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

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This issue of the *Texas Review of Law & Politics* covers legal and political events from the past as well as those ongoing in the present. Each article then suggests potential future action. It is our hope that this issue provides readers with an understanding of where our country stands today, how we got here, and where we should go in the future.

Elissa Graves explains a new challenge to the Affordable Care Act in her article titled *The Corporate Right to Free Exercise of Religion: The Affordable Care Act and the Contraceptive Coverage Mandate.* In this article, Graves provides a detailed explanation of the argument posed by two cases currently before the Supreme Court, *Sebelius v. Hobby Lobby, Inc.* and *Conestoga Wood Specialties Corp. v. Sebelius.* As this issue goes to print, the Supreme Court has not issued a decision, but a decision is expected in the coming weeks. The main question posed by these plaintiffs relates to the ability of corporations to exercise religion. Graves concludes that corporations should be held to be able to exercise religion; to hold otherwise would allow the government to require religious employers to violate their religious beliefs, which would be in stark contrast to statutory and constitutional protections of free exercise of religion.

In *Right on Crime: A Return to First Principles of American Conservatism,* Vikrant P. Reddy and Marc A. Levin discuss an area ripe for reform: the corrections system. Reddy and Levin describe the incarceration problem and give a detailed account of the history of the problem. The authors then urge conservatives to return to the "first principles of conservatism"—these principles include skepticism of all government programs, including prisons. After reminding conservatives that prisons evince nothing about conservative principles, Reddy and Levin propose specific reforms to improve the correctional system and call their fellow conservatives to "think outside the cell" when it comes to reforms in this area.

Next, in *Just Another Brick in the Wall: The Establishment Clause as a Heckler's Veto,* Richard F. Duncan discusses the misuse of the Establishment Clause to restrict liberty, rather than protect it, especially in situations involving passive, state-sponsored religious displays or monuments. Through the use of a relevant hypothetical, Duncan challenges the reader and courts to interpret the Establishment Clause not as a heckler's veto—empowering one group to censor another—but as a protection of individual liberty, allowing our pluralistic culture to be accurately represented.

Arthur Garrison then delineates the history and significance of the rule of law in his article *The Rule of Law and the Rise of*

Control of Executive Power. As the title suggests, after discussing the rule of law, the article then analyzes the executive power and the importance of limiting this power in light of the rule of law. Defining and controlling the executive power while ensuring enough power for the executive to be able to protect individual liberty is a particularly complicated balance. Garrison points out that the debate has been ongoing for many centuries, but the article ends on a hopeful note by pointing out that the presence of the debate indicates that America has not yet been overtaken by tyranny.

Lastly, Ilya Shapiro reviews Josh Blackman's book, *Unprecedented: The Constitutional Challenge to Obamacare,* in his book review titled *Fear and Loathing at One First Street.* Instead of a traditional book review, Shapiro tells the story of the years surrounding the passage of the Affordable Care Act and the subsequent Supreme Court case on the legislation, *NFIB v. Sebelius.* After the last few years of continuous media coverage on the Affordable Care Act, as well as the countless articles, books, seminars, and lectures on the subject, it may seem that there is nothing new to learn about this case. However, in this review, Shapiro gives unique insight into the formation and execution of the challenge to the legislation. This piece gives a new perspective on a much discussed case and controversy, and does so in an entertaining and light-hearted manner.

I hope this issue provides as much entertainment and intellectual stimulation for the readers as it has for me. It has been a privilege to work with these authors, and it has been an honor and a pleasure to work with the team of worthy and inspiring individuals that make up the *Texas Review of Law & Politics.*

Austin, Texas
May 2014

Kelsie Hanson
Editor in Chief

THE CORPORATE RIGHT TO FREE EXERCISE OF RELIGION: THE AFFORDABLE CARE ACT AND THE CONTRACEPTIVE COVERAGE MANDATE

BY ELISSA GRAVES*

* Litigation Counsel, Alliance Defending Freedom. B.A. 2009, University of North Texas; J.D. 2013, The University of Texas School of Law. I thank my husband, Kyle Graves, for his enduring support. I would also like to thank my colleagues at Alliance Defending Freedom, especially my fellow members of the Life Team. Any errors are my own. This Article is dedicated to my mother, Pamela Starkey, for her constant love and support.

I. INTRODUCTION

The Patient Protection and Affordable Care Act,[1] and the regulations and guidelines promulgated thereunder, require employers with fifty or more full-time employees[2] to provide coverage without cost sharing for contraceptive services,[3] as well as related education and counseling.[4] The regulations are widely referred to as the "contraceptive mandate" (the Mandate).[5] The regulations require that employers provide coverage for all Food and Drug Administration-approved contraceptives, including emergency contraception, surgical sterilization, hormonal birth control, intrauterine devices (IUDs), and barrier methods.[6] Many of these drugs have a mechanism of action that can destroy a fertilized egg after conception but prior to implantation.[7]

Corporations owned by religious individuals often object to this requirement due to their views against birth control, abortion, and surgical sterilization. Such corporations, as well as their religious owners, believe that the intentional destruction of life at any time following conception is morally wrong, and they are compelled by their religious convictions to abstain from facilitating such activities in any way. Corporations and their owners are alleging violations of both the Religious Freedom Restoration Act (RFRA),[8] which forbids the government from

1. Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of U.S.C.).

2. 26 U.S.C. § 4980H(c)(2)(A) (2012).

3. 45 C.F.R. § 147.130(a)(1)(iv) (2013).

4. *See Women's Preventive Service Guidelines*, HEALTH RES. AND SERVS. ADMIN., http://www.hrsa.gov/womensguidelines/ [http://perma.cc/J6T6-DYEY] (last visited May 24, 2014) [hereinafter *HRSA Guidelines*].

5. *See, e.g.*, Steve Kenny & Robert Pear, *Justice Blocks Contraception Mandate on Insurance in Suit by Nuns*, N.Y. TIMES, Dec. 31, 2013, http://www.nytimes.com/2014/01/01/us/politics/justice-sotomayor-blocks-contraception-mandate-in-health-law.html?_r=0 [http://perma.cc/JM44-MFNN].

6. *See* 45 C.F.R. § 147.130(a)(1)(iv) (2013) (pointing to "health plan coverage guidelines supported by the Health Resources and Services Administration"); *HRSA Guidelines*, *supra* note 4 (explaining that contraceptive methods include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity"); *Birth Control: Medicines to Help You*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm [http://perma.cc/3C3M-CJ8Q] (last visited May 24, 2014) [hereinafter *FDA Contraceptives*] (listing and describing emergency contraception, surgical sterilization, hormonal birth control, intrauterine devices, and barrier methods as approved contraceptives).

7. *FDA Contraceptives*, *supra* note 6. These drugs include the emergency contraceptive Plan B (the "morning-after pill") and its levergenestol counterparts: Ella (the "week-after pill"), and the copper IUD. *Id.*

8. 42 U.S.C. §§ 2000bb–2000bb-4 (2011).

substantially burdening any exercise of religion unless such regulation is narrowly tailored to support a compelling government interest,[9] and the Free Exercise Clause of the First Amendment, which proscribes laws that prohibit the free exercise of religion.[10]

A controversial threshold question arises in this context: do for-profit corporations have the ability to exercise religion? In order to proceed to the merits of RFRA and First Amendment claims, the claimant[11] must first have standing to assert the free exercise of religion. The resolution of this question—which will soon be decided by the United States Supreme Court in *Sebelius v. Hobby Lobby Stores, Inc.*[12] and *Conestoga Wood Specialties Corp. v. Sebelius*[13]—will determine whether the government has the ability to burden religious employers with practices that violate their strongly held religious beliefs by requiring them to provide contraceptive coverage without cost sharing. The Supreme Court should hold that the First Amendment and RFRA bars the government from requiring religious employers to violate their religious beliefs; to find otherwise would stand in stark contrast to our constitutional tradition of protecting religious liberties.

This article outlines the background of the Mandate in Section II and examines the religious objection to the Mandate in Section III. It discusses the divisive threshold issue of the free exercise rights of for-profit corporations and their religious owners in Section IV, and then applies RFRA and the First Amendment Free Exercise Clause to the Mandate in Section V. The article concludes with Section VI.

II. THE CONTRACEPTIVE COVERAGE REQUIREMENT

A. The Mandate

In 2010, Congress passed, and President Barack Obama signed into law, the Patient Protection and Affordable Care Act[14]

9. *Id.* § 2000bb-1(b).
10. U.S. CONST. amend. I.
11. Here, the cases involve both the corporations and their owners.
12. 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 82 U.S.L.W. 3139 (U.S. Nov. 26, 2013) (No. 13-354).
13. 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 82 U.S.L.W. 3139 (U.S. Nov. 26, 2013) (No. 13-356).
14. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of U.S.C.).

and the Health Care and Education Reconciliation Act of 2010,[15] collectively known as the Affordable Care Act (the ACA). The law states, in relevant part, that:

> [a] group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—
>
> . . . .
>
> (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration . . . .[16]

The regulations echo that non-grandfathered[17] group health plans are required to cover preventive services without cost sharing, as recommended by the Health Resources and Services Administration (HRSA).[18]

The Department of Health and Human Services (HHS) requested the Institute of Medicine to formulate a report recommending preventive services for women so that the HRSA could develop appropriate guidelines for implementing the preventive services mandate of the ACA.[19] The resulting report recommended coverage for the "full range" of contraceptive methods approved by the FDA—which include oral contraceptive pills, diaphragms, injections, emergency contraceptive drugs, IUDs, and sterilization procedures[20]—as well as related education and counseling.[21] In making the preventive services recommendations, the Institute observed that nearly half of all pregnancies in the United States were unintended, causing adverse health consequences for women and children, and that access to contraception would reduce the

15. Pub. L. No. 111-152, 124 Stat. 1029 (codified as amended in scattered sections of U.S.C.).

16. 42 U.S.C. § 300gg-13 (2011).

17. 45 C.F.R. § 147.140(a) (2013).

18. 45 C.F.R. § 147.130(a)(1)(iv) (2013); *HRSA Guidelines*, *supra* note 4. A woman may not be charged any kind of deductible, co-pay, or fee for all drugs, devices, education, and counseling required under the ACA. *Id.*

19. INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 1 (2011) [hereinafter IOM REPORT], *available at* http://www.iom.edu/Reports/2011/Clinical-Preventive-services-for-Women-Closing-the-Gaps.aspx [http://perma.cc/SU66-J5MJ].

20. *FDA Contraceptives*, *supra* note 6.

21. IOM REPORT, *supra* note 19, at 10.

medical costs borne by unintended pregnancy.[22] The Institute recommended coverage for such services without cost sharing, noting that women carry greater medical costs than men and implying that such a requirement would promote gender equality.[23]

In accordance with the IOM Report, the HRSA issued guidelines which recommended coverage for "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[24] Pursuant to the ACA and in accordance with the HRSA guidelines, the HHS promulgated regulations that required coverage without cost sharing of all recommended services.[25]

B. Exemptions

The Mandate contains a plethora of exemptions. The for-profit corporations challenging the Mandate, including Hobby Lobby Stores, Inc. (Hobby Lobby) and Conestoga Wood Specialties Corp. (Conestoga), do not qualify for any of these exemptions.[26] The exact number of Americans exempted from the Mandate is unclear, but the number is well in the millions.[27] The most significant exemption to the law is the provision regarding grandfathered health plans; such plans need not comply with the Mandate.[28] Grandfathered plans are those health plans that have not undergone certain changes.[29]

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22. *Id.* at 102–03, 107.

23. *Id.* at 18–20. The Institute supports its reasoning with several examples. *Id.* at 19. ("On average, women need to use more preventive care than men, owing to reproductive and gender-specific conditions, causing significant out-of-pocket expenditures for women. This creates a particular challenge to women, who typically earn less than men and who disproportionately have low incomes. Indeed, women are consistently more likely than men to report a wide range of cost-related barriers to receiving or delaying medical tests and treatments and to filling prescriptions for themselves and their families.") (internal citations omitted).

24. *See HRSA Guidelines*, *supra* note 4.

25. 45 C.F.R. § 147.130 (2013).

26. These companies do not qualify for the grandfathering exemption because their group insurance plans have changed since 2010.

27. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1124 (10th Cir. 2013) (en banc) ("Relying on information released by the White House and HHS, the plaintiffs estimate that at least 50 million people, and perhaps over a [sic] 100 million, are covered by exempt health plans."), *cert. granted*, 82 U.S.L.W. 3139 (U.S. Nov. 26, 2013) (No. 13-354); *id.* at 1143 ("[T]he contraceptive-coverage requirement presently does not apply to tens of millions of people.").

28. *See* 26 C.F.R. § 54.9815-1251T (2013); 29 C.F.R. § 2590.715-1251 (2013); 45 C.F.R. § 147.140 (2013).

29. *See, e.g.*, 45 C.F.R. § 147.140 (2013).

Grandfathering is a "right" that can be maintained perpetually, contains no sunset provision, and will apply indefinitely unless plans undergo changes specified in the appropriate regulations.[30] The grandfathering provisions of the ACA do not take into account any objection, religious or otherwise, to providing the covered drugs. The Mandate also does not apply to businesses with fewer than fifty employees—such businesses need not participate in employer-sponsored health plans under the ACA.[31]

The Mandate also contains a narrow exemption that applies to certain nonprofit "religious employers."[32] Following the issuance of the initial rule, the regulations defined "religious employer" narrowly for the purposes of the Mandate, requiring the showing of four criteria: (1) "[t]he inculcation of religious values is the purpose of the organization"; (2) "[t]he organization primarily employs persons who share the religious tenets of the organization"; (3) "[t]he organization serves primarily persons who share the religious tenets of the organization"; and (4) "[t]he organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended."[33] The fourth requirement refers to "churches, their integrated auxiliaries, and conventions or associations of churches" and to the "exclusively religious activities of any religious order."[34]

The narrow religious-employer exemption provoked hundreds of thousands of public comments.[35] On January 20, 2012, the HHS issued a press release acknowledging "the important concerns some have raised about religious liberty" and stating that religious objectors would be "provided an additional year . . . to comply with the new law."[36] On February 10, 2012, the HHS issued a "temporary enforcement safe harbor"

30. *See id.*
31. 26 U.S.C. § 4980H(a) (2012); *id.* § 4980H(c)(2)(A).
32. 45 C.F.R. § 147.130(a)(1)(iv)(A) (2013).
33. *Id.* § 147.130(a)(1)(iv)(B).
34. 26 U.S.C. § 6033(a)(3)(A)(i), (iii) (2012).
35. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012) ("The Departments received over 200,000 responses to the request for comments on the amended interim final regulations.").
36. Press Release, U.S. Dep't of Health & Human Servs., A Statement by U.S. Dep't of Health & Human Servs. Sec'y Kathleen Sebelius (Jan. 20, 2012), *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html [http://perma.cc/HTZ7-UWBA].

for non-exempt, nonprofit religious organizations that objected to the mandated coverage, advising that it would not enforce the Mandate for one additional year against such organizations—postponing enforcement until each organization's first plan year beginning on or after August 1, 2013.[37] In July 2013, the HHS issued a final rule extending the safe harbor through the end of 2013.[38] While the safe harbor is no longer applicable, it exemplifies the wide breadth of exemptions from the Mandate, undermining the government's argument that contraceptive coverage is necessary.

The final rule clarified the scope of the narrow religious-employer exemption, eliminating the first three of the four requirements.[39] The religious-employer exemption therefore remains limited to formal churches and their integrated auxiliaries and religious orders "organized and operate[d]" as nonprofit entities and "referred to in section 6033(a)(3)(A)(i) or (iii)" of the Internal Revenue Code.[40] The government admits that this change is not material, stating that the final religious-employer exemption "does not expand the universe of religious employers that qualify for the exemption beyond that which was intended in the 2012 final regulations, but only eliminates any perceived potential disincentive for religious employers to provide educational, charitable, and social services to their communities."[41]

The Mandate also contains a religious "accommodation" for nonprofit entities that object to the Mandate on the basis of religion but do not meet the preceding criteria.[42] This accommodation permits nonprofit entities to escape from directly providing contraceptives, but still requires an insurance provider, if the employer participates in a group health plan, or a third-party administrator, if the employer self-insures, to directly provide the mandated items.[43] The religious exemptions

37. Susan Bookman, *HHS Clarifies Temporary Safe Harbor from Contraceptive Coverage*, SOC'Y FOR HUMAN RES. MGMT., Sept. 4, 2012, http://www.shrm.org/hrdisciplines/benefits/articles/pages/hhs-contraceptives-safe-harbor.aspx [http://perma.cc/RDZ7-D79V].

38. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,889 (July 2, 2013).

39. *Id.* at 39,874.

40. *Id.*

41. *Id.*

42. *See* 45 C.F.R. § 147.131 (2013).

43. *See* Little Sisters of the Poor Home for the Aged v. Sebelius, No. 13-cv-2611-WJM-BNB, 2013 WL 6839900, at *3 (D. Colo. Dec. 27, 2013) (explaining the application of 45

from the direct requirements of the Mandate apply very narrowly.[44] For-profit corporations, however, cannot receive an exemption from the Mandate on religious grounds.[45]

Finally, the Mandate does not apply to members of a "recognized religious sect or division thereof" that conscientiously objects to acceptance of public or private insurance funds.[46] Together, these myriad exemptions make it so that millions of Americans are not provided contraceptive coverage under the ACA.[47] Nevertheless, the government continues to enforce the Mandate against many religious organizations that conscientiously object to providing such drugs and devices, but do not fit within the narrow confines of the religious-employer exemption.

C. Penalties for Noncompliance

Employers that violate this Mandate will be subjected to fines up to $100 per plan participant per day,[48] as well as possible government lawsuits under the Employee Retirement Income Security Act (ERISA).[49] If an employer chose to drop employee health insurance altogether, it would face fines of $2,000 per employee per year, minus the first thirty employees.[50] For some employers, the fines would be staggering. For example, Conestoga would incur a roughly $35 million penalty per year.[51] Hobby Lobby would incur an approximately $26 million penalty per year if it were to drop health insurance altogether, and it

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C.F.R. § 147.131).

44. Extended discussion of either of these religious exemptions is outside the scope of the article because they do not apply to for-profit corporations; all that needs to be known for the purposes of this article is that for-profit corporations, such as Hobby Lobby and Conestoga, are not entitled to the protections of these exemptions.

45. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1124 (10th Cir. 2013) (en banc) ("No exemption, proposed or otherwise, would extend to for-profit organizations like Hobby Lobby and Mardel. And the various government agencies responsible for implementing the exceptions to the contraceptive-coverage requirement have announced that no proposed exemption will extend to for-profit entities under any circumstances because of what the government considers an important distinction, discussed further below, between for-profit and non-profit status."), *cert. granted*, 82 U.S.L.W. 3139 (U.S. Nov. 26, 2013) (No. 13-354).

46. *See* 26 U.S.C. § 1402(g)(1) (2012); *id.* § 5000A(d)(2)(A)(i).

47. *See Hobby Lobby*, 723 F.3d at 1143 ("[T]he contraceptive-coverage requirement presently does not apply to tens of millions of people.").

48. 26 U.S.C. § 4980D(b)(1) (2012).

49. 29 U.S.C. § 1132 (2012).

50. 26 U.S.C. § 4980H(a), (c)(1), (c)(2)(D)(i) (2012).

51. *Obamacare vs. The Hahn Family*, ALLIANCE DEFENDING FREEDOM, http://alliancedefendingfreedom.org/page/obamacare/conestoga [http://perma.cc/ZF8J-M4GB] (last visited May 24, 2014).

would incur an astonishing $1.3 million penalty *per day* if it offered health insurance but omitted the required drugs and devices.[52]

III. THE RELIGIOUS OBJECTION

The objection to these drugs and related education counseling is rooted in one of the seminal commands of the Christian faith: "Thou shalt not kill."[53] Christians, and others of faith, maintain that life begins at conception. Conception begins prior to the attachment of a fertilized egg to the uterine wall—therein lies the volatile issue. Several of the drugs required under the Mandate work to prevent a fertilized egg from attaching to the uterine wall, thereby destroying an egg following conception.[54] This controversy is not new. Plan B and related emergency contraceptives have been at the center of battle since the original Plan B was approved for prescription in 1999,[55] and until just recently Plan B One-Step could not be obtained without a prescription for teenage girls under the age of seventeen.[56] Plan B was also required to be stocked behind the counter until a recent decision by the FDA made the drug available over the counter.[57]

The objection stretches further than the Christian faith: science indicates that a fertilized egg is, in essence, human in nature,[58] and no one can argue that the law should forbid the destruction of human beings by other human beings. The fetus, at any stage of pregnancy, is a product of human DNA and is therefore undeniably human. Because it is human in nature, a

52. Verified Complaint at ¶ 144, Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d. 1278 (W.D. Okla. 2012) (No. CIV-12-1000-HE).

