tem. "They never included a member of Congress in the COG shadow government after September 11," said Norman Ornstein, who studied the deployments as senior counselor to the Continuity of Government Commission.[30]

In 2003, Ornstein urged Cheney to propose some kind of legislative amendment to the Presidential Succession Act, but was met with resistance from Cheney's deputy chief of staff at the time, Dean McGrath:

> "He told me, 'Pursue this all you want, but I don't think there's any chance we'll be doing anything legislatively on this,'" Ornstein said.
>
> One commission insider, a Cheney admirer who did not want to be named, said the Vice President and his staff "had their plans" for presidential succession, "and their plans were going to be by fiat."[31]

Jane Mayer contends that there was an actual effort during the Reagan Administration to bypass Congress in shaping policies pertaining to presidential succession, an effort that sprang from the continuity-of-government exercises Cheney was involved with:

> If the president and vice president are indisposed, then power passes first to the Speaker of the House, and next to the president pro tempore of the Senate. But in a secret executive order, President Reagan, who was deeply concerned about the Soviet threat, amended the process for speed and clarity. The secret order established a means of re-creating the Executive Branch without informing Congress that it had been sidestepped, or asking for legislation that would have made the new "continuity-of-government" plan legally legitimate. Cheney, a proponent of expansive presidential powers, was evidently unperturbed by this oversight.[32]

Mayer does not name this "secret executive order," so it is difficult to verify the claim she makes. It is equally difficult to fact-check Cheney's supposed "unperturbed" attitude to the alleged executive order. Yet the apparent skepticism on the part

30. *Id.* at 157.
31. *Id.* at 158.
32. JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS 2 (2008).

of the Cheney camp regarding the ability—or lack thereof—of members of Congress to contribute meaningfully to the continuity of government in the event of a decapitating attack is remarkable. Of course, nothing appears to have been done during the course of the Bush Administration to change the Presidential Succession Act of 1947 "by fiat," as Gellman's anonymous Cheney admirer claimed the Administration planned.

During the 1980 Republican National Convention in Detroit, Cheney found himself defending the institution and powers of the presidency from a strange proposed political arrangement.[33] Having won the Republican presidential nomination, Ronald Reagan was considering whom to choose as a running mate, and many top Republicans urged him to name former President Gerald Ford, a dream ticket scenario Republicans believed would serve to unite the party in advance of the general election contest against President Carter.[34] The proposal would have involved giving Ford "a major role in foreign policy, the budget, and personnel," which amounted, in Cheney's view, to "a co-presidency, with the president and vice president dividing and sharing the powers of the office."[35] A number of people who served in the Ford Administration were asked to advise and represent the former President in talks with the Reagan camp, Cheney included.[36] Concerning the proposed arrangement between Reagan and Ford, Cheney reports that he was

> stunned at the extent to which Bill Casey, and presumably Governor Reagan, were willing to share the power of the president. After the meeting Bob Teeter and I joined [Senate Minority Leader Howard] Baker and [House Minority Leader John] Rhodes in discussing the proposal. It was clear that none of us thought the arrangement being discussed was even remotely workable. There can be only one president at a time, and certain presidential powers cannot be delegated.[37]

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33. CHENEY, *supra* note 1, at 139–40.
34. *Id.*
35. *Id.* at 140.
36. *Id.*
37. *Id.* Cheney goes on to state that "[o]n reflection, I don't think President Ford had any intention of being vice president a second time. He often told me over the years that the months he spent as vice president were the most miserable of his career. I think he deliberately made demands that he fully expected to be rejected and that he was surprised at how far Reagan was prepared to go to persuade him to accept the vice presidential nomination." *Id.*

Cheney's actions in the course of Congress's investigation of the Iran-Contra scandal serve as yet another example of his desire to safeguard expansive presidential powers from encroachment. Cheney states that the plan to sell arms to moderate factions in Iran "was ill-conceived," because it "violated the arms embargo that we had imposed on Iran and that we were insisting other nations observe, and it undermined our strict policy against negotiating with terrorists," and objects that "Congress had not been told about the operation, as we should have been."[38] He goes on to note that it was "troubling" that President Reagan claimed he knew nothing about the diversion of funds from the arms sales to the Nicaraguan Contras.[39] Cheney nonetheless used his position as the ranking Republican on the House side of the joint congressional committee investigating Iran-Contra to prevent the scandal from weakening the presidency. Cheney writes that in his closing statement at the hearings he

> made the point that Iran-Contra represented serious errors on the administration's part, but that there were mitigating factors—"which, while they don't justify administration mistakes, go a long way to helping explain and make them understandable." Among them were "congressional vacillation and uncertainty about our policies in Central America" and "the vital importance of keeping the Nicaraguan democratic resistance alive until Congress could reverse itself and repeal the Boland Amendment [which prohibited aid to the Contras]." I also noted that the administration's failure to notify Congress, while inexcusable, needed to be set against "a Congressional track record of leaks of sensitive information sufficient to worry even the most apologetic advocate of an expansive role for the Congress in foreign policy-making."[40]

Cheney quotes at length from the minority report that he and other Republicans on the joint committee issued, a report which complained of the "boundless view of Congressional power" that "began to take hold in the 1970s, in the wake of the Vietnam War."[41] Such a view constituted "an aggrandizing theory of Congress' foreign policy powers that is itself part of the

38. *Id.* at 143.
39. *Id.* at 144.
40. *Id.* at 146.
41. Minority Report, *in* REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, S. REP. NO. 100-216, H.R. REP. NO. 100-433, at 457 (1987).

problem."[42] The following passage from the minority report appears in his memoirs:

> The country's future security depends upon a modus vivendi in which each branch recognizes the other's legitimate and constitutionally sanctioned sphere of activity. Congress must recognize that an effective foreign policy requires, and the Constitution mandates, the President to be the country's foreign policy leader. At the same time, the President must recognize that his preeminence rests upon personal leadership, public education, political support, and inter-branch comity . . . . No President can ignore Congress and be successful over the long term. Congress must realize, however, that the power of the purse does not make it supreme. Limits must be recognized by both branches, to protect the balance that was intended by the Framers . . . . This mutual recognition has been sorely lacking in recent years.[43]

Thus, Cheney's belief that Iran-Contra was "ill-conceived" did little to lessen his belief in the need for a strong Executive Branch. To be sure, the observation in the joint committee minority report that "[n]o president can ignore Congress and be successful over the long term"[44] represents a healthy respect for congressional prerogatives. But it is quite notable that in the midst of a scandal involving the failure to properly notify Congress of executive activities, Cheney wanted to make sure that the powers of the Executive Branch would not be circumscribed.

Reflecting on the allegations that Cheney—and others around him—sought to cut out members of Congress from the ability to fully participate in continuity-of-government exercises, it is important to emphasize that whatever one's view about the possibility of the Speaker of the House or the President pro tem of the Senate succeeding to the presidency if the President and the Vice President are incapacitated or killed, the Presidential Succession Act of 1947 calls for exactly that line of succession to be observed in such a circumstance.[45] Pursuant to the dictates of the Act, the rest of the government would expect the Speaker, and the President pro tem to succeed to the presidency. To the

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42. CHENEY, *supra* note 1, at 146–47.

43. *Id.* at 147 (quoting Minority Report, S. REP. NO. 100-216, H.R. REP. NO. 100-433, at 438 (1987)).

44. Minority Report, S. REP. NO. 100-216, H.R. REP. NO. 100-433, at 438 (1987).

45. 3 U.S.C. § 19(a)(1), (b) (2006).

extent that some kind of "secret executive order" was put in place to bypass the stipulated line of succession—and it should be noted anew that these claims appear to be rather thinly sourced—then the "secret executive order" in question would take by nasty surprise the rest of the United States government, which would expect the line of succession to the presidency to unfold as the Presidential Succession Act mandated that it should. As such, in any situation in which the Act were invoked, if the implemented line of succession were to differ from what the Act mandates, the result would be greater chaos and disorganization in what would undoubtedly be an already chaotic situation. If Cheney did indeed countenance the bypassing of the Act in secret, then his decision should surely be held irresponsible.

On the other hand, Cheney should be commended for standing against any special arrangement that might have created a Reagan-Ford "co-presidency." Interestingly, such a stance would have prevented precisely the same kind of intra-governmental chaos and disorganization that any "secret executive order" bypassing the Presidential Succession Act would have created. By working and arguing against any kind of ad hoc transfer of certain powers of the presidency to the Vice President, Cheney ensured that there would remain a clear and unmistakable chain of command and responsibility in the Executive Branch. In the case of the Reagan-Ford negotiations, Cheney was clearly and admirably against any kind of special arrangement that would run counter to the clearly enunciated powers and responsibilities of the Presidency.[46] Far from taking any action that would bring about disorder, Cheney's stance on this issue was designed to prevent misunderstanding and confusion regarding Executive Branch functions.