53. *Exodus* 20:13 (King James).

54. *See, e.g.*, *Plan B One-Step*, WEBMD, http://women.webmd.com/guide/plan-b [http://perma.cc/E6XP-9YC6] (last updated Aug. 5, 2012) ("It is also possible that this type of emergency birth control prevents implantation of a fertilized egg in the uterus by altering its lining.").

55. *See* Pam Belluck, *Judge Strikes Down Age Limits of Morning-After Pill*, N.Y. TIMES, Apr. 5, 2013, http://www.nytimes.com/2013/04/06/health/judge-orders-fda-to-make-morning-after-pill-available-over-the-counter-for-all-ages.html [http://perma.cc/76CF-WSCG].

56. *Id.*; *see also* Press Release, U.S. Food & Drug Admin., FDA Approves Plan B One-Step Emergency Contraceptive for Use Without a Prescription for All Women of Child-Bearing Potential (June 20, 2013), *available at* http://www.fda.gov/newsevents/newsroom/pressannouncements/ucm358082.htm [http://perma.cc/HR6U-J75Z].

57. *See* Press Release, U.S. Food & Drug Admin., *supra* note 56.

58. *See* J.K. Findlay et al., *Human Embryo: A Biological Definition*, 22 HUM. REPROD. 905, 905 (2007) ("Definitions of a *human* embryo normally include those entities created by the fertilization of a *human* oocyte by a *human* sperm.") (emphasis added).

child in the womb, if left to live, will grow to be a fully developed human baby. From the moment of conception, the human nature of a fertilized egg is apparent in its DNA, and the fertilized egg will eventually result in a human being.[59] It is in the interest of both humanity and the government to allow what is human in nature to realize life as a living person. The objection to abortion and drugs and devices that destroy a fertilized egg therefore stretches much further than the confines of religion.

Reproductive procedures, most prevalently abortion and contraception, have garnered much controversy among those of faith. Many Christian organizations object to the requirement to provide coverage for contraceptives, ranging from objections to only a limited class of contraceptives[60] to contraceptives in their entirety.[61] The most prevalent objection against the Mandate is to a small class of contraceptives that operate, at least in part, by destroying a fertilized egg. Conscientious objectors maintain that such drugs are abortifacient because they can kill a very young life who, if otherwise left alone, would grow into a fully developed baby.[62] Such drugs include both the copper and

59. *See* Matt Slick, *A Logical Argument Against Abortion*, CHRISTIAN APOLOGETICS & RESEARCH MINISTRY, http://carm.org/logical-argument-against-abortion [http://perma.cc/36NV-EMW6] (last visited May 24, 2014).

60. *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1123 (10th Cir. 2013) (en banc) (objecting only to four of the twenty FDA-approved methods, comprising the progestin and copper IUD and the emergency contraceptives Ella and Plan B), *cert. granted*, 82 U.S.L.W. 3139 (U.S. Nov. 26, 2013) (No. 13-354).

61. *See, e.g.*, Autocam Corp. v. Sebelius, 730 F.3d 618, 621 (6th Cir. 2013) (objecting to the mandated drugs, devices, and procedures in their entirety), *petition for cert. filed*, 82 U.S.L.W. 3245 (U.S. Oct. 15, 2013) (No. 13-482).

62. An abortifacient drug is one that terminates an existing pregnancy. The Government and supporters of the Mandate frequently assert that pregnancy does not begin until implantation and therefore these drugs cannot be considered abortifacient. *See, e.g.*, 45 C.F.R. § 46.202(f) (2013) ("Pregnancy encompasses the period of time from implantation until delivery."); JAMES TRUSSELL ET AL., EMERGENCY CONTRACEPTION: A LAST CHANCE TO PREVENT UNINTENDED PREGNANCY 7 (2014), *available at* http://ec.princeton.edu/questions/ec-review.pdf [http://perma.cc/DNA6-5D6Y] ("[Emergency Contraceptives] do no interrupt an established pregnancy, defined by medical authorities such as the United States Food and Drug Administration/National Institutes of Health and the American College of Obstetricians and Gynecologists as beginning with implantation. Therefore, [emergency contraceptives] are not abortifacient.") (internal citations omitted).

However, medical science disputes the exact definition of the term "pregnancy." *See, e.g.*, DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1509 (32d ed. 2012) ("[P]regnancy" is "the condition of having a developing embryo or fetus in the body, after union of an oocyte and spermatozoon."); MOSBY'S MEDICAL DICTIONARY 1500–01 (8th ed. 2009) ("[P]regnancy" is "the gestational process, comprising the growth and development within a woman of a new individual from conception through the embryonic and fetal periods to birth."); *id.* at 430 ("[C]onception" is "1. the beginning of pregnancy, usually taken to be the instant that a spermatozoon enters an ovum and forms a viable zygote. 2. the act or process of fertilization.").

progestin intrauterine devices (IUDs), Plan B (the "morning-after pill"), and Ella (the "week-after pill"). All of these drugs can operate to destroy a fertilized egg by prohibiting the egg to attach to the uterine wall after conception has taken place.[63] The destruction of a fertilized egg is viewed by many as the destruction of a human life, and is therefore tantamount to an enumerated sin[64] in the Christian faith.

The exact mechanism of action of Plan B and its generic equivalents has lately been hotly disputed, and medical science does not seem to agree as to whether or not Plan B destroys a fertilized egg.[65] However, the mere possibility of destroying human life is objectionable. Many doctors believe, and the Plan B label continues to state, that there is a possibility that Plan B will interfere with implantation, thereby destroying a fertilized egg.[66] Ella is a newcomer to the market[67] but raises even greater concerns among people of faith and others who object to the destruction of a fertilized egg. Ella has a chemical composition much like that of RU-486,[68] also known as the abortion pill, which causes a medical abortion in women in the earlier stages of pregnancy.[69] Ella is extremely effective and can be used up to five days after intercourse.[70] A combined study showed that,

63. *See, e.g.*, *Intrauterine Device (IUD) For Birth Control*, WEBMD, http://www.webmd.com/sex/birth-control/intrauterine-device-iud-for-birth-control [http://perma.cc/8QPD-BHKS] (last updated May 7, 2013) ("Both types of IUD prevent fertilization of the egg by damaging or killing sperm. The IUD also affects the uterine lining (where a fertilized egg would implant and grow)."); *Plan-B One-Step*, *supra* note 54 ("It is also possible that this type of emergency birth control prevents implantation of a fertilized egg in the uterus by altering its lining.").

64. *Exodus* 20:13.

65. *See, e.g.*, TRUSSELL, *supra* note 62, at 6 (noting that, in two studies on the progestin levonorgestrel (Plan B), no effect on the endometrium was found, but that another study found a change in the endometrium—which would prevent a fertilized egg from attaching).

66. PLAN B (LEVONORGESTREL) TABLETS, 0.75 MG 1 (2006), *available at* http://ec.princeton.edu/pills/PlanBLabeling.pdf [http://perma.cc/C249-DFYC] ("[Plan B] may inhibit implantation (by altering the endometrium).").

67. Press Release, U.S. Food & Drug Admin., FDA Approves Ella™ Tablets For Prescription Emergency Contraception (Aug. 13, 2010), *available at* http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm222428.htm [http://perma.cc/NJA9-TWR2].

68. *See* TRUSSELL, *supra* note 62, at 2 (explaining that the drugs mifepristone (the generic equivalent of RU-486) and ulipristal acetate (found in Ella) are both antiprogestin drugs).

69. *See Abortion Pill: RU486, Medical Abortion*, AFFILIATED MED. SERVS., http://www.affiliatedmedicalservices.com/en/abortion-pill/general-information [http://perma.cc/DYL2-FDTK] (last visited May 24, 2014).

70. TRUSSELL, *supra* note 62, at 4 ("The antiprogestin ulipristal acetate (30 mg in a single dose) is the most effective [emergency contraception] option in the United States . . . .").

compared to emergency contraceptives containing levonorgestrel (such as Plan B), emergency contraceptives containing ulipristal acetate (such as Ella) demonstrated a 42% lower pregnancy rate when taken within 72 hours, and a 65% lower pregnancy rate if taken in the first 24 hours.[71] Obstetricians and gynecologists posit that, in order for this drug to be as effective as it is, it must work, at least in part, by preventing implantation of an already-fertilized egg.[72]

Both intrauterine devices act, in some instances, to destroy a fertilized egg.[73] Indeed, the copper IUD, which can also be used as emergency contraception,[74] is designed to destroy a fertilized egg.[75] The progestin IUD thins the lining of the uterus,[76] which can prevent fertilized eggs from attaching.

Numerous Christian organizations have filed suit challenging the Mandate because it conflicts with their beliefs against the use of contraceptives. Hobby Lobby, the operator of a nationwide chain of craft stores and the Christian bookstore Mardel, Inc. (Mardel), filed suit against HHS Secretary Kathleen Sebelius to prevent enforcement of the Mandate, claiming that it would violate the religious beliefs of Hobby Lobby's corporate owners.[77] Hobby Lobby's complaint illustrates its owners' faith and objections: "[t]he Green family has operated Hobby Lobby according to their Christian faith. Christian beliefs and values inform their decisions and form the inspiration for their company."[78] Additionally, the family members use the profits from their Hobby Lobby and Mardel stores to "support Christian

71. *Id.*

72. *See, e.g.*, Donna Harrison, *New York Times Misleads on Abortion Properties of Ella, Plan B*, LIFENEWS.COM (June 9, 2012, 11:34 AM), http://www.lifenews.com/2012/06/09/new-york-times-misleads-on-abortion-properties-of-ella-plan-b/ [http://perma.cc/GVP7-82WZ] ("Ella blocks the action of progesterone at the level of the ovary, and blocks the action of progesterone at the endometrium, both of which interfere with implantation.").

73. *Intrauterine Device (IUD) For Birth Control*, *supra* note 63.

74. TRUSSELL, *supra* note 62, at 2. ("[C]opper IUDs can be inserted up to 5 days after ovulation to prevent pregnancy.").

75. *See ParaGard (Copper IUD)*, MAYO CLINIC, http://www.mayoclinic.org/tests-procedures/paragard/basics/definition/PRC-20013048 [http://perma.cc/PP9A-MTKB] (last updated Jan. 21, 2012) ("If fertilization occurs, ParaGard keeps the fertilized egg from implanting in the lining of the uterus."); *see also* TRUSSELL, *supra* note 62, at 7 ("Its very high effectiveness implies that emergency insertion of a copper IUD must be able to prevent pregnancy after fertilization.").

76. *Mirena (Hormonal IUD)*, MAYO CLINIC, http://www.mayoclinic.org/tests-procedures/mirena/basics/definition/prc-20012867 [http://perma.cc/84JH-3NN4] (last updated Jan. 21, 2012).

77. Verified Complaint, *supra* note 52, at ¶ 1.

78. *Id.* at ¶ 39.

charities and ministries around the world."[79] The Hobby Lobby website states that the company is committed to "[h]onoring the Lord in all we do by operating the company in a manner consistent with biblical principles."[80] Hobby Lobby's commitment to its religious beliefs is apparent in its stocking of religious merchandise, the Christian music played in-store, and, most significantly, its decision to close the business on Sundays.[81] The Hobby Lobby owners object only to providing IUDs (copper and progestin) or emergency contraception (Plan B and Ella); the owners do not object to the remaining sixteen approved methods.[82]

Conestoga is a cabinet-making company based in Pennsylvania.[83] Norman Hahn and his family members, the owners of Conestoga, are devout Mennonites.[84] As the individual plaintiffs in *Conestoga*, the Hahns object to emergency contraceptives and sterilization.[85] The Hahns are a perennial example of a family that looks to God for all things. It is difficult to see the Hahns and not see that their faith permeates every facet of their lifestyle, including their family-owned and -operated business.[86]

IV. THE CORPORATE RIGHT TO FREE EXERCISE OF RELIGION

Constitutional law, statutory law, and other court precedent all stand in support of a corporate right to free exercise of religion. Furthermore, even if the Court finds that corporations cannot exercise religion, there is strong precedent that corporations still have standing to assert the free exercise right of their owners. In lawsuits challenging the Mandate, the government has frequently argued, as a threshold issue, that for-profit entities are unable to exercise religion and therefore cannot assert rights

79. *Id.*

80. *Our Company*, HOBBY LOBBY, http://www.hobbylobby.com/our_company [http://perma.cc/A5GQ-D3ZR] (last visited May 24, 2014).

81. Verified Complaint, *supra* note 52, at ¶¶ 43, 45.

82. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1125 (10th Cir. 2013) (en banc), *cert. granted*, 82 U.S.L.W. 3139 (U.S. Nov. 26, 2013) (No. 13-354).

83. Conestoga Wood Specialties Corp. v. Sebelius 724 F.3d 377, 381 (3d Cir. 2013), *cert. granted*, 82 U.S.L.W. 3139 (U.S. Nov. 26, 2013) (No. 13-356).

84. *Id.*

85. *Id.* at 389 (Jordan, J., dissenting).

86. *See* Kathryn Jean Lopez, *Do Mennonites Who Make Cabinets Have Religious Liberty in America?*, NAT'L REV. ONLINE (Dec. 9, 2013, 2:57 PM), http://www.nationalreview.com/corner/365840/do-mennonites-who-make-cabinets-have-religious-liberty-america-kathryn-jean-lopez [http://perma.cc/M3LC-5Q84].

under the First Amendment Free Exercise Clause. The government has often been able to convince lower courts to dispose of lawsuits against the Mandate on this ground, with several courts refusing to reach the merits of the corporations' free exercise claim. This argument, however, is inconsistent with current constitutional and corporate law. Based on constitutional law, statutory law, and other court precedent, the Supreme Court should find that a corporate right to free exercise does exist, enabling it to address the claims against the Mandate on the merits.

A. Constitutional Rights of Corporations

The Constitution explicitly protects the free exercise right of individuals. Statutory law overwhelmingly allows corporations to form for all lawful purposes[87] and grants corporations the same rights as those individuals.[88] Furthermore, the Supreme Court

87. *See, e.g.*, ARK. CODE § 4-27-301(a) ("Every corporation incorporated under this chapter has the purpose of engaging in any lawful business unless a more limited purpose is specifically set forth in the articles of incorporation."); CAL. CORP. CODE § 202(b)(1)(A) ("The purpose of the corporation is to engage in any lawful act or activity . . . ."); COLO. REV. STAT. § 7-103-101 (authorizing corporations to "engage[e] in any lawful business"); DEL. CODE tit. 8, § 122 (stating that corporations have the power to "[t]ransact any lawful business"); FLA. STAT. § 607.0301 ("Corporations may be organized under this act for any lawful purpose . . . ."); GA. CODE § 14-2-301 ("Every corporation incorporated under this chapter has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation."); KY. REV. STAT. § 271B.3-010 ("Every corporation incorporated under this chapter has the purpose of engaging in any lawful business . . . ."); MISS. CODE. § 79-4-3.01(a) ("Every corporation . . . has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation."); MONT. CODE ANN. § 35-1-114(1) ("Each corporation incorporated under this chapter has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation."); N.C. GEN. STAT. § 55-3-01(a) ("Every corporation incorporated under this Chapter has the purpose of engaging in any lawful business unless a more limited purpose is set forth in its articles of incorporation."); R.I. GEN. LAWS § 7-1.2-301 ("Corporations may be organized under this chapter for any lawful purpose or purposes . . . ."); TENN. CODE § 48-13-101 ("Every corporation . . . has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the charter."); WASH. REV. CODE § 23B.03.010(1) ("Every corporation incorporated under this title has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation.").

88. *See, e.g.*, ALA. CODE § 10-2B-3.02 ("Unless its articles of incorporation provide otherwise, every corporation . . . has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs . . . ."): ALASKA STAT. § 10.06.010 ("[A] corporation has all the powers of a natural person in carrying out its business activities . . . ."); ARIZ. REV. STAT. § 10-302 ("Unless its articles of incorporation provide otherwise, every corporation . . . has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs . . . ."); GA. CODE § 14-2-302 ("[E]very corporation has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs . . . ."); KY. REV. STAT. § 271B.3-020 ("[E]very corporation . . . shall have the same powers as an individual to do all

has frequently extended constitutional protections to both non-profit and for-profit corporations. These facts compel the conclusion that the Constitution must also protect the free exercise right of corporations.

It is an undisputed fact that the government cannot force an American citizen to violate his or her faith. The government cannot bar a Muslim inmate from engaging in religious activities[89] or having a beard,[90] and it cannot require a Jehovah's Witness to recite the pledge of allegiance.[91] Nor can the government "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation."[92] Importantly, the Supreme Court has also recognized the ability of individual business owners to challenge laws on religious grounds. For example, in *Braunfeld v. Brown*, the Court allowed Jewish merchants in Philadelphia to challenge Pennsylvania's Sunday-closing laws because the laws allegedly infringed on their free exercise of religion.[93]

While it is undeniable that the government cannot force Christians to violate their strongly held beliefs by forcing them to hand out drugs that destroy fertilized eggs, the same can also be

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things necessary or convenient to carry out its business and affairs . . . ."); MISS. CODE. § 79-4-3.02 ("[E]very corporation . . . has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs . . . ."); MONT. CODE ANN. § 35-1-115 ("Unless its articles of incorporation provide otherwise, each corporation . . . has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs . . . ."); N.C. GEN. STAT. § 55-3-02 ("Unless its articles of incorporation or this Chapter provide otherwise, every corporation . . . has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs . . . ."); OHIO REV. CODE ANN. § 1701.03 ("A corporation may be formed under this chapter for any purpose or combination of purposes for which individuals lawfully may associate themselves . . . ."); S.C. CODE § 33-3-102 ("Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs . . . ."); TEX. BUS. ORGS. § 2.101 ("[A] domestic entity has the same powers as an individual to take action necessary or convenient to carry out its business and affairs."); VA. CODE § 13.1-627 ("Unless its articles of incorporation provide otherwise, every corporation . . . has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs . . . .").

89. Lovelace v. Lee, 472 F.3d 174, 204 (4th Cir. 2006) (reversing summary judgment against the plaintiff, a Muslim prisoner).

90. Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366–67 (3d Cir. 1999); Couch v. Jabe, 679 F.3d 197, 204 (4th Cir. 2012).

91. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

92. Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

93. 366 U.S. 599, 601 (1961).

said for corporations that are owned and controlled by Christians. Overwhelmingly, corporate law, which is governed by statute in the individual states, allows corporations to form for any lawful purpose,[94] and grants for-profit corporations the same rights as individuals.[95] Corporations have long been permitted to make charitable donations,[96] create scholarships for university students,[97] create environmental awareness programs,[98] and even act against the will of their shareholders.[99] Furthermore, the Supreme Court has recognized that since 1871 "it [has been] well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis."[100] Corporate law permits corporate entities to function and be protected as individuals as a matter of law; the issue at hand is no different.

Moreover, there is strong precedent upholding the constitutional rights of corporations. The Supreme Court has recognized the constitutional free exercise right of numerous non-profit corporations, such as the Church of Jesus Christ of Latter-Day Saints,[101] Hosanna-Tabor Evangelical Lutheran Church and School,[102] O Centro Espirita Beneficiente Uniao do

94. *See, e.g.*, COLO. REV. STAT. § 7-103-101 (2013); FLA. STAT. § 607.0301 (2013); IND. CODE § 23-1-22-1 (2013); MISS. CODE ANN. § 79-4-3.01 (2013); MONT. CODE ANN. § 35-1-114 (2013); OHIO REV. CODE ANN. § 1701.03 (LexisNexis 2013); S.C. CODE ANN. § 33-3-101 (2013); TENN. CODE ANN. § 48-13-101 (2013); TEX. BUS. ORGS. CODE ANN. § 2.001 (2013); UTAH CODE ANN. § 16-10a-301 (LexisNexis 2013); VA. CODE ANN. § 13.1-626 (2013); WASH. REV. CODE § 23B.03.010 (2013).

95. *See, e.g.*, ALA. CODE § 10A-2-3.02 (2013); KY. REV. STAT. ANN. § 271B.3-020 (West 2013); N.C. GEN. STAT. § 55-3-02 (2013).

96. 26 U.S.C § 170 (2012).

97. *See, e.g., Program Details*, DR. PEPPER TUITION GIVEAWAY, http://www.drpeppertuition.com/program-details [http://perma.cc/5983-JZNK] (last visited May 24, 2014).

98. *See, e.g., Sustainability and Our Future*, WHOLE FOODS MKT., http://www.wholefoodsmarket.com/mission-values/core-values/sustainability-and-our-future [http://perma.cc/K9CA-6DXT] (last visited May 24, 2014).

99. Jena McGregor, *Starbucks CEO Howards Schultz's Grande Support for Gay Marriage*, WASH. POST, March 25, 2013, http://www.washingtonpost.com/business/on-leadership/starbucks-ceo-howard-schultzs-grande-support-for-gay-marriage/2013/03/25/3400fa80-956d-11e2-bc8a-934ce979aa74_story.html [http://perma.cc/9J2M-6XN3].

100. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 687 (1978).

101. Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338–40 (1987) (reversing summary judgment against the church-run corporation which was discriminating in employment practices on the basis of religion).

102. EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 772 (6th Cir. 2010) (involving an "ecclesiastical corporation"), *rev'd*, 132 S. Ct. 694 (2012) (reversing summary judgment ruling against a religious-based school which was discriminating in employment practices involving ministerial positions on the basis of religion).

Vegetal,[103] and the Church of the Lukumi Babalu Aye.[104] Furthermore, in the landmark case *Citizens United v. Federal Election Commission*, the Supreme Court recognized that corporations are able to exercise the right of free speech, asserting that "the Government may not suppress political speech on the basis of the speaker's corporate identity."[105] Additionally, the constitutional right of freedom of the press has long protected for-profit corporations that sell newspapers.[106] Finally, since *Roe v. Wade*[107] was decided in 1973, the right to bring constitutional challenges to abortion laws has been interpreted as belonging as much to doctors and their for-profit medical clinics as it does to women.[108]

If constitutional protections apply to the above corporations, there is no reason that constitutional protections should not also apply to corporations such as Hobby Lobby and Conestoga. We cannot pick and choose what First Amendment rights corporations are entitled to enjoy. A corporation, in employing the corporate right of free speech, does not actually speak for itself, but instead speaks for its owners. We protect the free speech right of the corporation in order to protect the free speech right of its owners. The same argument can be made for the corporate right of free exercise. The corporation, through its actions, does not exercise the religious beliefs of itself, but instead exercises the religious beliefs of its owners. The corporation's free exercise right must be protected in order to protect the free exercise right of its owners. To require a corporation to engage in activities that are inconsistent with the religious beliefs of its corporate owners would be to require the

103. O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973, 973 (10th Cir. 2004) (en banc) (affirming a favorable holding on an RFRA claim brought by "a New Mexico corporation on its own behalf"), *aff'd sub nom.* Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal, 546 U.S. 418 (2006).

104. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) (overturning a law forbidding the ritual slaughter of animals).

105. 558 U.S. 310, 365 (2010).

106. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 264–65 (1964).

107. 410 U.S. 113 (1973).

108. Most recently, in a district court decision striking down a requirement that abortion doctors obtain admitting privileges in the state of Texas, Judge Lee Yeakel, in addressing a standing question on this very issue of corporate constitutional rights, asserted: "[t]hat abortion providers may raise constitutional challenges to state statutes that seek to regulate abortions is now so well established in our jurisprudence it is axiomatic." Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 951 F. Supp. 2d 891, 897 (W.D. Tex. 2013), *rev'd on other grounds*, No. 13-51008, 2014 WL 1257965 (5th Cir. Mar. 27, 2014).

corporate owners to violate their religious beliefs. To say that one can exercise "some" select First Amendment rights while simultaneously being incapable of exercising other First Amendment rights goes against all constitutional tradition.

B. The Religious Freedom Restoration Act

In addition to the Constitution, corporate entities are also protected by RFRA, which statutorily codifies the Free Exercise Clause embodied in the First Amendment. RFRA's framework subjects any substantial burdening of a person's free exercise of religion to strict scrutiny.[109] Although RFRA does not define the term "person," the Dictionary Act in the United States Code defines "person" as including "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[110] Additionally, the Tenth Circuit has specifically held that for-profit corporations are protected by RFRA.[111] In *Hobby Lobby*, the court asserted that "the plain language of the text [of RFRA] encompasses 'corporations.'"[112] Moreover, the court pointed out that "the Supreme Court has affirmed RFRA rights of corporate claimants, notwithstanding the claimants' decision to use the corporate form."[113]

C. Standing

If for-profit corporations do have the right to the free exercise of religion, they will also necessarily have standing to assert it. However, even if it is found that for-profit corporations do not have the right to free exercise, there is substantial precedent supporting for-profit corporations' standing to assert the free exercise rights of their owners. In addition to the Tenth Circuit—which held that Hobby Lobby had standing to assert its claim on behalf of itself[114]—the Ninth Circuit and the Second Circuit have allowed for-profit corporations to assert the free

109. 42 U.S.C. § 2000bb-1 (2011).

110. 1 U.S.C. § 1 (2012).

111. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1129–30 (10th Cir. 2013) (en banc), *cert. granted*, 82 U.S.L.W. 3139 (U.S. Nov. 26, 2013) (No. 13-354).

112. *Id.*

113. *Id.* (citing O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973, 973 (10th Cir. 2004) (en banc) (affirming a favorable holding on an RFRA claim brought by "a New Mexico corporation on its own behalf"), *aff'd sub nom.* Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal, 546 U.S. 418 (2006)).

114. *Id.* at 1126.

exercise right of their owners.

The Ninth Circuit has permitted multiple for-profit corporations to assert the free exercise rights of their owners.[115] In *EEOC v. Townley Engineering & Manufacturing Co.*, the company policy of a closely held manufacturer of mining equipment required employees to attend weekly devotional services.[116] The corporation argued that the application of Title VII of the Civil Rights Act to an employment dispute related to the devotional services violated its rights under the Free Exercise Clause of the First Amendment.[117] Although the court addressed and rejected the free exercise claim on the merits,[118] it treated the corporation as "the instrument through and by which [the owners] express their religious beliefs."[119] The court held that the corporation "present[ed] no rights of its own different from or greater than its owners' rights," and therefore determined "the rights at issue [were] those of [the owners]."[120] The Ninth Circuit reiterated this "pass-through" theory of corporate rights of free exercise in *Stormans, Inc. v. Selecky*, where a Christian family-owned pharmacy challenged on free exercise grounds a state requirement to stock Plan B emergency contraception.[121] The court held that the pharmacy "ha[d] standing to assert the free exercise right of its owners."[122]

The Second Circuit has similarly permitted a for-profit corporation and its owners to assert free exercise rights. In *Commack Self-Service Kosher Meats, Inc. v. Hooker*, a kosher deli brought an action asserting that the government's regulation of kosher foods violated the corporation's and its owners' rights of free exercise.[123] Although the plaintiffs did not prevail on their claim, the court endorsed the principle that "'the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.'"[124] This

115. *See* EEOC. v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 619–20 (9th Cir. 1988).
116. *Id.* at 612.
117. *Id.* at 619.
118. *Id.* at 619–21.
119. *Id.* at 619.
120. *Id.* at 620.
121. 586 F.3d 1109, 1113 (9th Cir. 2009).
122. *Id.* at 1120.
123. 680 F.3d 194, 200–01 (2d Cir. 2012).
124. *Id.* at 210 (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993)).

reasoning compels the conclusion that the protections of the Free Exercise Clause must pertain to the decision of for-profit corporations' owners to refuse to provide contraceptives for religious reasons, and that those corporations therefore must have standing to assert free exercise rights on behalf of their owners, if not also themselves.

D. The Mandate and Corporate Free Exercise

The threshold issue of a corporate free exercise right has been brought to the forefront in the cases challenging the Mandate. The circuit courts are divided in their opinions and their reasoning on the issue. Nevertheless, the history and precedent explained above, combined with modern corporate practices and the closely held structure of the corporations involved in the Mandate cases, give strong support to the conclusion that these corporations can assert free exercise rights. To find otherwise would have troubling implications for the constitutional rights of individuals.

1. Circuit Split

In the cases challenging the Mandate, a controversial issue has been whether corporations can assert rights of free exercise under the First Amendment and the Religious Freedom Restoration Act. The status of the law is in flux until final resolution by the Supreme Court, with circuit courts disagreeing about this threshold issue of standing.

The Tenth and Seventh Circuits have held that corporations can assert free exercise rights. In *Hobby Lobby*, the Tenth Circuit asserted: "individuals may incorporate for religious purposes and keep their Free Exercise rights, and unincorporated individuals may pursue profit while keeping their Free Exercise rights."[125] The court noted that while the government takes no issue with this broad proposition, "[t]he problem for the government . . . is when individuals incorporate *and* fail to satisfy Internal Revenue Code § 501(c)(3). At that point, Free Exercise rights somehow disappear."[126] The court insisted that "the Free Exercise Clause is *not* a 'purely personal' guarantee[] . . . unavailable to

125. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1134 (10th Cir. 2013) (en banc), *cert. granted*, 82 U.S.L.W. 3139 (U.S. Nov. 26, 2013) (No. 13-354).

126. *Id.*

corporations."[127] Furthermore, in *Korte v. Sebelius*, the Seventh Circuit stated: "[t]here is nothing inherently incompatible between religious exercise and profit-seeking."[128] Rather, "a faith-based, for-profit corporation can claim free-exercise protection to the extent that an aspect of its conduct is religiously motivated."[129]

In contrast, in *Conestoga*, the Third Circuit held as a threshold matter that "for-profit, secular corporations cannot engage in religious exercise" protected by the First Amendment or RFRA.[130] The *Conestoga* court noted its divergence from and expressly disagreed with the en banc Tenth Circuit.[131]

The cases challenging the Mandate are in stark conflict. Final resolution of these issues is forthcoming. However, our constitutional tradition begs the conclusion that corporations are capable of exercising religion. The rights of these corporations must be vindicated. Failure to do so could have dire consequences for First Amendment rights and the rights of conscience.

2. Modern Corporate Practices

Corporations frequently assert beliefs on behalf of themselves in other contexts. Take, for example, Starbucks, a publicly traded for-profit corporation, which frequently campaigns for same-sex equality, promoting cases and initiatives that support that cause.[132] Not all Starbucks employees, customers, or shareholders may agree with the views of the corporation, but in our corporate world it is an accepted fact that corporations can assert their viewpoints on religion, politics, environmental issues, and civil rights. Numerous other corporations act in the same manner. Corporations regularly donate to environmental programs[133] and fund scholarships for universities.[134]

127. *Id.* at 1133 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 778 n.14 (1978)).

128. 735 F.3d 654, 681 (7th Cir. 2013).

129. *Id.* at 679.

130. Conestoga Wood Specialties Corp. v. Sebelius, 724 F.3d 377, 381 (3d Cir. 2013), *cert. granted*, 82 U.S.L.W. 3139 (U.S. Nov. 26, 2013) (No. 13-356).

131. *Id.* at 384 n.7.

132. *See, e.g.*, Brief of 278 Employers & Organizations Representing Employers as Amici Curiae in Support of Respondent Edith Schlain Windsor (Merits Brief) at 7, U.S. v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307) (opposing the Defense of Marriage Act); McGregor, *supra* note 99 (defending the corporation's support of gay marriage).

133. *See, e.g.*, *Environmental Initiatives at PGE*, PORTLAND GEN. ELECTRIC, http://portlandgeneral.com/community_environment/initiatives/default.aspx

Shareholders may not always agree with these beliefs, but the corporations are permitted to assert their beliefs in these secular ideas without serious opposition from the government or the public. The modern era of corporate law establishes that corporations have the ability to function as individuals in asserting their beliefs in secular as well as religious causes.

Supporters of the Mandate argue that corporations do not have "feelings,"[135] cannot exercise religion,[136] and therefore cannot assert the free exercise right of their owners.[137] But such an argument is antithetical to our constitutional jurisprudence, especially in the realm of reproductive rights.[138] Abortion rights are rights that can be asserted by not only women, but also their doctors and their doctors' medical practices—which are frequently for-profit corporations.[139] Abortionists and their corporations have successfully argued that they have standing to assert abortion rights.[140] But the articles of incorporation do not themselves ingest RU-486, the medical abortion pill,[141] nor do the bylaws decide if the corporation will carry a pregnancy to term. Although these medical clinics—*for-profit corporations*—cannot engage in these actions, it is an undisputed fact that they can assert abortion rights. The same principle can be applied to for-profit corporations asserting the constitutional right of free

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[http://perma.cc/3ZSM-HB6B] (last visited May 24, 2014).

134. *See, e.g.*, *Program Details*, *supra* note 97; *Google for Education*, GOOGLE, http://www.google.com/edu/students/scholarships.html [http://perma.cc/BZ74-6EPV] (last visited May 24, 2014).

135. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 466 (2010) (Stevens, J., concurring in part and dissenting in part) ("It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires.").

136. Conestoga Wood Specialties Corp. v. Sebelius, 724 F.3d 377, 381 (3d Cir. 2013), *cert. granted*, 82 U.S.L.W. 3139 (U.S. Nov. 26, 2013) (No. 13-356).

137. *Id.* at 388.

138. Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 951 F. Supp. 2d 891, 897 (W.D. Tex. 2013) (asserting "[t]hat abortion providers may raise constitutional challenges to state statutes that seek to regulate abortions is now so well established in our jurisprudence it is axiomatic"), *rev'd on other grounds*, No. 13-51008, 2014 WL 1257965 (5th Cir. Mar. 27, 2014).

139. *See, e.g.*, Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 734 F.3d 406, 406 (5th Cir. 2013) (listing West Side Clinic, Inc. as a plaintiff), *application to vacate stay denied*, 134 S. Ct. 506 (2013). In *Planned Parenthood*, abortion doctors and abortion companies—including West Side Clinic—brought suit seeking a permanent injunction against the enforcement of the Texas abortion law, on behalf of their patients *and themselves*. *See id.* at 409. West Side Clinic is a for-profit corporation. *Wysk Company Profile for West Side Clinic, Inc.*, WYSK, http://www.wysk.com/index/texas/sherman/te9vhr3/west-side-clinic-inc/profile [http://perma.cc/K7UA-PFSB] (last visited May 24, 2013).

140. *Planned Parenthood*, 951 F. Supp. 2d at 897.

141. *Abortion Pill*, *supra* note 69.

exercise. While the corporation itself cannot worship in any meaningful way, it is a tool used to further a corporate owner's religious beliefs. Hobby Lobby, for example, sells a wide selection of religious items, plays Christian music in its stores, and takes out full-page ads on Christmas and Easter asserting its belief in Jesus Christ.[142] Hobby Lobby is a tool used by its owners, in part, to further their religious message, just as the abortion doctors use their for-profit clinics to further their support of abortion. Corporations must be able to assert their owners' constitutional rights, otherwise citizens' rights cannot be protected.

3. The Unique Structure of Closely Held Corporations

The corporate structure of the companies challenging the Mandate further compels the conclusion that these corporations should be entitled to assert the right of free exercise under RFRA and the First Amendment. Many of the corporations challenging the Mandate are either closely held corporations or S-corporations, neither of which is publicly traded. These structures purposefully foster limited ownership. They allow the corporations to be entirely owned, operated, and controlled by religious families.[143] For example, Conestoga, a closely held corporation, is controlled by the Hahn family, who own 100 percent of the voting shares.[144] Meanwhile Hobby Lobby, an S-corporation, is controlled by voting trusts, which hold the shares to the corporation and which are owned and controlled by the Green family.[145] These corporate forms are considered much "closer" to their owners than publicly traded companies, where shares and ownership of the corporation are bought, sold, and traded at will. The families are as close to their corporations as corporate law allows them to be.

For the most part, these corporations make it very clear that their values are derived from their faith by stating such purposes in their articles of incorporation,[146] donating a substantial

142. Verified Complaint, *supra* note 52, at ¶¶ 43, 47.

143. *See, e.g.*, Conestoga Wood Specialties Corp v. Sebelius, 724 F.3d 377, 381 (3d Cir. 2013), *cert. granted*, 82 U.S.L.W. 3139 (U.S. Nov. 26, 2013) (No. 13-356); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1120 (10th Cir. 2013) (en banc), *cert. granted*, 82 U.S.L.W. 3139 (U.S. Nov. 26, 2013) (No. 13-354).

144. *Conestoga*, 724 F.3d at 381.

145. *Hobby Lobby*, 723 F.3d at 1122.

146. *See, e.g.*, Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 116 (D.D.C. 2012), *appeal dismissed*, 2013 WL 2395168 (D.C. Cir. May 3, 2013) (No. 13-5018).

portion of profits to charity,[147] closing on Sundays,[148] and placing religious ads in newspapers.[149] These corporations are not just faceless entities, but the outgrowth of the personal initiatives of highly religious families. These corporations' rights are tightly intertwined with the rights of their owners and controlling shareholders. The religious beliefs of the owners are lived out through their corporations. Although publicly traded corporations are not entitled to less protection than their closely held counterparts, the fact that the vast majority of the plaintiffs in the Mandate cases are closely held corporations further supports the conclusion that these corporations should be able to assert First Amendment rights on behalf of both the corporations and their family owners. Similar to individuals and non-profit corporations, these corporations cannot be forced, consistent with the Constitution, to provide drugs to which they object on the basis of strongly held religious beliefs.

4. Negative Implications

To rule that corporations do not have the First Amendment right to free exercise would have troubling implications for constitutional rights across the board. State law permits corporations to function as individuals,[150] and federal jurisprudence has granted corporations the ability to exercise constitutional rights.[151] It would be a slippery slope to start picking and choosing among constitutional rights and to guarantee some, but not others, to corporations. This would allow the judiciary the ability to take away the constitutional rights of corporate owners by ruling that their corporations do not have specific constitutional rights. This could eventually lead to abortion doctors losing the ability to use their clinics as a vehicle to assert constitutional rights of privacy and due process. Similarly, churches could lose the ability to assert rights of free exercise. Our Constitution does not permit arbitrary line drawing. The rights belong to the citizens of the United States,

147. *See, e.g., id.* at 111.

148. *See, e.g., Hobby Lobby*, 723 F.3d at 1122.

149. *See, e.g., id.*

150. *See* Susanna Kim Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97, 106 (2009) ("The corporation has standing to enter into contracts, to hold property, to sue and be sued, and ultimately to carry on business in the corporate name." (citing MODEL BUS. CORP. ACT § 3.02 (2005))).

151. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010).

and to divest American corporations of constitutional rights is to divest their owners of those same rights.

To uphold our constitutional scheme, and to protect individual liberties such as abortion and free exercise, corporations must be able to exercise constitutional rights, including the free exercise of religion.

V. APPLICATION OF THE RELIGIOUS FREEDOM RESTORATION ACT AND THE FIRST AMENDMENT

If the threshold issue of corporate free exercise is decided in favor of the corporations challenging the contraceptive Mandate, RFRA and the First Amendment Free Exercise Clause will be applicable. The Mandate can survive neither RFRA nor First Amendment inquiry, and will be invalid as applied to corporations objecting to it on the basis of their sincerely held religious beliefs.

A. The Religious Freedom Restoration Act

Under RFRA, the government may not impose a substantial burden, even if resulting from a rule of general applicability, unless such burden is narrowly tailored to serve a compelling government interest.[152] A plaintiff's "claimed beliefs 'must be sincere and the practice[] at issue must be of a religious nature.'"[153] At issue in the Mandate cases are conscientious objectors' wishes to refrain from morally objectionable activity in accordance with their religious beliefs.[154]

1. Substantial Burden

A government action "substantially burdens" religious exercise when it creates "substantial pressure on an adherent to modify his behavior and to violate his beliefs."[155] The Mandate requires religious objectors to either comply or be subject to enormous

152. 42 U.S.C. § 2000bb-1 (2011).

153. Kaemmerling v. Lappin, 553 F.3d 669, 678 (D.C. Cir. 2008) (quoting Levitan v. Ashcroft, 281 F.3d 1313, 1320 (D.C. Cir. 2002)).