IV. CHENEY IN THE EXECUTIVE BRANCH

The failure of former senator John Tower to win confirmation as George Herbert Walker Bush's Secretary of Defense led to Bush asking Cheney to serve as Pentagon chief.[47] The most consequential period during Cheney's service at the Pentagon was the buildup for and prosecution of Operation Desert Storm.

46. CHENEY, *supra* note 1, at 139–40.
47. *Id.* at 156–57.

During the prelude to war, the Bush Administration debated whether the President should seek a congressional resolution authorizing the use of force.[48] Cheney made clear in his memoirs that he did not favor such a move:

> We had all the authority we needed, because the United States Senate had previously ratified the United Nations Charter, including Article 51, which allowed us to go to the assistance of a member state, such as Kuwait, that had been invaded. Moreover, if we got turned down by the Congress, that would be a huge blow to our coalition and to our troops already deployed. If the military action was successful, it wouldn't matter whether Congress had supported us beforehand. If, on the other hand, we failed, even if we had a vote supporting the use of force we'd be faced with intense criticism, including from those who had voted with us. In other words, I thought there was significant risk in seeking their approval and very little to be gained.
>
> I also thought it would set a dangerous precedent. As a legal and constitutional matter, the president had the authority he needed. If he sought congressional approval, that would surely be read by some as a message that he needed the congressional vote. It looked to me like a move that would diminish the power of the office.[49]

In believing that congressional approval was not needed to authorize the use of force, Cheney challenged the observation in the Iran-Contra joint committee minority report that "[n]o president can ignore Congress and be successful over the long term."[50] When it came to liberating Kuwait, Cheney believed that Congress could be ignored and that the President had all the authority he needed to wage war; indeed, Cheney believed that to ask for congressional approval was to weaken the office of the presidency.[51] Nevertheless, after Congress authorized the use of force, he called George Bush and told him, "'Mr. President,' . . . 'you were right.'"[52] Cheney noted in his memoirs that "[g]oing to Congress was high-risk, no doubt about it, but it had worked."[53] He also revealed that if Congress failed to pass

48. *Id.* at 207–08.
49. *Id.*
50. Minority Report, *in* REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, S. REP. NO. 100-216, H.R. REP. NO. 100-433, at 438 (1987).
51. CHENEY, *supra* note 1, at 207–08.
52. *Id.* at 208.
53. *Id.* at 209.

the authorizing resolution, the President would still have given the go-ahead to wage war, and would "probably [have] been impeached" as a consequence.[54] It is difficult to imagine Cheney disapproving of any decision by Bush to wield unilateral executive power in waging war against Saddam Hussein's regime.

As Vice President under President George W. Bush, Cheney of course fought to increase and safeguard the powers of the presidency. One particular episode stands out. Cheney had been given the responsibility of chairing an energy task force that received input from individuals and groups outside of the government.[55] This caused outside organizations to file suits demanding that the energy task force release the names of everyone with whom it met.[56] Congressman Henry Waxman, the ranking member of the House Oversight and Government Reform Committee, joined in demanding the lists, as did the General Accounting Office.[57] Cheney, however, resisted:

> We said no, not because we had anything to hide. Every recommendation we made was publicly available, as was the legislation we put forward based on the report. But I believed, and the president backed me up, that we had the right to consult with whomever we chose—and no obligation to tell the press or Congress or anybody else whom we were talking to. If citizens who come to the White House to offer advice have to worry about lawsuits or being called before congressional committees, it would pretty severely curtail the counsel a president and vice president could receive.[58]

Cheney goes on to note that there were people within the administration who thought that the lists should be released, because it would save the administration from "a real political headache."[59] But Cheney refused, believing that "something larger was at stake: the power of the presidency and the ability of the president and vice president to carry out their constitutional duties."[60] As Cheney notes with satisfaction, the Supreme Court validated his position by a vote of 7–2.[61]

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54. *Id.* at 208–209.
55. *Id.* at 315–17.
56. *Id.* at 317.
57. *Id.*
58. *Id.*
59. *Id.* at 317–18.
60. *Id.* at 318.
61. *See id.* (discussing Cheney v. U.S. Dist. Court, 542 U.S. 367, 392 (2004)).