154. The Supreme Court has routinely recognized "inaction," such as refraining from an activity, as religious exercise. *See, e.g.*, Emp't Div., Dep't. of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990) (asserting that under the Free Exercise Clause, "the 'exercise of religion' often involves not only belief and profession but the performance of (*or abstention from*) physical acts") (emphasis added).

155. Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981).

penalties and possible private lawsuits.[156] This is a prototypical substantial burden.

The Supreme Court has found a substantial burden on free exercise in situations imposing much milder punishment than the Mandate. The case of *Sherbert v. Verner*, for example, involved a plaintiff who was not required to work on the Sabbath, but who was denied unemployment benefits for refusing to work on that day.[157] The Supreme Court held that the denial of unemployment benefits as a result of the plaintiff's refusal to work on Saturday for religious reasons was an "unmistakable" pressure on the plaintiff to forego her religious observance.[158] The Court reasoned that the law forced the plaintiff "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[159] Furthermore, in *Thomas v. Review Board of the Indiana Employment Security Division*, the Court found a substantial burden "[w]here the state condition[ed] receipt of an important [employment] benefit upon conduct proscribed by a religious faith . . . thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs."[160] The Court noted that "[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."[161] Finally, in *Wisconsin v. Yoder*, the Court struck down a five-dollar fine that was imposed on Amish parents when they refused to send their children to high school.[162] The Court noted that the law's impact on the Yoder's religious practice was "not only severe, but inescapable, for the . . . law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."[163]

The Mandate is a "quintessential substantial burden."[164] The

156. 26 U.S.C. § 4980D(a)–(b) (2012) (imposing financial penalties on companies failing to meet all the requirements for group plans); 29 U.S.C. § 1132(a) (2012) (providing for civil enforcement actions by the Secretary of Labor, as well as by plan participants); *see also* 26 U.S.C. § 4980H (2012) (imposing penalties if an employer refuses to provide insurance altogether).

157. 374 U.S. 398, 401, 403 (1963).

158. *Id.* at 404.

159. *Id.*

160. *Thomas*, 450 U.S. at 717–18.

161. *Id.* at 718.

162. 406 U.S. 205, 208, 234–35 (1972).

163. *Id.* at 218.

164. Geneva Coll. v. Sebelius, 941 F. Supp. 2d 672, 683 (W.D. Pa. 2013).

Mandate forces conscientious objectors to contraceptive coverage to choose between violating their religious beliefs, paying enormous fines, or abandoning their business altogether.

2. Strict Scrutiny

RFRA demands that any substantial burden on religion satisfy the standard of strict scrutiny,[165] which requires any such burden to serve a compelling government interest and to be the least restrictive means necessary to serve that alleged compelling interest.[166] Strict scrutiny "is the most demanding test known to constitutional law."[167] Furthermore, the strict scrutiny standard codified in RFRA can only be satisfied "through application of the challenged law 'to the person'—the particular claimant."[168] As applied to the corporations in the Mandate cases, the Mandate does not satisfy the standard of strict scrutiny.

a. Compelling Interest

The compelling interest test may only be satisfied where the challenged law serves interests "of the highest order."[169] The government may not assert generalized interests[170] "in the abstract,"[171] but must "specifically identify an 'actual problem' in need of solving" and demonstrate that coercing conscientious objectors to provide contraceptives is "actually necessary to the solution."[172] The government must "demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."[173] Because the government "bears the risk of uncertainty, ambiguous proof will not suffice."[174]

The government has alleged compelling interests in public

165. Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal, 546 U.S. 418, 430 (2006).
166. 42 U.S.C. § 2000bb-1 (2011).
167. City of Boerne v. Flores, 521 U.S. 507, 534 (1997).
168. *O Centro*, 546 U.S. at 430–31.
169. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).
170. *O Centro*, 546 U.S. at 431.
171. Cal. Democratic Party v. Jones, 530 U.S. 567, 584 (2000).
172. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011) (internal citations omitted).
173. *O Centro*, 546 U.S. at 430–31.
174. *Brown*, 131 S. Ct. at 2739 (internal citations omitted).

health and gender equality to support the Mandate.[175] The government has often alleged similar interests when promoting laws burdening religious exercise.[176] While these interests "are indeed of tremendous societal significance,"[177] the widespread exemptions related to the Mandate demonstrate that the government's asserted interests are not sufficiently compelling to withstand constitutional scrutiny.

The government cannot allow widespread exemptions on the one hand and argue that the interests the Mandate serves are compelling on the other. The government has voluntarily omitted millions[178] of people from the requirements of the Mandate under the grandfathering provision[179] of the ACA. Additionally, the Mandate does not apply to members of a "recognized religious sect or division" who conscientiously object to the acceptance of public or private insurance funds,[180] nor to a narrow class of religious employers.[181] Even though the government's asserted interests in public health and gender equality would be compelling in some circumstances, "a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited."[182] A compelling interest does not exist where the government "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort."[183] The massive exemptions to the Mandate "fatally undermine[] the [g]overnment's broader contention" that the law will be "necessarily . . . undercut" if conscientious objectors are exempted as well.[184] The government cannot demonstrate a compelling interest in public health and

175. Conestoga Wood Specialties Corp. v. Sebelius 724 F.3d 377, 412 (3d Cir. 2013) (Jordan, J., dissenting), *cert. granted*, 82 U.S.L.W. 3139 (U.S. Nov. 26, 2013) (No. 13-356).

176. *See, e.g.*, *O Centro*, 546 U.S. at 438; Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 529 (1993).

177. *Conestoga*, 724 F.3d at 412 (Jordan, J., dissenting).

178. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1143 (10th Cir. 2013) (en banc) ("[T]he contraceptive-coverage requirement presently does not apply to tens of millions of people."), *cert. granted*, 82 U.S.L.W. 3139 (U.S. Nov. 26, 2013) (No. 13-354).

179. *See* 26 C.F.R. § 54.9815-1251T (2013); 29 C.F.R. § 2590.715-1251 (2013); 45 C.F.R. § 147.140 (2013).

180. 26 U.S.C. § 5000A(d)(2)(A)(i)–(ii) (2012) (referencing 26 U.S.C. § 1402(g)(1) (2012)).

181. 45 C.F.R. § 147.130(a)(1)(iv) (2013).

182. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993).

183. *Id.* at 546–57.

184. Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal, 546 U.S. 418, 434 (2006).

gender equality where it has already exempted millions of Americans from the law.

b. Least Restrictive Means

Even if the government can successfully advance a compelling interest, RFRA would still require it to employ "the least restrictive means" in furthering its asserted compelling government interests.[185] The Mandate cannot pass this test.

In the context of the Mandate, the government has ample less restrictive means available, besides burdening the religious exercise of conscientious objectors, to further its alleged compelling interests and to provide contraceptive coverage. The government has already utilized some of these means in other circumstances. For example, the government can and already does subsidize contraceptives by providing birth control coverage under Title XIX (Medicaid) and Title X (Family Planning Services funding).[186] The government has spent hundreds of millions of dollars providing and subsidizing family planning coverage.[187]

Furthermore, additional less restrictive means are available, but not yet utilized. The government could: expand federal Medicare, Medicaid, or other federal programs to provide the objectionable drugs and devices; authorize a tax credit to employees who buy the objectionable drugs and devices with their own funds; provide the objectionable drugs and devices free of cost through the state health insurance exchange or the federally facilitated exchanges; or enable and subsidize companies, doctors, or others to distribute the drugs and devices at the government's expense.

Moreover, many of the corporations objecting to the requirements of the Mandate object only to a limited class of

185. 42 U.S.C. § 2000bb-1(b)(2) (2011).

186. *Id.* § 1396r-1c; *id.* § 300.

187. *See, e.g.*, Family Planning Grants in 42 U.S.C. §§ 300–300a-8 (2011); The Teenage Pregnancy Prevention Program, 42 U.S.C. § 713(c) (2011); The Healthy Start Program, 42 U.S.C. § 254c-8 (2011); The Maternal, Infant, and Early Childhood Home Visiting Program, 42 U.S.C. § 711 (2011); Maternal and Child Health Block Grants, 42 U.S.C. § 703 (2011); 42 U.S.C. § 247b-12 (2011); Title XIX of the Social Security Act, 42 U.S.C. §§ 1396–1396w-5 (2011); The Indian Health Service, 25 U.S.C. § 13 (2012), 42 U.S.C. § 2001(a) (2011), & 25 U.S.C. §§ 1601–1683 (2012); Health Center Grants, 42 U.S.C. § 254b(e), (g), (h), (i) (2012); The NIH Clinical Center, 42 U.S.C. § 248 (2011); The Personal Responsibility Education Program, 42 U.S.C. § 713 (2011); The Unaccompanied Alien Children Program, 8 U.S.C. § 1232(b)(1) (2012).

contraceptives; they do not object to providing traditional birth control pills or diaphragms. To achieve its allegedly compelling government interests, the government could require these corporations to provide only the drugs and devices to which they do not object on religious grounds. Finally, for those corporations that object to providing any of the listed contraceptives, devices, or procedures, the government could still employ the less restrictive means discussed above.

The availability of less restrictive means compels the conclusion that the government has not met its burden, irrespective of whether the government has a compelling government interest. If the Court reaches the merits of the cases challenging the Mandate, the Mandate should be struck down without question. This illustrates the importance of answering the corporate free exercise question in the affirmative. Unless corporations have the ability to assert rights of free exercise, they will not be protected by RFRA, and their corporate owners will be forced to engage in activities that are objectionable to their strongly held religious beliefs.

B. The Free Exercise Clause

The Mandate violates the Free Exercise Clause because it "is not neutral or generally applicable."[188] A law that is not neutral or generally applicable is subject to the standard of strict scrutiny. As discussed above, the Mandate does not meet this strict standard.

The Mandate is not neutral because it discriminates among religious organizations on a religious basis—determining the requisite "religiosity" required for exemption from the requirement of contraceptive coverage. The religious-employer exemption protects only a narrow class of religious employers, determining which ones are "religious enough" to qualify by defining the exempt employer with reference to internal religious characteristics. The exemption applies only to formal churches and their integrated auxiliaries and religious orders "organized and operate[d]" as nonprofit entities and "referred to in section 6033(a)(3)(A)(i) or (iii)" of the Internal Revenue Code.[189] Under the command of *Lukumi* and its progeny, the

188. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 560 (1993) (Souter, J., concurring).

189. 45 C.F.R. § 147.131(a) (2013).

religious-employer exemption is not neutral, does not meet the strict scrutiny standard, and is therefore unconstitutional. The government cannot decide what qualifies as "religious enough" for protection—this is far outside of the purview of the government's powers outlined in the Constitution, and it is forbidden by the First Amendment.

Furthermore, the Mandate is not generally applicable. A law that regulates religious conduct, yet leaves similar secular conduct unregulated, is not generally applicable.[190] The Mandate exempts widespread secular conduct, yet refuses to exempt certain kinds of religious conduct. In *Lukumi*, the Supreme Court invalidated a city ordinance that banned the killing of animals—including the plaintiffs' religious animal sacrifice—yet contained exemptions for people such as hunters and veterinarians.[191] Likewise, in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, the Third Circuit held that a policy banning police officers from having beards impermissibly infringed on the free exercise rights of Muslim police officers because while the policy contained secular exemptions for medical reasons and for undercover officers, it did not provide a religious exemption.[192]

The Mandate is riddled with widespread secular exemptions under the grandfathered health plan provision.[193] The grandfathering provision is an entirely secular exemption, containing absolutely no reference to religion. This is

190. *See, e.g.*, *Lukumi*, 508 U.S. at 544–45; *see also* Blackhawk v. Pennsylvania, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.) (recognizing that a law is not generally applicable if it "burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated").

191. *Lukumi*, 508 U.S. at 537.

192. 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.).

193. The government's analysis suggests that employers will eventually relinquish all grandfathered plans. *See* Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 34,538, 34,552 (June 17, 2010) (presenting a mid-range estimate that 51% of employers will have relinquished their grandfathered plans by 2013, with more employers expected to relinquish their plans each following year). However, there is absolutely no sunset provision on the grandfathered status of plans, and the government itself maintains that grandfathering status is a "right" that can be maintained perpetually. *See* 45 C.F.R. § 147.140 (2013) (outlining the "[p]reservation of [the] right to maintain existing coverage"). The government itself estimates that tens of millions of women will remain covered under grandfathered plans that will not need to comply with the Mandate. Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726-01, 41,732 (July 19, 2010) (estimating that "98 million individuals will be enrolled in grandfathered group health plans in 2013").

unacceptable—the Mandate must exempt religious conduct where it exempts similar secular conduct. This further reinforces the fact that the Mandate is not neutral. A law fails the basic requirement of neutrality if it "creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection."[194]

VI. CONCLUSION

A decision permitting the Mandate to stand would have deep and troubling implications for religious liberties and First Amendment rights. The challenge to the Mandate implicates perennial rights of the republic in free exercise, as well as our system of free enterprise. Corporations have long been held to possess rights guaranteed to individuals under the First Amendment, including the right to free speech and the freedom of the press, with nonprofit corporations being able to assert the right to the free exercise of religion. Furthermore, for-profit corporations, such as abortion clinics and related medical facilities, frequently challenge laws on the basis of several constitutional provisions under the purview of the right to privacy. To rule that corporations do not possess these rights would allow the government to deprive individuals of their constitutional rights any time they operate a business—this is antithetical to our constitutional tradition. Corporations must be guaranteed the right of free exercise of religion so that corporations and individuals alike can continue to receive the benefits of their protected rights under the federal Constitution.

The Mandate is an unconstitutional violation of the right of free exercise guaranteed under the First Amendment, belonging to corporations just as it belongs to individuals. The history and application of both corporate law and constitutional law compels this conclusion. To decide otherwise would permit our most precious liberties to be diluted, and would have wide, negative implications for the First Amendment liberties of the individual.

194. Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999)

RIGHT ON CRIME: A RETURN TO FIRST PRINCIPLES FOR AMERICAN CONSERVATIVES

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I. INTRODUCTION

On March 14, 2013, Ken Cuccinelli, the Attorney General of Virginia, took the stage at the Conservative Political Action Conference (CPAC) in Maryland. This was perhaps the most conservative attorney general in the country addressing the most conservative audience in the country. Over the course of a nearly twenty-minute speech, the attorney general lambasted the size of the national debt, reasserted his conviction that President Barack Obama's signature health care legislation was unconstitutional, and referred to the Environmental Protection Agency (EPA) as the "Employment Prevention Agency."[1] The audience applauded every one of these "red meat" lines. The crowd also broke into applause when Cuccinelli asked:

> [H]ow many times have I seen my fellow tough-on-crime conservatives be not merely willing, but excited, to lock up every convict and throw away the key? If we really believe that no one is beyond redemption, we need to stop throwing away that key! Conservatives should lead in changing the culture of corrections in America.[2]

In these remarks at CPAC, Cuccinelli's support for corrections reform appeared to arise from a socially conservative impulse. Then, seven months later, Cuccinelli added a stark note of fiscal conservatism when he told the *Washington Post*, "[t]here is an expectation that the generic Republican position is tough on crime . . . [b]ut even that has budget limits . . . ."[3] In both instances, Cuccinelli's comments were made in the thick of a closely contested and nationally prominent gubernatorial campaign.[4] This suggests that he did not think he would pay a significant political price for his views.

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1. Kenneth T. Cuccinelli, Va. Attorney Gen., Remarks at the 40th Conservative Political Action Conference 2 (Mar. 14, 2013), *available at* http://bearingdrift.com/wp-content/uploads/CuccinelliCPACSpeech.pdf [http://perma.cc/D8TL-76RJ]).

2. *Id.* at 4.

3. Jerry Markon & Fredrick Kunkle, *Cuccinelli Says Sentencing Policy Should Be Judged, in Part, on Cost*, WASH. POST, Aug. 18, 2013, http://www.washingtonpost.com/politics/cuccinelli-says-sentencing-policy-should-be-judged-in-part-on-cost/2013/08/18/b6496e38-068c-11e3-88d6-d5795fab4637_story.html [http://perma.cc/8AGC-6BT7].

4. *See The Passion of Ken Cuccinelli*, NEWSMAX MAG., Feb. 2012, http://www.newsmax.com/ken_cuccinelli_biography [http://perma.cc/KN2M-TB9C]; *see generally* Laura Vozzella & Fredrick Kunkle, *McAuliffe, Cuccinelli Take Their Bitter Battle to the Airwaves*, WASH. POST, Sept. 25, 2013, http://www.washingtonpost.com/local/virginia-politics/mcauliffe-cuccinelli-take-their-bitter-battle-to-the-airwaves/2013/09/25/08983784-23af-11e3-b75d-5b7f66349852_story.html [http://perma.cc/U96T-GNCT].

Cuccinelli's avid support for prison reform surprised some political observers,[5] but his views are hardly unique among prominent right-leaning lawyers. Edwin Meese, the U.S. Attorney General under President Ronald Reagan, has advocated similar views.[6] So too have Asa Hutchinson, former U.S. Attorney and Administrator of the Drug Enforcement Administration; Bill Bennett, former Director of the Office of National Drug Control Policy; Larry Thompson, former U.S. Deputy Attorney General; and Viet Dinh, the Bush Administration lawyer who was the primary architect of the U.S.A. Patriot Act.[7] All five are signatories to the Right on Crime Statement of Principles, a document that the Texas Public Policy Foundation developed in 2010 to articulate the position on criminal justice policy that is most consistent with the philosophical roots of conservative political and legal thought.[8]

All of these individuals have been major figures in American law enforcement over the last three decades. None could plausibly be called "soft on crime." Nor could any of the non-lawyer signatories—for example, Jeb Bush, Newt Gingrich, Grover Norquist, and J.C. Watts[9]—be called "soft on crime."

The idea that conservatives are ideologically committed to mass incarceration is—and always was—a caricature. American incarceration rates increased significantly in recent decades, and many on the right supported this increase, but conservative support for increased incarceration was linked to unique historical circumstances, not to any philosophical commitment.[10] Moreover, while conservatives were correct in the early 1970s that some increase in incarceration was necessary to ensure that violent and dangerous offenders served significant prison terms,

5. *The Passion of Ken Cuccinelli, supra* note 4.

6. *See* RIGHT ON CRIME, STATEMENT OF PRINCIPLES 1, http://www.rightoncrime.com/wp-content/uploads/2010/11/ROC-Statement-of-Principles9.pdf [http://perma.cc/9GYJ-WMYG].

7. *See id.*

8. *Id.* at 1–2.

9. *Id.* at 1.

10. *See* David Dagan & Steven M. Teles, *The Conservative War on Prisons*, WASH. MONTHLY, Nov.–Dec. 2012, http://www.washingtonmonthly.com/magazine/novemberdecember_2012/features/the_conservative_war_on_prison041104.php?page=all [http://perma.cc/TA8Q-E9XZ] ("Republican's rhetorical campaign against lawlessness took off in earnest during the 1960s, when Richard Nixon artfully conflated black rioting, student protest, and common crime to warn that the 'criminal forces' were gaining the upper hand in America. As an electoral strategy, it was a brilliant success. But as an ideological claim, the argument that America needed more police and prisons was in deep tension with the conservative cause of rolling back state power.").

the sixfold increase in incarceration from the early 1970s to the mid-2000s reached many nonviolent, low-risk offenders.[11] Now, as crime rates are declining, conservatives are increasingly focused on developing policies that prioritize using limited prison space to house violent offenders while looking for alternative sanctions to hold nonviolent offenders accountable, restore victims, and protect public safety.[12] In generating and advocating these policies, conservatives are returning to first principles: skepticism of state power, insistence on government accountability, and concern for how public policy affects social norms.

In this article, we discuss the conservative return to first principles in criminal justice. In Part II, we explain the modern problem of mass incarceration. Then, in Part III, we note the historical reasons behind the push to increase incarceration in the 1980s and 1990s. In Part IV, we detail legislative reforms to remedy the incarceration problem that are consistent with conservative ideological principles.