Cheney's determination to safeguard the powers of the presidency did not prevent him from heading off exercises of presidential power that would circumscribe his role as Vice President. As Cheney pointedly notes in his memoirs, "[i]n addition to being the oldest guy in the West Wing, I was also the only one the president couldn't fire . . . . [H]aving been elected and sworn in, I carried my own duties as a constitutional officer."[62] One of those duties, Cheney notes, was his role as President of the Senate.[63] In that latter capacity, Cheney—through his Chief of Staff David Addington—was asked in 2008 by Texas Senator Kay Bailey Hutchison to sign an amicus brief supporting the decision by the U.S. Court of Appeals for the D.C. Circuit, which challenged the District of Columbia's ban on handguns.[64] Cheney did so, only to be told by White House Chief of Staff Josh Bolten that he and Addington had committed a "process foul," a message amplified by the fact that the Bush Justice Department was arguing before the Supreme Court that the court of appeals ruling was "too broad."[65] As a result of his decision to sign on to the amicus brief, Cheney was in effect breaking with the Bush Justice Department. Cheney describes the discussions between Addington and Bolten:

> Addington, who was always careful to protect the institution of the vice presidency, listened and then explained to Josh, with a smile I'm sure, that he worked for the vice president, not the president's chief of staff, and that the Senate functions of the vice president were the vice president's business.[66]

Cheney's propensity to regard executive power with more favor than he has historically viewed congressional authority may paradoxically serve to circumscribe executive authority. Any exercise of executive authority to bypass Congress in pursuit of policy goals serves to cut Congress out as a partner in policy making. At times, cutting Congress out may be necessary, and even if it were not necessary, the Executive Branch may indeed possess the authority to bypass Congress. However, if Congress is not made a partner in policymaking it will not have the same

62. *Id.* at 305.
63. *Id.*
64. *Id.* at 494–95 (discussing Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007)).
65. *Id.* at 495.
66. *Id.*

kind of stake in the success of a particular policy. By excluding Congress from the crafting and implementation of a particular policy, the Executive Branch takes upon its own shoulders all of the political risk and pressure involved in ensuring that the policy in question succeeds. Should the policy succeed, then all is fine and good—the Executive Branch is safe from criticism and will likely garner plaudits from observers. But should the policy fail, then the Executive Branch alone is open to political criticism and censure, with Congress remaining free from any blame, since it was not involved in the crafting and implementation of policy.

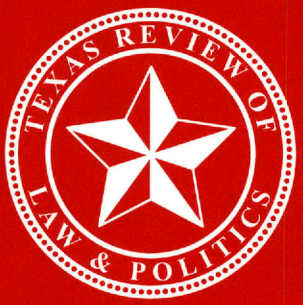
In the aftermath of any policy failure, a decision by the Executive Branch not to get congressional approval for the implementation of the policy in question may well be cited as a reason for that policy failure—especially by members of Congress who seek to protect their own authority and prerogatives—and henceforth, Executive Branch authority may be limited in certain policy realms as a perceived corrective measure. The minority report from the Iran-Contra joint congressional committee observes—as mentioned above—that "[n]o president can ignore Congress and be successful over the long term."[67] That observation certainly safeguards the prerogatives of members of Congress, but it also safeguards the interests of people like Cheney, who believe in a robust executive and who would not want to see anything occur that might cause a backlash against the expansive use of executive authority.

V. CONCLUSION

Notwithstanding the assertion of *vice* presidential prerogatives in a conflict with the President's chief of staff, Dick Cheney has been a consistent and insistent advocate of presidential power. Large-scale government interventions in economic policy on the part of Nixon-era executive agencies—and the President's approval of those interventions—did not dissuade Cheney from the belief that the office of the presidency needed to possess significant amounts of political power. That belief hardened during Cheney's service in Congress, during which time he was a participant in continuity-of-government exercises that confirmed

67. Minority Report, *in* REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, S. REP. NO. 100-216, H.R. REP. NO. 100-433, at 438 (1987).

his philosophy regarding executive power. He worked to preserve the power of the presidency from a peculiar political arrangement that might have brought about a co-presidency and from any effort by Congress to limit presidential power in the wake of the Iran-Contra scandal. Finally, as both Secretary of Defense and Vice President, Cheney continued his effort to ensure the vibrancy of executive power. Cheney's dedication to this issue is certainly notable and impressive, and it is a key part of his overall political legacy. Despite never having been President, his decades-long career in politics has significantly influenced the Office of the President and will shape the work of future presidents long after Cheney has departed from the political scene.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