II. THE INCARCERATION PROBLEM

According to the International Centre for Prison Studies, the United States has the highest incarceration rate in the democratic world.[13] About 2.2 million Americans, or 716 out of every 100,000, are serving time behind bars.[14] This figure is striking when compared to figures from other nations of the Anglo-American common law tradition. In England and Wales,

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11. ROGER K. WARREN, CRIME & JUSTICE INST., NAT'L INST. OF CORR. & NAT'L CTR. FOR STATE COURTS, EVIDENCE-BASED PRACTICE TO REDUCE RECIDIVISM: IMPLICATIONS FOR STATE JUDICIARIES 6 (2007), *available at* http://www.wicourts.gov/courts/programs/docs/cjijudicialpaperfinal.pdf [http://perma.cc/EG42-CBKY] (reporting a sixfold increase); *Throwing Away the Key*, THE ECONOMIST, Nov. 16, 2013, http://www.economist.com/news/united-states/21589868-shocking-number-non-violent-americans-will-die-prison-throwing-away-key [http://perma.cc/ZSM5-Y95P] (discussing the incarceration of nonviolent offenders).

12. *See, e.g.*, *Criminal Justice Issues*, C-SPAN (Mar. 7, 2014), http://www.c-span.org/video/?318175-5/criminal-justice-issues [http://perma.cc/A47L-LMXM] (providing a video recording in which panelists at the 2014 Conservative Political Action Conference discuss the potential benefits of reducing prison populations).

13. ROY WALMSLEY, INT'L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 1 (10th ed.), *available at* http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wppl_10.pdf [http://perma.cc/7QFR-9SGZ]. The International Centre for Prison Studies reports that the United States has the highest prison population rate in the world. *Id.* We use the limiting language, "in the democratic world," because we are concerned that undemocratic nations may underreport their prison statistics.

14. *Id.* at 3.

only 148 out of every 100,000 persons are incarcerated.[15] Australia was founded as a prison colony, yet it incarcerates only 130 out of every 100,000 persons.[16] Canada incarcerates 118 out of every 100,000.[17] This is to say nothing of democratic nations outside the Anglo-American common law tradition. France incarcerates 98 out of every 100,000 persons[18] and Japan incarcerates 51 out of every 100,000 persons.[19]

In an important book on incarceration, *The Collapse of American Criminal Justice*, Professor William Stuntz noted that, with the important exception of homicide, American crime rates are fairly comparable to crime rates in Western democracies such as Great Britain and France.[20] Therefore, he wrote, "[i]f Western nations' crime rates determine the size of their prison populations, the United States should imprison roughly the same share of its citizenry as do the British or the French . . . not four to seven times as many."[21]

Americans pay dearly for these extremely high rates of incarceration. In 2012, states spent $52.4 billion on incarceration,[22] and the federal government spent approximately $6.6 billion.[23] Depending on the state, the per-year cost of maintaining a single prison inmate can range from approximately $14,600 to more than $60,000.[24] Over the last thirty years, prisons have been the second-fastest growing component of state budgets, trailing only Medicaid.[25] Roughly

15. *Id.* at 5.
16. *Id.* at 6.
17. *Id.* at 3.
18. *Id.* at 5.
19. *Id.* at 4.
20. WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 50 (2011). For international homicide figures, see UNITED NATIONS OFFICE ON DRUGS AND CRIME, GLOBAL STUDY ON HOMICIDE (2011), *available at* http://www.unodc.org/documents/data-and-analysis/statistics/Homicide/Globa_study_on_homicide_2011_web.pdf [http://perma.cc/SML9-8NLN].
21. STUNTZ, *supra* note 20, at 50.
22. NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE SPENDING FOR CORRECTIONS: LONG-TERM TRENDS AND RECENT CRIMINAL JUSTICE POLICY REFORMS 1 (2013), *available at* http://www.nasbo.org/sites/default/files/pdf/State%20Spending%20for%20Corrections.pdf [http://perma.cc/NCX9-AAQY].
23. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-743, BUREAU OF PRISONS: GROWING INMATE CROWDING NEGATIVELY AFFECTS INMATES, STAFF, AND INFRASTRUCTURE 1 (2012), *available at* http://www.gao.gov/assets/650/648123.pdf [http://perma.cc/7F83-MJE4].
24. CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 10 (2012), *available at* http://www.vera.org/sites/default/files/resources/downloads/Price_of_Prisons_updated_version_072512.pdf [http://perma.cc/5BYF-V3LZ].
25. CHRISTINE S. SCOTT-HAYWARD, VERA INST. OF JUSTICE, THE FISCAL CRISIS IN

one in every fourteen dollars in state budgets is now spent on corrections.[26]

Those are just the financial costs. Yet another cost is the risk to public safety that potentially results from a vitiated deterrence effect. This is a somewhat counterintuitive thought, but Professor Stuntz explained it well by drawing an analogy to the "Laffer Curve," an important idea in supply-side economics:

> Conservative economist Arthur Laffer argued that high marginal tax rates generated less tax revenue than lower marginal rates. Higher marginal rates increased the *percentage* of income the IRS takes, but lowered the *amount* of income earned by reducing the financial rewards for work. According to Laffer's theory, the second effect often overwhelms the first. . . . [A] Laffer-like phenomenon plainly operates in the sphere of crime and punishment. Putting more offenders in prison cells increases the tangible price criminals pay for their crimes—but if done too often, it diminishes the intangible price by making a stay in the nearby house of corrections an ordinary life experience. The second effect can easily overwhelm the first: meaning, more punishment may yield less deterrence.[27]

There are social and cultural costs, not just fiscal and victimization costs, that result from extremely high incarceration rates. In 2007, fifty-two percent of state prisoners and sixty-three percent of federal prisoners reported having minor children.[28] Mountains of research and common sense confirm that children with incarcerated parents underperform in virtually every important social indicator.[29] They suffer from lower high school

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CORRECTIONS: RETHINKING POLICIES AND PRACTICES 3 (2009), *available at* http://www.vera.org/files/The-fiscal-crisis-in-corrections_July-2009.pdf [http://perma.cc/ULE9-FH32].

26. *See* NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT: EXAMINING FISCAL 2011–2013 STATE SPENDING 56, *available at* http://www.nasbo.org/sites/default/files/State%20Expenditure%20Report%20%28Fiscal%202011-2013%20Data%29.pdf [http://perma.cc/LLM7-A6E6].

27. STUNTZ, *supra* note 20, at 53.

28. LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP'T OF JUSTICE, NCJ 222984, PARENTS IN PRISON AND THEIR MINOR CHILDREN 1 (2010), *available at* http://www.bjs.gov/content/pub/pdf/pptmc.pdf [http://perma.cc/3FCJ-BSPK].

29. *See, e.g.*, Keva M. Miller, *The Impact of Parental Incarceration on Children: An Emerging Need for Effective Interventions*, 23 CHILD & ADOLESCENT SOC. WORK J. 472, 477–79 (2006), *available at* http://coursewebs.law.columbia.edu/coursewebs/cw_13F_LAW_L6656_001.nsf/0f66a77852c3921f852571c100169cb9/B43ECA7DE60A5BFA85257BD3006DE220/$FILE/Miller,+Keva+Impact+of+Parental+Incarceration+on+Children.pdf?OpenElement [http://perma.cc/QV4B-UMAB].

graduation rates, higher teen pregnancy rates, and higher incarceration rates.[30]

Finally, the high cost of incarceration supports a system that often does not work. Rather than emerge rehabilitated, plenty of offenders leave prison in a worsened social condition.[31] It is sometimes ruefully joked that prisons are finishing schools for criminality.[32] Even offenders who emerge from incarceration relatively stable find it difficult to reenter society because a criminal record is a significant barrier to employment.[33] There are a number of states in which recidivism rates hover above fifty percent.[34] Reflecting on this figure, former Speaker of the House Newt Gingrich and former Virginia Attorney General Mark Earley have asked whether Americans would accept other government programs with such a high failure rate: "If two-thirds of public school students dropped out, or two-thirds of all bridges built collapsed within three years, would citizens tolerate it?"[35]

These high rates of incarceration and associated high costs would perhaps be justified if the evidence demonstrated that more incarceration resulted in less crime. As the comparison to international incarceration rates makes clear, however, it is difficult to establish such a causal relationship.

Moreover, consider that from 2008 through 2013, the states in which crime rates increased saw a four percent decline in

30. *See id.* at 477–78.

31. JEREMY TRAVIS ET AL., URBAN INST., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 1 (2001), *available at* http://www.urban.org/pdfs/from_prison_to_home.pdf [http://perma.cc/F8B6-NARJ].

32. *E.g.*, Shankar Vedantam, *When Crime Pays: Prison Can Teach Some to Be Better Criminals*, NAT'L PUB. RADIO (Feb. 1, 2013), http://www.npr.org/2013/02/01/169732840/when-crime-pays-prison-can-teach-some-to-be-better-criminals [http://perma.cc/58GA-B9B7] (providing audio recording in which Shankar Vedantam and Donald Hutcherson discuss Hutcherson's research on the impact of prison on criminality).

33. *See* HARRY J. HOLZER, WHAT EMPLOYERS WANT: JOB PROSPECTS FOR LESS-EDUCATED WORKERS 58 (1996) (reporting that a survey of employers in four major metropolitan cities revealed that two-thirds of employers would not hire someone with a criminal record).

34. PEW CTR. ON THE STATES, PEW CHARITABLE TRUSTS, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS 10–11 (2011), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/State_Recidivism_Revolving_Door_America_Prisons%20.pdf [http://perma.cc/E8HQ-2WKJ].

35. Newt Gingrich & Mark Earley, *Cutting Recidivism Saves Money and Lives*, ATLANTA J.-CONST., Mar. 23, 2010, http://www.ajc.com/news/news/opinion/cutting-recidivism-saves-money-and-lives/nQdbX/ [http://perma.cc/6994-3LP2].

imprisonment.[36] At the same time, the states in which the crime rate decreased saw a five percent decline in imprisonment.[37] As these figures indicate, crime rates declined regardless of whether imprisonment rates increased or decreased.

Many criminologists believe that America's costly increase in incarceration over the last several decades is responsible for about twenty to thirty-five percent of the corresponding drop in the national crime rate.[38] The rest of the decline may be attributed to a variety of factors, the relative merits of which are hotly debated among social scientists. These factors include but are not limited to: demographic changes such as the aging of the baby boomers; the end of the U.S. crack epidemic; and improvements in law enforcement strategies such as the implementation of CompStat and the use of "broken windows" policing.[39] Some suggest that reduced levels of lead in household products have played a role in falling crime rates.[40] It has even been argued that the rise of entertainment technologies, such as video games and the Internet, have kept young men indoors and off the streets.[41] It may be that all of these arguments are partly

36. *States Cut Both Crime and Imprisonment*, PEW CHARITABLE TRUSTS (Dec. 19, 2013), http://www.pewstates.org/research/data-visualizations/states-cut-both-crime-and-imprisonment-85899528171 [http://perma.cc/49VD-7LH4].

37. *Id.*

38. *See, e.g.*, Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 J. ECON. PERSP. 163, 185–86 (2004), *available at* http://pricetheory.uchicago.edu/levitt/Papers/LevittUnderstandingWhyCrime2004.pdf [http://perma.cc/5FCG-68T6] ("In summary, the factors I examine cumulatively predict crime declines between 1973 and 1991 of between 20 and 35 percent. Essentially all of this predicted reduction is attributable to increased incarceration . . . ."); William Spelman, *The Limited Importance of Prison Expansion*, *in* THE CRIME DROP IN AMERICA 97, 123 (Alfred Blumstein & Joel Wallman eds., rev. ed. 2006) ("In short, the prison buildup was responsible for about one-fourth of the crime drop.").

39. *See, e.g.*, Levitt, *supra* note 38, at 171–73, 179–81 (arguing that, unlike the receding crack epidemic, changing demographics and improvements in law enforcement strategies played little or no role in the crime decline in the 1990s); *see generally* George L. Kelling & James Q. Wilson, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1, 1982, http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/ [http://perma.cc/EN4R-R9NK] (discussing "broken windows" policing); BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, POLICE EXEC. RESEARCH FORUM, COMPSTAT: ITS ORIGINS, EVOLUTION, AND FUTURE IN LAW ENFORCEMENT AGENCIES (2013), *available at* http://www.policeforum.org/assets/docs/Free_Online_Documents/Compstat/compstat%20-%20its%20origins%20evolution%20and%20future%20in%20law%20enforcement%20agencies%202013.pdf [http://perma.cc/V248-6MW9] (discussing CompStat—a performance management system used by police to reduce crime, among other things).

40. *Cf.* John Paul Wright et al., *Blood Lead Levels in Early Childhood Predict Adult Psychopathy*, 7 YOUTH VIOLENCE & JUV. JUST. 208, 214–16 (2009) (arguing that lead ingestion during childhood may cause deficits in the limbic system that result in antisocial behavior).

41. A. Scott Cunningham et al., *Understanding the Effects of Violent Video Games on*

valid. Whatever the real reason or reasons may be, it seems likely that something other than increased incarceration is contributing to the crime drop because crime has been falling across the globe, not just in the United States.[42]

Incarceration is a sensible public safety strategy. Nevertheless, once incarceration reaches a level that is necessary to incapacitate dangerous and violent offenders, it is hard to posit a clear correlation between increases in incarceration and reductions in crime. Incarceration can reach a point of diminishing returns at which money is better spent on improved law enforcement strategies, substance abuse treatment, or community supervision monitoring.

III. HISTORY

The extraordinarily high rate of imprisonment in the United States is a recent phenomenon. Before 1980, the highest imprisonment rate in U.S. history was recorded in 1939, when 137 out of every 100,000 Americans were behind bars.[43] The dramatic rise in the U.S. incarceration rate is particularly observable in the federal prison system. In the thirty-year period from 1950 to 1980, federal prisons gained about 6,600 inmates.[44] In the thirty-year period from 1980 to 2010, they gained over

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Violent Crime 4 (ZEW Centre for European Economic Research, Discussion Paper No. 11-042, 2014), *available at* http://ftp.zew.de/pub/zew-docs/dp/dp11042.pdf [http://perma.cc/S8FC-H5H4].

42. *The Curious Case of the Fall in Crime*, THE ECONOMIST, July 20, 2013, http://www.economist.com/news/leaders/21582004-crime-plunging-rich-world-keep-it-down-governments-should-focus-prevention-not [http://perma.cc/35AT-NEBD].

43. STUNTZ, *supra* note 20, at 46.

44. *See* MARK A. LEVIN & VIKRANT P. REDDY, TEX. PUB. POLICY FOUND., THE VERDICT ON FEDERAL PRISON REFORM: STATE SUCCESSES OFFER KEYS TO REDUCING CRIME AND COSTS 1 (2013), http://www.texaspolicy.com/sites/default/files/documents/2013-07-PP24-VerdictOnFederalPrisonReform-CEJ-LevinReddy.pdf [http://perma.cc/D992-MMU7] [hereinafter THE VERDICT]. Moreover, in the last few years, while some state prison populations have begun to decline, the federal prison population has continued to grow. Erica Goode, *U.S. Prison Populations Decline, Reflecting New Approach to Crime*, N.Y. TIMES, July 25, 2013, http://www.nytimes.com/2013/07/26/us/us-prison-populations-decline-reflecting-new-approach-to-crime.html?pagewanted=all&_r=0 [http://perma.cc/UDP5-VHUN]. In 2012, one year after the Texas Legislature authorized the closure of a prison in the city of Sugar Land, the federal government purchased a new prison facility in northwestern Illinois. Brandi Grissom, *Prison Closing Pleases City and Helps State Budget*, N.Y. TIMES, Aug. 19, 2011, http://www.nytimes.com/2011/08/19/us/19ttprison.html [http://perma.cc/YF36-VPZ6] (discussing the closing of the Sugar Land prison); Rick Pearson, *U.S. Buys Thomson Prison From State for $165 Million*, CHI. TRIB., Oct. 3, 2012, http://articles.chicagotribune.com/2012-10-03/news/ct-met-durbin-quinn-thompson-prison-1003-20121003_1_thomson-prison-guantanamo-bay-wolf [http://perma.cc/5YCR-YPDN] (discussing the new prison facility in northwestern Illinois).

185,500 inmates.[45] In the 1980s and 1990s, America became far more punitive; more individuals were prosecuted and sentence lengths grew longer.[46]

Policies focused on incarceration emerged as a response to skyrocketing crime rates in the 1960s.[47] Urban crime had become an epidemic, and nowhere was this truer than in New York City.[48] In fact, in 1963, New York City was known as the "murder capital of the nation."[49] A *Time* magazine cover with the caption "The Rotting of The Big Apple" portrayed the muggings, robberies, and murders for which New York—and Times Square in particular—had become notorious.[50] Small business owner Bernie Goetz became a vigilante icon when he shot four teenage subway muggers in 1985.[51] Movies like *Serpico*, *Taxi Driver*, and *Dirty Harry* depicted crime-ridden urban environments in which chaos ruled.[52]

Just as it is unclear what caused the crime decline of recent years, it is unclear what caused the crime spike that began in the 1960s. Sociologist James Q. Wilson, however, suggested that abrupt changes in cultural norms may have been responsible for the spike:

> At the deepest level, many . . . shifts, taken together, suggest that crime in the United States is falling [in the

45. THE VERDICT, *supra* note 44, at 1.

46. TODD R. CLEAR & NATASHA A. FROST, THE PUNISHMENT IMPERATIVE 33 (2014) ("Scholars have demonstrated that virtually all growth in prison populations over several decades could be attributed to the two sanctioning phases of the system: commitments to prison once convicted and length of stay once admitted. Eighty-eight percent of the growth in prison populations between 1980 and 1996 has been attributed to increasing commitments to prison and increasing lengths of stay."); *see also* STUNTZ, *supra* note 20, at 247 (showing that the imprisonment rate per 100,000 population increased from 96 in 1973 to 179 in 1983 to 359 in 1993 and prison-years per murder conviction increased from 10 in 1973 to 21 in 1983 to 38 in 1993).

47. MARK A. R. KLEIMAN, WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT 8–15 (2009).

48. STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED 107 (2011).

49. Thomas J. Lueck, *Low Murder Rate Brings New York Back to '63*, N.Y. TIMES, Dec. 31, 2007, http://www.nytimes.com/2007/12/31/nyregion/31murder.html?_r=0 [http://perma.cc/XWW8-BV7A].

50. *New York City*, TIME, Sept. 17, 1990, http://content.time.com/time/covers/0,16641,19900917,00.html [http://perma.cc/BHB7-QNDS] (last visited May 24, 2014). For the accompanying article, see Joelle Attinger, *The Decline of New York*, TIME, Sept. 17, 1990, at 36.

51. *See generally* Suzanne Daley, *Man Tells Police He Shot Youths in Subway Train*, N.Y. TIMES, Jan. 1, 1985, http://www.nytimes.com/1985/01/01/nyregion/man-tells-police-he-shot-youths-in-subway-train.html [http://perma.cc/4JK2-25R2].

52. SERPICO (Paramount Pictures 1973); TAXI DRIVER (Columbia Pictures 1976); DIRTY HARRY (Warner Bros. 1971).

> early 2000s]—even through the greatest economic downturn since the Great Depression—because of a big improvement in the culture. The cultural argument may strike some as vague, but writers have relied on it in the past to explain both the Great Depression's fall in crime and the explosion of crime during the sixties. In the first period, on this view, people took self-control seriously; in the second, self-expression—at society's cost—became more prevalent. It is a plausible case.[53]

Psychologist Steven Pinker made a similar argument in his book, *The Better Angels of Our Nature*:

> The leveling of hierarchies and the harsh scrutiny of the power structure [in the 1960s] were unstoppable and in many ways desirable. But one of the side effects was to undermine the prestige of aristocratic and bourgeois lifestyles that had, over the course of several centuries, become less violent than those of the working class and underclass. Instead of values trickling down from the court, they bubbled up from the street, a process that was later called "proletarianization" and "defining deviancy down."[54]

From the 1960s through the early 1990s, crime arguably became the most important domestic issue in American politics. Liberal politicians and thinkers, however, were widely viewed as disengaged from the issue.[55] Many liberals of the period argued that because crime resulted from social pathologies, such as poverty and racism, crime would continue until the social pathologies were eradicated; in other words, public policy directed at reducing crime would have no effect.[56] In some

53. James Q. Wilson, *Hard Times, Fewer Crimes*, WALL ST. J., May 28, 2011, http://online.wsj.com/news/articles/SB10001424052702304066504576345553135009870 [http://perma.cc/TJ5J-FUN2].

54. PINKER, *supra* note 48, at 110.

55. Dagan & Teles, *supra* note 10 ("[Conservative policies on crime during this period] worked political magic by tapping into a key liberal weakness. Urban violent crime was rising sharply during the 1960s and liberals had no persuasive response beyond vague promises that economic uplift and social programs would curb delinquency."); *see also* MICHAEL W. FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S 2 (2005) ("In the face of the rise in crime (the murder rate alone almost doubled between 1963 and 1968), [liberals] initially maintained that the statistics were faulty—a response that if not incorrect was insensitive to the victims of crime as well as their friends and family, co-workers and neighbors. They also tended to dismiss those who pleaded for law and order as racists, ignoring blacks who were victimized more often than any other group and insulting Jews who had steadfastly supported the civil rights movement.").

56. FLAMM, *supra* note 55, at 2.

extreme cases, liberals appeared not only to ignore crime, but explicitly to approve of it. Novelist Norman Mailer, for example, suggested that graffiti was not vandalism; it was artistic commentary on architecture.[57]

In response, conservatives insisted on incapacitation through more incarceration.[58] Conservative policy prescriptions of this period emphasized the importance of building new prison beds, increasing sentence lengths, and enacting truth-in-sentencing laws that limited parole.[59] Richard Nixon made the fight against crime one of the cornerstones of his 1968 and 1972 presidential election victories.[60] George H.W. Bush capitalized on the issue in his 1988 U.S. presidential campaign by launching *Willie Horton*, a campaign commercial criticizing Governor Michael Dukakis's support for weekend passes for convicted felons.[61] The commercial featured Willie Horton, a Massachusetts felon sentenced to life in prison who committed armed robbery and rape while on a weekend furlough.[62] In the minds of many Americans, Governor Dukakis's hapless response to the advertisement became emblematic of the liberal attitude towards crime in this chaotic era.[63]

As the conservative position became increasingly attractive to a

57. NORMAN MAILER, THE FAITH OF GRAFFITI (1974) ("There was always art in a criminal act—no crime could ever be as automatic as a production process—but graffiti writers were somewhat opposite to criminals since they were living through the stages of the crime in order to commit an artistic act—what a doubling of the intensity of the artist's choice when you steal not only the cans but try for the colors you want, not only the marker and the color but the width of the tip or the spout, and steal them in double amounts so you don't run out in the middle of a masterpiece.").

58. KLEIMAN, *supra* note 47, at 13–14.

59. *See generally* Judith Greene, *Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments Leading to the Passage of the 1994 Crime Act*, *in* SENTENCING AND SOCIETY: INTERNATIONAL PERSPECTIVES 43, 43–64 (Cyrus Tata & Neil Hutton eds., 2002).

60. Dagan & Teles, *supra* note 10; *see also Crime*, MUSEUM OF THE MOVING IMAGE, THE LIVING ROOM CANDIDATE: PRESIDENTIAL CAMPAIGN COMMERCIALS 1952–2012 (1968), http://www.livingroomcandidate.org/commercials/1968 [http://perma.cc/L6KG-LQSG] (providing a video recording of Nixon's 1968 campaign commercial, *Crime*).

61. *See Willie Horton*, MUSEUM OF THE MOVING IMAGE, THE LIVING ROOM CANDIDATE: PRESIDENTIAL CAMPAIGN COMMERCIALS 1952–2012 (1988), http://www.livingroomcandidate.org/commercials/1988 [http://perma.cc/72UE-R7CG] (providing a video recording of Bush's 1988 campaign commercial, *Willie Horton*).

62. *Id.*

63. *See* Eric Benson, *Dukakis's Regret: What the Onetime Democratic Nominee Learned From the Willie Horton Ad.*, N.Y. MAG., June 17, 2012, http://nymag.com/news/frank-rich/michael-dukakis-2012-6/ [http://perma.cc/CPR5-VNK6] (providing an interview of Dukakis in which he describes the decision not to respond to the Willie Horton campaign commercial "the biggest mistake of my political career").

population that felt terrorized by crime, liberal political candidates began to adopt it.[64] Soon, increasing incarceration became a bipartisan cause.[65] In Texas, the liberal icon Ann Richards showed as much enthusiasm for prison building as did the Republican governor who served before her, Bill Clements, and the Republican governor who served after her, George W. Bush.[66] It is also worth noting that the first person to attempt to use the Willie Horton story against Michael Dukakis was not George H.W. Bush in the 1988 presidential election but, rather, Al Gore in the 1988 Democratic primary.[67] James Q. Wilson sardonically joked that "there are no more liberals on the crime and law-and-order issue . . . because they've all been mugged."[68]

Next, as any public-choice theorist could have predicted, labor unions interested in maximizing the number of jobs for corrections officers joined in the cause.[69] The most notorious mandatory sentencing law in the country, California's "three strikes" law, was supported by California's powerful prison guard unions.[70] A federal "three strikes" law was also supported by President Bill Clinton.[71] Unsurprisingly, California's prisons were

64. *See* FLAMM, *supra* note 55, at 183 ("The Dukakis debacle and the return of law and order to national politics convinced many Democrats that they would have to find a candidate with the record and rhetoric to challenge the Republicans on the issue. In 1992 he appeared and his name was Bill Clinton. . . . On the campaign trail against President Bush, Clinton made it clear that he was a 'New Democrat' who would not coddle criminals.").

65. *See id.* at 184 ("In 1991, the Republicans had a 37–16 percent advantage on law and order according to a Time/CNN poll; by 1994, the Democrats had a 42–34 percent edge according to a CNN/USA Today Poll.").

66. *See Ann Richards*, THE ECONOMIST, Sept. 28, 2006, http://www.economist.com/node/7963556 [http://perma.cc/A539-6ZYJ] (noting that Richards "oversaw the biggest prison-building programme in American history").

67. Richard L. Berke, *The 1992 Campaign: Political Week; In 1992, Willie Horton is Democrats' Weapon*, N.Y. TIMES, Aug. 25, 1992, http://www.nytimes.com/1992/08/25/us/the-1992-campaign-political-week-in-1992-willie-horton-is-democrats-weapon.html [http://perma.cc/X9VJ-6QPP].

68. John Leo & Jack E. White, *Low Profile for a Legend: Bernhard Goetz, the Subway Gunman, Spurns Aid and Celebrity*, TIME, Jan. 21, 1985, at 54.

69. *See* Daniel DiSalvo, *The Trouble With Public Sector Unions*, NAT'L AFFAIRS 11–12 (Fall 2010), http://www.nationalaffairs.com/doclib/20100918_DiSalvo_pdf[1].pdf [http://perma.cc/DHW6-E53D]; *see generally* JOSHUA PAGE, THE TOUGHEST BEAT: POLITICS, PUNISHMENT, AND THE PRISON OFFICERS UNION IN CALIFORNIA 44–80 (2011) (discussing the California Correctional Peace Officers Association and its political activities generally).

70. DiSalvo, *supra* note 69, at 12; *see generally* PAGE, *supra* note 69, at 117–33 (discussing the efforts of the California Correctional Peace Officers Association to enact and defend California's "three strikes" law).

71. Gwen Ifill, *White House Offers Version of Three-Strikes Crime Bill*, N.Y. TIMES, Mar. 2, 1994, http://www.nytimes.com/1994/03/02/us/white-house-offers-version-of-three-strikes-crime-bill.html [http://perma.cc/56W-7VNU].

filled to almost double design capacity in 2011 when, in *Brown v. Plata*, the U.S. Supreme Court upheld a federal district court's order that California release prisoners to alleviate unconstitutional overcrowding.[72] Some analysts suggest that private prison companies, which benefitted financially from increased incarceration, played a role in the dramatic expansion of U.S. prisons.[73] However, there is no evidence that the popularity of private prison companies reflected their political influence rather than their affordability. On the other hand, it is clear that unionized labor forces in state facilities contributed to the popularity of the private companies.[74]

The most important thing to realize about this unique period is that historical exigencies—not ideological principles—were the driving force behind public policy decisions on criminal justice. There is nothing inherent in traditional conservative thinking that favors incarceration over other methods of handling offenders. In fact, because incarceration is expensive and restricts individual liberty, conservative ideology would favor incarceration only in the most extreme circumstances involving violent and habitual offenders. Moreover, personal responsibility is at the heart of conservative ideology, and prisoners receiving "three hots and a cot" while not paying restitution, child support, and other obligations hardly maximizes personal responsibility.

As we have seen, we have likely reached a point where the pendulum has swung too far on this issue. Traditional fiscal conservatives are concerned about escalating costs and long-term sustainability.[75] Libertarians are uncomfortable with the scope of punitive government and its intrusion into the lives of citizens.[76] Social conservatives see a link between the mass incarceration of

72. Brown v. Plata, 131 S. Ct. 1910, 1923, 1947 (2011).

73. *See, e.g.*, CHRISTOPHER HARTNEY & CAROLINE GLESMANN, NAT'L COUNCIL ON CRIME & DELINQUENCY, PRISON BED PROFITEERS: HOW CORPORATIONS ARE RESHAPING CRIMINAL JUSTICE IN THE U.S. 12–14 (2012), *available at* http://nccdglobal.org/sites/default/files/publication_pdf/prison-bed-profiteers.pdf [http://perma.cc/RW42-RAT4].

74. *See* Antje Deckert & William R. Wood, *Prison Privatization and Contract Facilities*, *in* CORRECTIONS 219, 224 (William J. Chambliss ed., 2011), *available at* http://www.academia.edu/2911049/Prison_Privatization_and_Contract_Facilities [http://perma.cc/YH4D-MQMX].

75. *See* Neil King Jr., *As Prisons Squeeze Budgets, GOP Rethinks Crime Focus*, WALL ST. J., June 21, 2013, http://online.wsj.com/news/articles/SB10001424127887323836504578551902602217018 [http://perma.cc/S59D-H94B].

76. *See, e.g.*, Radley Balko, *More Democracy, More Incarceration*, REASON, Oct. 25, 2010, http://reason.com/archives/2010/10/25/more-democracy-more-incarcerat [http://perma.cc/MPT4-A3BE].

young men and the breakdown of American families, especially lower-income families.[77]

The modern American politician who best combined fiscal conservatism, libertarianism, and social conservatism in an effective political platform was Ronald Reagan. As a politician, Reagan took pride in the reductions in incarceration that occurred on his watch. In his second gubernatorial inaugural address in California, for example, he boasted that California's "rehabilitation policies and improved parole system are attracting nationwide attention. Fewer parolees are being returned to prison than at any time in our history and our prison population is lower than at any time since 1963."[78] In 1971, he even attempted, albeit unsuccessfully, to close the infamous San Quentin Prison located north of San Francisco.[79]

IV. NEW SOLUTIONS BASED ON OLD WISDOM

As concern about incarceration has grown in conservative circles, so too have solutions to the problem grown in conservative states. In many ways, Texas, despite its international reputation as the premier "tough on crime" state, serves as a model for corrections reform.[80]

The transformation in Texas began in 2007 when the Legislative Budget Board estimated that it would cost taxpayers

77. *See, e.g.*, Mitch Pearlstein, *Crime, Punishment, and Rehabilitation*, NAT'L REV., Oct. 3, 2011, http://www.nationalreview.com/nrd/articles/296415/crime-punishment-and-rehabilitation [http://perma.cc/B5ED-AXYW]. Mike Pearlstein, a social conservative and Founder and President of Center of the American Experiment, points out that incarcerated men "are less attractive marriage partners, not just because they may be incarcerated, but because rap sheets are not conducive to good-paying, family-supporting jobs." *Id.* It is common sense that neighborhoods suffering from high incarceration rates also suffer a plague of single-parent homes and troubled children. This, in turn, leads to dysfunctional communities that are mistrustful of law enforcement. Most American children are taught they may always ask the police for help. In some American neighborhoods, however, children are taught never to engage with the police. *See generally* Jamie L. Flexon et al., *Exploring the Dimensions of Trust in the Police Among Chicago Juveniles*, 37 J. CRIM. JUST. 180 (2009), http://www.sciencedirect.com/science/article/pii/S0047235209000208 [http://perma.cc/HSU-4AGY].

78. Governor Ronald Reagan, Second Inaugural Address (Jan. 4, 1971), *available at* http://governors.library.ca.gov/addresses/33-Reagan02.html [http://perma.cc/EDX4-34EM]).

79. Bobby White, *San Quentin Seen as a Hot Property*, WALL ST. J., Mar. 18, 2009, http://online.wsj.com/news/articles/SB123732681929562101 [http://perma.cc/4K93-GKD3].

80. For an interesting comparison of the successful sentencing model in Texas and the failing sentencing model in Texas, see Ashley Stebbins, *A Tale of Two States Without a Sentencing Commission: How Divergent Sentencing Approaches in California and Texas Have Left Texas in a Better (and Model) Position*, 62 BAYLOR L. REV. 873 (2010).

$2 billion to build 17,000 prison beds to accommodate the expected increase in Texas's prison population by 2012.[81] Although Texas had a budget surplus that year, its legislators refused to spend the money; instead, they allocated a much smaller amount, approximately $241 million, to expanding community-based supervision options such as probation, problem-solving courts, and evidence-based drug treatment.[82]

In the Texas Senate, Democrat John Whitmire, a Houston lawyer, rallied support for community-based supervision.[83] In the House of Representatives, Republican Jerry Madden, a West Point alumnus and Dallas businessman, led the charge.[84] Madden believed, and Whitmire agreed, that costly prison space ought to be reserved for the people "we're afraid of, not the ones we're mad at."[85] The Republican-majority legislature followed Madden's and Whitmire's lead, as did Republican Governor Rick Perry, who signed the reform legislation into law.[86] Indeed, at the beginning of the 2007 legislative session, Governor Perry had explicitly announced his support for corrections reform in his State-of-the-State Address: "[T]here are thousands of non-violent offenders in the system whose future we cannot ignore. Let's focus more resources on rehabilitating those offenders so we can ultimately spend less money locking them up again."[87]

Texas's efforts to expand its community-based supervision options produced tangible—and exceptional—results. In 2011, for the first time in modern history, Texas closed a state prison.[88] Then, in 2013, it closed two more.[89] Most importantly, crime in

81. COUNCIL OF STATE GOV'TS, JUSTICE CTR., JUSTICE REINVESTMENT IN TEXAS: ASSESSING THE IMPACT OF THE 2007 JUSTICE REINVESTMENT INITIATIVE 3 (2009), *available at* http://www.ncsl.org/portals/1/Documents/cj/texas.pdf [http://perma.cc/UC8J-6U47].

82. John Buntin, *The Correctionists*, GOVERNING, http://www.governing.com/poy/jerry-madden-john-whitmire.html [http://perma.cc/7CGQ-9ENS] (last visited May 24, 2014).

83. *Id.*

84. *Id.*

85. *See* Vikrant P. Reddy & Marc A. Levin, *The Conservative Case Against More Prisons*, THE AM. CONSERVATIVE, Mar. 6, 2013, http://www.theamericanconservative.com/articles/the-conservative-case-against-more-prisons/ [http://perma.cc/EN24-32WU]; *see also* Marc A. Levin, *Whitmire, Madden Lay Out Viable Alternative to More Prisons*, TEX. PUB. POLICY FOUND. (Jan. 30, 2007), http://www.texaspolicy.com/press/levin-whitmire-madden-lay-out-viable-alternative-more-prisons [http://perma.cc/A2JW-RVSD].

86. Dagan & Teles, *supra* note 10.

87. Governor Rick Perry, State-of-the-State Address (Feb. 7, 2007), *available at* http://governor.state.tx.us/news/speech/29/ [http://perma.cc/KNA6-M6TW]).

88. Grissom, *supra* note 44.

89. Elizabeth Koh, *TDCJ to Close Two Privately Run Jails in August*, TEX. TRIB., June 11,

Texas has continued to decline. As of this writing, crime rates in Texas are lower than they have been since 1968.[90] Moreover, crime rates in Texas are falling faster than crime rates in virtually every other large state in America.[91]

Texas's success is just the tip of the iceberg. Several other "red states" have passed comparable reform packages proposed by conservative legislators and signed into law by conservative governors. For example, Georgia, under Republican Governor Nathan Deal, passed a sweeping corrections reform bill in 2012.[92] Like Governor Perry, Governor Deal showed a particular interest in rehabilitating drug offenders and framed his arguments in terms of taxpayer resources: "If we fail to treat the addict's drug addiction, we haven't taken the first step in breaking the cycle of crime . . . a cycle that destroys lives and wastes taxpayer resources."[93]

Other states that have enacted major reforms led by conservative governors include Ohio,[94] Pennsylvania,[95] and South Dakota.[96] This year alone, important reform packages were passed and signed into law in Alaska,[97] Idaho,[98] and Mississippi.[99] In all cases, conservative politicians have led the

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2013, http://www.texastribune.org/2013/06/11/tdcj-shutters-private-jails/ [http://perma.cc/6ZDF-QDC7].

90. *Public Safety in Texas*, PEW CHARITABLE TRUSTS (Jan. 14, 2013), http://www.pewstates.org/research/state-fact-sheets/public-safety-in-texas-85899432273 [http://perma.cc/UR2D-FG3Z].

91. *See* Vikrant P. Reddy, *Texas Crime Rate Falling Faster Than the National Crime Rate*, RIGHT ON CRIME (Sept. 24, 2012), http://www.rightoncrime.com/2012/09/post-needs-editing-department-of-justice-focuses-on-victims/ [http://perma.cc/Y73M-7KJ5].

92. H.B. 1176, 151st Gen. Assemb., Reg. Sess. (Ga. 2012). For a brief summary of the reforms, see PEW CTR. ON THE STATES, PEW CHARITABLE TRUSTS, 2012 GEORGIA PUBLIC SAFETY REFORM: LEGISLATION TO REDUCE RECIDIVISM AND CUT CORRECTIONS COSTS 6–9 (2012), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_Georgia_Safety_Reform.pdf [http://perma.cc/H6GV-CDFU].

93. Governor Nathan Deal, State-of-the-State Address: Charting the Course to Prosperity (Jan. 10, 2012), *available at* http://gov.georgia.gov/press-releases/2012-01-10/gov-deals-state-state-address-charting-course-prosperity [http://perma.cc/4A4R-3Y62].

94. H.B. 86, 129th Gen. Assemb., Reg. Sess. (Ohio 2011).

95. S.B. 100, 2011–2012 Gen. Assemb., Reg. Sess. (Pa. 2012); H.B. 135, 2011–2012 Gen. Assemb., Reg. Sess. (Pa. 2012).

96. S.B. 70, 2013 Legis. Assemb., 88th Sess. (S.D. 2013). For a brief summary of the reforms, see PEW CTR. ON THE STATES, PEW CHARITABLE TRUSTS, SOUTH DAKOTA'S 2013 CRIMINAL JUSTICE INITIATIVE 7–9 (2013), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2013/PSPP_SD_2013_Criminal_Justice_Initiative_.pdf [http://perma.cc/VG7F-NLVZ].

97. S.B. 64, 28th Leg. (Alaska 2013).

98. S. 1357, 63rd Leg., 1st Reg. Sess. (Idaho 2014).

99. H.B. 585, 2014 Reg. Sess. (Miss. 2014).

reform efforts.[100] Each state is different, but three major policy ideas have been adopted in every state: performance-incentive funding for corrections institutions, swift and certain sanctions for criminal offenders, and the introduction of problem-solving courts that are distinct from traditional adversarial courts.

A. Performance-Incentive Funding

Perhaps the most significant criminal justice reform idea to receive conservative backing is performance-incentive funding. This idea is based on the conservative insight that prison funding should be based partly on performance, not just population numbers. Performance can be measured in several ways including whether treatment is obtained, whether education is received, and whether restitution is paid to victims. Above all, though, performance should be measured in terms of recidivism. A prison that can boast a low recidivism rate among its inmates is doing something right by helping to preserve public safety and is the kind of facility towards which we ought to direct public resources.

Arizona presents a good example of how performance-incentive funding works in practice. In 2008, Arizona instituted a policy that allows a portion of state savings from reduced incarceration to be redirected to counties that pursue policies that divert offenders from prison, reduce recidivism, and ensure victim restitution.[101] The policy helps recipient counties implement proven strategies for better supervising probationers.[102] Between 2008 and 2010, the number of Arizona probationers revoked to prison fell twenty-eight percent and the number of new felony convictions among Arizona probationers fell thirty-one percent.[103]

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100. *See, e.g., SB 64 Alaska Senate Bill*, OPENSTATES.ORG, http://www.openstates.org/ak/bills/28/SB64/ [http://perma.cc/3WGW-2HZQ] (last visited May 24, 2014) (showing sponsor as Senate Judiciary Committee); *S. 1357 Idaho Senate Bill*, OPENSTATES.ORG, http://www.openstates.org/id/bills/2014/S1357/ [http://perma.cc/7X5C-CP3W] (last visited May 24, 2014) (showing sponsor as Senate Judiciary and Rules Committee); *H.B. 585 Mississippi House Bill*, OPENSTATES.ORG, http://www.openstates.org/ms/bills/2014/HB585/ [http://perma.cc/S7AW-SMNS] (last visited May 24, 2014) (showing Republican sponsors).

101. S.B. 1476, 48th Leg., 2nd Gen. Assemb. (Ariz. 2008).

102. PEW CTR. ON THE STATES, PEW CHARITABLE TRUSTS, THE IMPACT OF ARIZONA'S PROBATION REFORMS 2 (Mar. 2011), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2011/PSPP_Arizona_probation_brief_web.pdf [http://perma.cc/849G-DKPY].

103. *Id.* at 1.

In Ohio, a similar program, Reasonable and Equitable Community and Local Alternatives to the Incarceration of Minors (RECLAIM), has also been tremendously successful.[104] The recidivism rate for moderate-risk youth in Ohio state lockups fell from fifty-four percent to twenty-two percent under RECLAIM.[105] For conservatives who have long emphasized that incentives affect the behavior of both individuals and systems, the success of these policies is unsurprising.

B. Swift and Certain Sanctions

Another especially promising practice consistent with traditional conservative insight is HOPE, a probation program that is organized around the principles that swiftness and certainty are more important for effective punishment than is severity. HOPE, which stands for Hawaii's Opportunity Probation with Enforcement, began in Honolulu under the leadership of Justice Steven Alm, a former federal prosecutor, and it is beginning to spread across the mainland.[106]

HOPE is partly rooted in the thinking of the eighteenth-century Italian jurist Cesare Beccaria, who is widely regarded as the first criminologist in Western Civilization.[107] Beccaria's 1764 treatise, *On Crimes and Punishments*, was known to and read by many of the founding fathers of the United States.[108] Beccaria made several arguments in the treatise that many of the founding fathers made and that many modern conservatives continue to make, such as the importance of a right to bear arms.[109]

One of Beccaria's most important arguments was that criminal offenders respond better to immediate and certain punishments

104. PEW CHARITABLE TRUSTS, STATE-LOCAL PARTNERSHIP IN OHIO CUTS JUVENILE RECIDIVISM, COSTS (2013), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2013/PSPP-State-Local-Partnership-in-Ohio-Cuts-Juvenile-Recidivism-Costs.pdf [http://perma.cc/WQ4H-4J43].

105. CHRISTOPHER T. LOWENKAMP & EDWARD J. LATESSA, EVALUATION OF OHIO'S RECLAIM FUNDED PROGRAMS, COMMUNITY CORRECTIONS FACILITIES, AND DYS FACILITIES 25 tbl.10 (Aug. 17, 2005), *available at* http://www.uc.edu/content/dam/uc/ccjr/docs/reports/project_reports/Final_DYS_RECLAIM_Report_2005.pdf [http://perma.cc/7AC2-J5PJ].

106. KLEIMAN, *supra* note 47, at 34–48.

107. ROBERT A. FERGUSON, INFERNO: AN ANATOMY OF AMERICAN PUNISHMENT 39–44 (2014).

108. *Id.* at 39.

109. *See id.*

than they do to tenuous but severe punishments.[110] Using this insight, the HOPE Court applies swift, sure, and commensurate sanctions to promote compliance with drug tests and probation terms. For example, a judge might inform a drug offender that, rather than be prosecuted, the offender will be assigned a color.[111] The offender will have to call the court daily to learn whether his color has been randomly selected.[112] If his color has been selected, the offender will have to report to the court and pass a drug test.[113] If he fails to pass the drug test, he will have to spend an immediate stint in jail.[114] At first, the stint will be short—often just a weekend. However, if the offender continues to test positive for drugs, his sanctions will become more onerous.[115] In this way, lengthy and protracted trials are virtually eliminated in favor of immediate sanctions.[116]

HOPE has decreased substance abuse and probation failures in Hawaii by more than two-thirds.[117] Moreover, HOPE has helped Hawaii identify which of its drug offenders most desperately require treatment. The twenty to thirty percent of HOPE probationers who cannot pass the random drug tests suffer from serious chemical addictions.[118] Hawaii can prioritize using its limited treatment resources to help these offenders.

HOPE works because swift and certain sanctions are more effective responses to criminal behavior than are severe sanctions applied only after multiple probation violations. An eighteenth-century treatise is hardly necessary to explain why. A parent disciplining a child understands the concept more intuitively than does a professor. HOPE-style programs are sprouting across the country. Fort Worth, Texas, for example, has launched a comparable program called Supervision With Intensive enForcemenT (SWIFT).[119] Whatever it is called and wherever it

110. *See* CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 63 (Richard Bellamy ed., Cambridge Univ. Press 1995).

111. KLEIMAN, *supra* note 47, at 40.

112. *Id.*

113. *Id.*

114. *Id.* at 39.

115. *Id.* at 37.

116. *Id.*

117. ANGELA HAWKEN & MARK KLEIMAN, MANAGING DRUG INVOLVED PROBATIONERS WITH SWIFT AND CERTAIN SANCTIONS: EVALUATING HAWAII'S HOPE 18 (Dec. 2009), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf [http://perma.cc/WUH8-UNMM].

118. *See id.* at 33.

119. Vikrant P. Reddy, *SWIFT Sanctions Can Change Adult Probation in Tarrant County*, TEX. PUB. POLICY FOUND. (Apr. 12, 2012), http://www.texaspolicy.com/

is located, HOPE has generated tremendous admiration among conservative reformers.

C. Problem-Solving Courts

Accountability courts, sometimes called problem-solving courts, are specialized courts in which a judge oversees the supervision and treatment of the offender.[120]

A mental health court, for example, provides certain offenders with appropriate treatment rather than traditional sentences.[121] Importantly, mental health courts are relatively inexpensive to create in comparison to their potential benefits. "Merrill Rotter, the Medical Director and Co-Project Director of the Bronx Mental Health Court, notes that some of the programs 'cost as little as $150,000 while others cost multiples of that.'"[122]

A RAND Institute study of mental health courts found that "the leveling off of mental health treatment costs and the dramatic drop in jail costs yielded a large cost savings."[123] In the Washoe County Mental Health Court in Reno, Nevada, for instance, the 2007 class of 106 graduates went from 5,011 jail days one year prior to mental health court to 230 jail days one year after, a ninety-five percent reduction.[124] The overall cost to the system was reduced from $566,243 one year prior to the institution of mental health courts to $25,290 one year after.[125]

In Santa Barbara County in California, an evaluation of mental health courts found that the participants averaged fewer "jail days after treatment than before, with a greater reduction in

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center/effective-justice/opinions/swift-sanctions-can-change-adult-probation-tarrant-county [http://perma.cc/JWR3-Z8FF].

120. *See generally* Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 L. & POL'Y 125, 125–38 (2001) (providing background information on problem-solving courts).

121. *See generally* Henry J. Steadman et al., *Mental Health Courts: Their Promise and Unanswered Questions*, 52 L. & PSYCHIATRY 457, 457–58 (2001) (providing background information on mental-health courts).

122. Marc A. Levin & Vikrant P. Reddy, *Peach State Criminal Justice: Controlling Costs, Protecting the Public*, GA. PUB. POL'Y FOUND. (Feb. 16, 2012), http://www.georgiapolicy.org/peach-state-criminal-justice-controlling-costs-protecting-the-public-2/#ff_s=fKu1Z [http://perma.cc/F2UB-QMUU] (citing Interview with Merrill Rotter, Medical Director, Bronx Mental Health Court (Jan. 13, 2009)).

123. M. SUSAN RIDGELY ET AL., RAND INFRASTRUCTURE, SAFETY & ENV'T, JUSTICE, TREATMENT, AND COST: AN EVALUATION OF THE FISCAL IMPACT OF ALLEGHENY COUNTY MENTAL HEALTH COURT xi (2007).

124. Interview with Julie Clements, Pretrial Services Officer, Washoe County Mental Health Court (Jan. 13, 2009).

125. *Id.*

jail days noted for participants in the [mental health court] than for participants in [the traditional judicial system]."[126] The *American Journal of Psychiatry* reported that "participation in the mental health court program was associated with longer time without any new criminal charges or new charges for violent crimes."[127]

Drug courts are another proven alternative to incarceration. They combine intensive judicial oversight of low-level drug offenders with mandatory drug testing and escalating sanctions to achieve results.[128] According to the National Association of Drug Court Professionals, the average recidivism rate for offenders who complete a drug court program is between four percent and twenty-nine percent.[129] In contrast, the average recidivism rate for offenders who do not participate in a drug court program is a whopping forty-eight percent.[130] Similarly, the Government Accountability Office reports that re-arrest rates among drug-court participants are ten to thirty percentage points below re-arrest rates in a comparison group.[131]

Drug courts can be exceptionally cost-effective. Some drug courts cost less than $3,000 per participant, and their estimated net savings, taking into account both reduced corrections spending and avoided victims costs, average $11,000 per participant.[132]

Mental health courts and drug courts—along with other problem-solving courts such as Veterans' Courts[133] and Prostitution Diversion Courts[134]—exist because the standard

126. MERITH COSDEN ET AL., EVALUATION OF THE SANTA BARBARA COUNTY MENTAL HEALTH TREATMENT COURT WITH INTENSIVE CASE MANAGEMENT 4 (2004).

127. Dale E. McNiel & Renée L. Binder, *Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence*, 164 AM. J. PSYCHIATRY 1395, 1395 (2007).

128. KLEIMAN, *supra* note 47, at 39–40.

129. *Do Drug Courts Work?*, SUPERIOR COURT OF CAL. DRUG COURT SERVS., http://www.alameda.courts.ca.gov/dcs/facts2.html [http://perma.cc/C8ZR-L4ZN] (last visited May 24, 2014).

130. *Id.*

131. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 05-219, ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES 45 (2005), *available at* http://www.gao.gov/new.items/d05219.pdf [http://perma.cc/MK9E-HMAA].

132. CAL. ADMIN. OFF. OF THE COURTS, CALIFORNIA DRUG COURT COST ANALYSIS STUDY 3 (2006), http://www.courts.ca.gov/documents/cost_study_research_summary.pdf [http://perma.cc/9CHG-ADHA].

133. *See generally* MARC A. LEVIN, TEX. PUB. POLICY FOUND., VETERANS' COURTS (2009).

134. *See generally* Tristan Hallman, *Texas Bill on Prostitution Diversion Modeled on Dallas County*, DALL. NEWS, June 5, 2013, http://www.dallasnews.com/

adversarial litigation model is not always optimal. The model may be effective for civil justice matters and for determining whether a defendant is guilty of a crime, but it has limited efficacy in addressing criminality.

V. CONCLUSION

Prisons, of course, are a necessary part of any society. In *The Scarlet Letter*, Nathaniel Hawthorne observed that "[t]he founders of a new colony, whatever Utopia of human virtue and happiness they might originally project, have invariably recognized it among their earliest practical necessities to allot a portion of the virgin soil . . . as the site of a prison."[135] Conflict and crime will always exist. So too will prisons.

Prisons, however, are not a source of pride. Conservative philosophy recognizes that an unusually high number of prison cells indicates a society with too much crime, too much punishment, or both. This understanding was set aside in the 1960s to deal with perceived emergency conditions, but the bottom line is that prisons evince nothing about conservative political and legal principles. First principles in conservative thought counsel skepticism of all government programs—including prisons.

All conservatives—fiscal conservatives, libertarians, and social conservatives—are now returning to first principles. Perhaps the key indicator of this is the robust language in the 2012 Republican Platform:

> Government at all levels should work with faith-based institutions that have proven track records in diverting young and first time, non-violent offenders from criminal careers, for which we salute them. Their emphasis on restorative justice, to make the victim whole and put the offender on the right path, can give law enforcement the flexibility it needs in dealing with different levels of criminal behavior. We endorse State and local initiatives that are trying new approaches to curbing drug abuse and diverting first-time offenders to rehabilitation.[136]

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news/politics/state-politics/20130605-texas-bill-on-prostitution-diversion-modeled-on-dallas-county.ece [http://perma.cc/GK96-T36L].

135. NATHANIEL HAWTHORNE, THE SCARLET LETTER 33 (Dover Publ'ns 1994) (1850).

136. REPUBLICAN PARTY PLATFORM 2012: WE BELIEVE IN AMERICA 38 (2012), *available at* http://www.gop.com/wp-content/uploads/2012/08/2012GOPPlatform.pdf [http://perma.cc/M6U7-FUNM].

Conservatives know that there are methods other than incarceration for holding offenders accountable. These methods can improve public safety and increase the likelihood that victims receive restitution. Utilizing these methods does not mean making excuses for criminal behavior; it simply means "thinking outside the cell" when it comes to punishment and accountability.

JUST ANOTHER BRICK IN THE WALL: THE ESTABLISHMENT CLAUSE AS A HECKLER'S VETO

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"When rights are incorporated against the States through the Fourteenth Amendment they should advance, not constrain, individual liberty."[1]

I. INTRODUCTION

Although the First Amendment explicitly protects individuals against only laws made by "Congress,"[2] the Supreme Court has long held that, under the Due Process Clause of the Fourteenth Amendment, the states are forbidden from "depriving" persons of the fundamental individual liberties protected by the First Amendment.[3] Thus, under the so-called doctrine of incorporation, a particular provision of the First Amendment (as well as of the rest of the Bill of Rights) "is made applicable to the states [only] if the Justices are of the opinion that it was meant to protect a 'fundamental' aspect of liberty."[4]

However, sometimes the Court applies the Establishment Clause of the First Amendment against the states in ways that seem to restrict rather than protect liberty. Remarkably, sometimes the Court even interprets the Establishment Clause as requiring it to act as a judicial censor issuing heckler's vetoes which grant one group of citizens the power to deprive another group of citizens an opportunity to view and enjoy a state-sponsored display or memorial in a public park or building. The purpose of this article is to search for liberty under the incorporated First Amendment, and to seek to discern when liberty is advanced and when it is restricted by Supreme Court decisions concerning passive displays and monuments erected by state governments as part of a pluralistic public culture.

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1. Zelman v. Simmons-Harris, 536 U.S. 639, 678 (2002) (Thomas, J., concurring).

2. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

3. The Due Process Clause of the Fourteenth Amendment provides: "nor shall any State *deprive* any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1 (emphasis added).

4. 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.6(a), at 855 (5th ed. 2012). Justice John Paul Stevens has stated that "the idea of liberty" is the source of the incorporation doctrine. John Paul Stevens, *The Bill of Rights: A Century of Progress*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 13, 33 (Geoffrey R. Stone et al. eds., 1992).

II. PASSIVE DISPLAYS AND LIBERTY: A HYPOTHETICAL CASE

Suppose that a local public high school has put up a "Gay Pride—Stop Homophobia" poster in the hallway to celebrate gay pride month. When several conservative Christian students at the school are offended by the display, their parents complain to the school board, and the school board orders the principal to take the gay pride poster down immediately because its message offends the Christian students and their parents and makes them feel like unwelcome outsiders in the public school.

Here is the question I ask my students when we discuss this problem in class: is the school board's decision, ordering the principal to take down the poster, one that is advancing liberty or one that is restricting liberty? What would the ACLU and other organizations advocating for the freedom of speech argue in such a case?

What about the liberty of the offended students and their parents—isn't it a good thing for the school board to protect them from having to view the offensive poster? What about their liberty not to look at the poster? Doesn't the poster amount to an endorsement by the government of gay pride and a disapproval of the religious beliefs of the Christian students and their families?

What about the courts? Suppose the Christian families sued in federal court seeking to enjoin the school from displaying the gay pride poster under the Free Exercise Clause, because the school's endorsement of the poster harmed the religious sensibilities of the Christian families? Should the courts enjoin the school from displaying the poster in order to protect the free exercise right of the Christian students not to have their religious beliefs offended by the school's endorsement of gay pride and disapproval of homophobia?

How should the issues raised above be decided under the incorporated Free Speech Clause? Where does liberty reside in this problem?

A. Freedom of Speech and Censorship of Governmental Displays: Herein of Pico, Barnette *and* Cohen

In the above hypothetical, I believe that organizations supporting freedom of speech, such as, perhaps, the ACLU, would argue that the school board's decision censoring the gay

pride poster violates the freedom of speech of the students who wish to be a willing audience for the display, and does not violate any First Amendment right of the Christian students and their families who could easily avert their eyes to avoid seeing the display that offends them. I believe that this is a classic "heckler's veto" situation, one in which the cause of liberty is on the side of those who wish to receive the speech and not on the side of the offended observers who wish to impose their view of acceptable speech on everyone else in the community. Although it is not clear that the Free Speech Clause would forbid the school from removing its own gay pride display, it is abundantly clear that the willing audience for the display has a strong liberty interest on its side and that the hecklers have no real liberty interest on theirs.

As Justice Douglas observed in his majority opinion in *Griswold v. Connecticut*, "[t]he right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, [and] the right to read."[5] In other words, both willing speakers and willing audiences have First Amendment rights: speakers to speak; and audiences to listen, to view, and to read. This is important when the speaker chooses not to defend the right to speak because, in such cases, the willing audience for the speech may be able to assert the right to receive the censored expression.

The closest case to our hypothetical involving censorship of the gay pride display is *Board of Education v. Pico*, a case involving a school board's decision to remove certain library books from public high school and junior high school libraries.[6] The censored books, including works by Kurt Vonnegut, Langston Hughes, and Richard Wright,[7] were removed by the school board to appease the concerns of a group of "politically conservative" parents who objected to the content of the books.[8] The school board explained that it decided to remove the books because they are "anti-American, anti-Christian, anti-Sem[i]tic,

5. Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (stating that the First Amendment "embraces the right to distribute literature . . . and necessarily protects the right to receive it" (citing Martin v. City of Struthers, 319 U.S. 141, 143 (1943))). *See generally* Jamie Kennedy, *The Right to Receive Information: The Current State of the Doctrine and the Best Application for the Future*, 35 SETON HALL L. REV. 789 (2005).

6. Bd. of Educ. v. Pico, 457 U.S. 853, 856–57 (1982) (plurality opinion).

7. The censored books included Kurt Vonnegut's *Slaughterhouse-Five*, Langston Hughes' *Best Short Stories of Negro Writers*, Richard Wright's *Black Boy*, and Eldridge Cleaver's *Soul On Ice*. *Id.* at 856 n.3.

8. *Id.* at 856.

and just plain filthy."[9]

Although there was no majority opinion on the First Amendment issues in the case,[10] Justice Brennan's plurality opinion in *Pico* is of landmark quality and is often studied in First Amendment courses in law schools. The plurality made clear that its decision concerned only the "*removal* from school libraries of books originally placed there by the school authorities" and not decisions by school authorities concerning "the *acquisition* of books."[11] However, Justice Brennan stated that when school boards remove books from school libraries "simply because they dislike the ideas contained in those books,"[12] they violate the First Amendment "'right [of students] to receive information and ideas.'"[13] The plurality opinion made clear that: "'The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.'"[14]

Justice Brennan emphasized that removal of books was forbidden only if the school board intended "to deny respondents access to ideas"[15] and noted that "such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."[16] In other words, pluralism is a reason to allow access to contested ideas, not a reason to deny access to such expression.

The plurality's opinion is a very narrow one. It does not interfere with the power of the school board to define the school's curriculum, or to choose textbooks, or even to remove

9. *Id.* at 857.

10. Justice White, the fifth vote in the case to affirm the court of appeals' decision denying summary judgment to the school board, explicitly declined to reach the First Amendment issues in the case. *Id.* at 883 (White, J., concurring).

11. *Id.* at 862 (plurality opinion).

12. *Id.* at 872.

13. *Id.* at 867 (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)). As the plurality emphasized, "the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom." *Id.*

14. *Id.* (quoting Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring)).

15. *Id.* at 871 ("Our Constitution does not permit the official suppression of *ideas*.").

16. *Id.* at 868. *See also* Right To Read Def. Comm. v. Sch. Comm., 454 F. Supp. 703, 714 (D. Mass. 1978) (stating that the removal of books from a public school library interfered with right of library patrons "to read and be exposed to controversial thoughts").

library books based upon its judgment of their "educational suitability."[17] The decision only forbids removal decisions "exercised in a narrowly partisan or political manner" or intended to suppress unpopular or unwelcome ideas.[18] Still, *Pico* strongly supports the idea that censorship of public school library books (or school displays) restricts a real liberty interest: the interest of the willing audience whose right to receive speech is deprived when the censored expression is removed.[19] The removal of books from a school library, or of the hypothetical gay pride display from the school's hallway, "implicates the right to receive information because the state is hindering access to information previously available."[20]

But what about the impressionable Christian students, at least some of whom feel deeply offended and unwelcome by their school's celebration of gay pride and disapproval of homophobia and traditional sexual morality? Should a public school be allowed to send a message endorsing the idea that the gay students and their allies are valued insiders in the school community and religious conservatives are despised outsiders, "homophobes" whose sincerely held religious views concerning marriage and human sexual morality are anathema to school authorities? Do these dissenters have a liberty interest served by the removal of the display?

As Justice Harlan put it so memorably in *Cohen v. California*, the remedy for those who wish to avoid the "bombardment of their sensibilities" by messages that offend them is "simply by averting their eyes."[21] This is true even in the case of impressionable school children exposed in school to ideas and messages they perceive as "distasteful or immoral or absurd," or even "offensive and irreligious."[22] As Justice Kennedy put it so

17. *Pico*, 457 U.S. at 871 (plurality opinion).

18. *Id.* at 870–71.

19. *Id.* at 867–68.

20. Martin D. Munic, *Education or Indoctrination—Removal of Books from Public School Libraries:* Board of Education, Island Trees Union Free School District No. 26 v. Pico, 68 MINN. L. REV. 213, 237 (1983).

21. Cohen v. California, 403 U.S. 15, 21 (1971). The Court explicitly stated that to allow offended listeners a right to censor speech that offends them would create a kind of heckler's veto by empowering the hecklers to censor speech "as a matter of personal predilections." *Id.* The Court recently reaffirmed this principle in Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011) (noting that the Constitutional remedy for the "unwilling listener or viewer" is to avert her eyes (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 210–11 (1975))).

22. Lee v. Weisman, 505 U.S. 577, 591 (1992).

clearly in *Lee v. Weisman*: "To endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry. And tolerance presupposes some mutuality of obligation."[23] In other words, the remedy for students offended by ideas they are exposed to in public schools is not to censor the speech of their teachers and fellow students, but rather to have "confidence in [their] own ability to accept or reject [the] ideas" of others and to respond to what they believe to be false ideas with their own version of the truth.[24]

In a tolerant and pluralistic society, all points of view should be allowed to compete in the marketplace of ideas, and no one has a liberty interest or right "to prevent criticism of [his] beliefs or even [his] way of life."[25] The just-quoted language is from Circuit Judge Posner's opinion for the court in *Zamecnik v. Indian Prairie School District No. 204*, a case (like our hypothetical) involving a public school and speech concerning homosexuality.[26] In *Zamecnik*, after the school allowed teachers and students to wear T-shirts supporting gay pride as part of an annual event called the "Day of Silence," it subsequently banned students from taking the opposing side of the issue by wearing T-shirts with the slogan "Be Happy, Not Gay."[27] The school banned the T-shirts under a school rule forbidding "derogatory comments" concerning sexual orientation.[28] The Seventh Circuit ruled against the school and held that "a school that permits advocacy of the rights of homosexual students cannot be allowed to stifle criticism of homosexuality."[29] Students offended by the T-shirts' message do not have a heckler's veto to silence their fellow students because, as Judge Posner put it, disapproval of another's message "is not a permissible ground for banning it."[30] In a pluralistic and democratic society, students must be

23. *Id.* at 590–91.
24. *Id.* at 591.
25. Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874, 876 (7th Cir. 2011).
26. *See id.* at 875.
27. *Id.* Plaintiff Heidi Zamecnik wore the "Be Happy, Not Gay" T-shirt to school on "Day of Truth," an annual event designed as a counterpoint to "Day of Silence." *Id.*
28. *Id.* "A school official inked out the phrase 'Not Gay'" on Plaintiff's T-shirt. *Id.*
29. *Id.* at 876.
30. *Id.* at 879. The Constitution does not "establish a generalized 'hurt feelings' defense to a high school's violation of the First Amendment rights of its students." *Id.* at 877.

prepared to think for themselves on controversial issues such as gay rights, and thus, they should not be sheltered from the clash of opposing views, even if some of those views are considered derogatory or offensive by fellow students or school officials.[31]

Thus, in our hypothetical concerning the gay pride display, it seems that the willing audience for the display has a strong liberty interest in being protected against censorship of the display, and that removal of the display does not advance any serious liberty interest of the Christian students offended by the display. In other words, the school board's decision to remove the display in order to appease the offended families does not advance anyone's liberty but, to the contrary, serves to constrain the liberty of the display's willing audience to receive speech.

Moreover, even if we change the facts a little to strengthen the claim of the Christian dissenters, there is still no liberty interest served by censorship or removal of the display. Suppose, for example, that school authorities required students to affirm their belief and support for the display's message of gay pride and the evil of "homophobia." Would the Christian students now have a liberty interest in resisting the compelled affirmation of belief?

Under *West Virginia State Board of Education v. Barnette*, a public school may not compel any student "to confess by word or act" the student's allegiance to any "matter[] of opinion."[32] Thus, the Christian dissenters now have a liberty interest that protects them from being compelled to affirm their allegiance to the message of the gay pride display. However, under *Barnette*, a student's right not to participate in recitation of the Pledge of Allegiance does not include a right to silence his teacher and willing classmates who wish to participate. As Judge Easterbrook explained in *Sherman v. Community Consolidated School District 21*, "so long as the school does not compel pupils to espouse the content of the Pledge as their own belief, it may carry on with patriotic exercises. Objection by the few does not reduce to silence the *many* who want to pledge allegiance."[33] As in *Barnette*

31. *See id.* at 876.

32. W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that under the First Amendment, public schools may not compel students to pledge allegiance to the flag).

33. Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 445 (7th Cir. 1992) (emphasis added) (emphasis omitted). For an excellent discussion of Judge Easterbrook's opinion in this case, see Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451 (1995).

and *Sherman*, so too in our hypothetical. The Christian dissenters may not be compelled to affirm their support for the gay pride display, but so long as they are free to avert their eyes and ignore the gay pride display, they have no liberty interest in denying others the liberty to be an audience for the school's gay pride display.

B. Why Heckler's Vetoes are Bad and Offended Observer's Vetoes are Worse

What exactly is wrong with the government appeasing the hurt feelings of those who are offended by speech in public places? Why should the right to speak and to receive speech be elevated over the rights of those who are deeply offended by expression they encounter in public places?

The classic heckler's veto case arises when someone wishes to speak in a public forum and someone else threatens to violently stop the speech. So, for example, someone like Martin Luther King may wish to speak in favor of racial equality in a public park in Montgomery, Alabama, and someone else, perhaps a local chapter of the Ku Klux Klan, threatens violence if Dr. King is allowed to speak. In order to keep the peace and prevent a violent situation, city officials forbid Dr. King from speaking. Is it wrong for government to silence a speaker in order to avert a possible violent reaction? If so, why?[34]

Cheryl Leanza has explained the heckler's veto cases in this manner:

> Heckler's veto cases typically consider the appropriate behavior of local law enforcement when a crowd or individual threatens hostile action in response to a demonstration or speaker. In these cases, the First Amendment grants a positive right to the speaker: the local government must take action to protect the speaker against a hostile crowd. The courts do not allow local law enforcement to accede to a heckler's veto.[35]

In other words, the evil in heckler's veto situations is that it

34. In his important book on free speech and the civil rights movement in the South, Harry Kalven Jr., warned that without constitutional protection for the freedom of speech of "Negro speakers" against hostile Southern crowds, the South could become "one gigantic heckler veto." HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 141 (1966).

35. Cheryl A. Leanza, *Heckler's Veto Case Law as a Resource for Democratic Discourse*, 35 HOFSTRA L. REV. 1305, 1306 (2007).

empowers hecklers to "silence any speaker of whom they do not approve."[36]

It is not only the speaker who benefits from the law's rejection of the heckler's veto; the willing audience for the speaker's message is also protected. In other words, "difficult questions of competing First Amendment rights should be resolved with the goal of increasing the viewpoints to which listeners are exposed."[37] Even if no speaker is harmed when the state accedes to a heckler's veto, "first amendment recognition [should] be given to a right of access for the protection of the reader, the listener, and the viewer."[38]

Professor Barron believed the "point of ultimate interest" of the First Amendment should be "not the words of the speakers but the minds of the hearers."[39] Thus, the point of free speech, even from the perspective of speakers, is for the ideas in the speaker's message to reach the minds of the willing audience. When government accedes to a heckler's veto, the censored ideas die aborning, and the marketplace of ideas is impoverished accordingly.

Notice that the classic heckler's veto situation is different, in at least one respect, from the offended-observer situation in *Pico* and in our gay pride display hypothetical.[40] In the case of the heckler's veto, the state's decision to censor expression is not intended to suppress speech or to appease hecklers, but rather to serve a strong interest in protecting public safety from a potentially violent demonstration. However, in cases concerning offended observers, the government curtails speech not to

36. KALVEN, *supra* note 34, at 140.

37. Leanza, *supra* note 35, at 1305.

38. Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1666 (1967).

39. *Id.* at 1653.

40. I am using the term "offended-observer situation" to describe cases in which the heckler is not threatening violence, but instead asks government officials to suppress books or displays that offend his sensibilities. Professor Esbeck calls these cases "unwanted exposure" cases. *See* Carl H. Esbeck, *Unwanted Exposure to Religious Expression by Government: Standing and the Establishment Clause*, 7 CHARLESTON L. REV. 607, 608 (2013) [hereinafter Esbeck, *Unwanted Exposure to Religious Expression*]. These are almost uniformly cases in which the offended observer could easily have avoided the unwanted expression simply by looking away or taking a slightly different path across the public square. For example, in *Pico*, rather than seek to remove library books they disliked, the offended observers could have avoided the books merely by declining to check them out (or by instructing their children not to check them out). And in our gay pride hypothetical, the offended observers could have simply averted their eyes as they approached the gay pride display.

protect public safety, but merely to appease the sensibilities of those who have decided to seek to censor an unwanted display rather than to avert their eyes.[41] The government inflicts a real First Amendment harm on the willing audience for the censored expression for the sole purpose of empowering the offended observers to decide which speech others may have the opportunity to read or view in public space.

To pose yet another example of the offended observer's veto, suppose a state art museum, under pressure from a group of conservative citizens, decides to remove its collection of the late Robert Mapplethorpe's homoerotic photography from public viewing in the museum.[42] Should the First Amendment protect the interest of those who wish to view the Mapplethorpe exhibit, or does it allow the state to censor the exhibit in order to accommodate the offended sensibilities of those who wish to "contract the spectrum" of art available for public viewing?[43] Again, the willing audience for the Mapplethorpe exhibit has, at the very least, a strong liberty interest in the recognition of its right to view the photographs, especially when the state's only reason for removing the exhibit is to censor ideas disliked by the politically influential offended observers.

As District Judge Tauro explained when he enjoined a school committee's decision to remove a controversial book from a public school library in response to complaints by offended parents: "The most effective antidote to the poison of mindless orthodoxy is ready access to a broad sweep of ideas and philosophies. There is no danger in such exposure. The danger is in mind control."[44] The evil of heckler's vetoes, and of

41. *See, e.g.*, Bd. of Educ. v. Pico, 457 U.S. 853 (1982).

42. *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 574 (1998) (describing political opposition to public support for the exhibition of Mapplethorpe's homoerotic photography). *See also* Linnemeier v. Ind. Univ.—Purdue, 155 F. Supp. 2d 1034, 1035 (N.D. Ind. 2001) (resulting in an unsuccessful attempt by offended observers to enjoin theatrical production of *Corpus Christi* at a state university).

43. *See* Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (stating that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge"). Moreover, additional dictum in Justice Douglas's majority opinion in *Griswold* stated that the "right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the *right to receive*, the *right to read* and freedom of inquiry, [and] freedom of thought . . . ." *Id.* (emphasis added) (citations omitted).

44. Right To Read Def. Comm. v. Sch. Comm., 454 F. Supp. 703, 715 (D. Ma. 1978). As Nat Hentoff observed, "No judge in all of American history had ever before so clearly and vigorously set forth the First Amendment right-to-read of public school students." NAT HENTOFF, THE FIRST FREEDOM: THE TUMULTUOUS HISTORY OF FREE SPEECH IN

offended observer's vetoes, is for government to allow the sensibilities of some citizens to deny "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences."[45] To put it another way, heckler's vetoes deprive individuals who may "wish to form an opinion rather than voice one" the opportunity "to sample widely from books and cultural materials" that might help them "gather ideas rather than advocate a position."[46]

III. PASSIVE DISPLAYS AND LIBERTY: ANOTHER HYPOTHETICAL CASE

Suppose we introduce a slight change in the facts of our hypothetical case involving censorship of the gay pride poster. Suppose now a public school decides to display, not a gay pride poster, but rather a "Merry Christmas" poster featuring a typical portrayal of a young mother, a bearded father, and an infant child in a manger. Next, several dissenting students and their families demand that the school must take this poster down to comply with the Establishment Clause. If a court were to agree that this passive Christmas display violates the incorporated Establishment Clause, would the court be advancing liberty or constraining liberty?

Surely, the answer here must be the same as in our first hypothetical. Liberty resides with the students who compose the Christmas display's willing audience, not with those offended by the display, since the latter individuals may avert their eyes if they wish to avoid viewing it. Liberty is offended by heckler's vetoes, and undoubtedly the First Amendment must not require censorship to appease those offended by a Christmas display that is meaningful to others. In a pluralistic society, the public culture should reflect the diversity of our society, not the narrow views of those who seek to deny others a place at the table.

Is this an unfair interpretation? Suppose instead of a Christmas display a public school decides to celebrate Martin Luther King Day with a poster of Dr. King and the quotation: "A just law is a man-made code that squares with the moral law or

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AMERICA 36–37 (1980).

45. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

46. Marc Jonathan Blitz, *Constitutional Safeguards for Silent Experiments in Living: Libraries, the Right to Read, and a First Amendment Theory for an Unaccompanied Right to Receive Information*, 74 UMKC L. REV. 799, 803 (2006).

the law of God."[47] How should this case come out?

The Supreme Court has decided a number of cases involving passive governmental displays touching upon religion,[48] and its decisions are consistently inconsistent, seriously muddled, and egregiously flawed.[49] Many of these cases allow offended observers to censor passive religious displays and thus deprive a willing audience of the right to receive speech that previously had been available to them.[50]

Since all of these cases concern state or local government displays, they have been decided under the incorporated Establishment Clause.[51] In order to clearly focus on what the Constitution says about this issue, it seems appropriate to begin with the Court's jurisprudence concerning incorporation of the Establishment Clause.

A. Incorporation as Protection Against Deprivations of Liberty

The Bill of Rights was originally ratified as a check on the power of the federal government,[52] and in *Barron v. Mayor of Baltimore,* the Supreme Court held that these amendments were not applicable to the states.[53] Chief Justice Marshall explained this holding in no uncertain terms:

> Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention. Had congress engaged in the

47. Martin Luther King, Jr., Letter from Birmingham City Jail (Apr. 16, 1963), *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 289, 293 (James M. Washington ed., 1991). Or, perhaps the poster might have quoted from Dr. King's "*I Have a Dream*" speech, which he closed by quoting "the words of the old Negro spiritual, 'Free at last, free at last; thank God Almighty, we are free at last.'" Martin Luther King, Jr., I Have a Dream (Aug. 28, 1963), *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR., *supra,* at 217, 220.

48. *See infra* notes 98–115 and accompanying text.

49. *See, e.g.*, Patrick M. Garry & John P. Garry, *The Establishment Clause and the Making of a New Secularism: A Review Essay on* Church, State and the Crisis in American Secularism *by Bruce Ledewitz,* 51 DUQ. L. REV. 251, 253 (2013) ("Because of very sharp and basic differences between the justices, the United States Supreme Court has been inconsistent and confusing in its Establishment Clause doctrine.").

50. *See infra* notes 98–115 and accompanying text.

51. *See, e.g.*, Cnty. of Allegheny v. ACLU, 492 U.S. 573 (1989); Van Orden v. Perry, 545 U.S. 677 (2005).

52. This discussion of incorporation of the Establishment Clause relies heavily on my earlier work. *See* Richard F. Duncan, *Justice Thomas and Partial Incorporation of the Establishment Clause: Herein of Structural Limitations, Liberty Interests, and Taking Incorporation Seriously,* 20 REGENT U. L. REV. 37 (2007).

53. Barron v. Mayor of Balt., 32 U.S. 243 (1833).

> extraordinary occupation of improving the constitutions of the several states, by affording the people additional protection from the exercise of power by their own governments, in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language. . . . These amendments demanded security against the apprehended encroachments of the general government not against those of the local governments.
>
> . . . These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.[54]

However, by early in the twentieth century the Supreme Court had found a way to "incorporate" certain provisions of the Bill of Rights against the states as "part of the liberty protected from state interference by the due process clause of the Fourteenth Amendment."[55] Under this concept of "selective incorporation," a particular provision of the Bill of Rights "is made applicable to the states if the Justices are of the opinion that it was meant to protect a 'fundamental' aspect of liberty."[56] In other words, only individual liberties that are deemed to be "implicit in the concept of ordered liberty"[57] or "fundamental to the American scheme of Justice"[58] are incorporated against the states by the Due Process Clause of the Fourteenth Amendment. As Justice John Paul Stevens has put it so directly, "the idea of liberty" is the source of the incorporation doctrine.[59]

Moreover, under the doctrine of incorporation these fundamental individual liberties are protected only against "deprivations" by the states.[60] Individuals do not have a right to strike down laws that merely hurt their feelings or offend their sensibilities because only laws that deprive them of a protected liberty—i.e., laws which impose substantial burdens, undue burdens, or extreme restrictions on their individual liberty—constitute unconstitutional deprivations of liberty under the Fourteenth Amendment. Thus, the incorporated liberty of free

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54. *Id.* at 250.

55. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 6.3.3, at 511 (4th ed. 2011).

56. 2 ROTUNDA & NOWAK, *supra* note 4, § 15.6(a), at 855.

57. *Id.* at 855–56 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

58. *Id.* at 856 (quoting Duncan v. Louisiana, 391 U.S. 145, 149 (1968)).

59. Stevens, *supra* note 4, at 33.

60. The Due Process Clause of the Fourteenth Amendment, the portal for incorporation, provides: "nor shall any State *deprive* any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1 (emphasis added).

exercise of religion is protected, if at all, only against laws that impose "substantial burdens" on an individual's religious exercise.[61] Similarly, freedom of speech protects an individual's right to say what he wishes to say and to refrain from being compelled to speak, not the right to censor the state's message or to silence willing messengers of the government's speech.[62] The right to just compensation for regulatory takings is protected only against "extreme"[63] regulations that deprive an owner of "economically viable use" of her property.[64] Even a woman's "fundamental liberty" to choose to terminate an unwanted pregnancy is protected only against laws that unduly burden her liberty to choose, not against laws that reasonably regulate her access to abortion or which merely seek to persuade her to give life to the child she is carrying.[65]

Thus, under the Court's theory of incorporation, structural provisions of the Constitution—i.e., those which define and limit the powers of the national government—"resist incorporation,"[66] because these provisions do not create fundamental individual liberty interests. For example, no one would suggest that the powers of Congress to regulate interstate commerce and to declare war[67] should be incorporated and made applicable to the

61. *See* Locke v. Davey, 540 U.S. 712, 725 (2004) (holding that a government scholarship that could be used by college students to pursue a degree in any course of study except devotional theology imposed only a "relatively minor burden" on the free exercise liberty of scholarship recipients and thus did not violate the incorporated Free Exercise Clause). *See generally* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).

62. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 630, 642 (1943). As Judge Easterbrook observed, although a student has a right under the incorporated Free Speech Clause not to be compelled to recite the Pledge of Allegiance in a government school, she does not have a corresponding right to censor the curriculum or to silence her classmates "who want to pledge allegiance." Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 445 (7th Cir. 1992) (emphasis omitted).

63. First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A., 482 U.S. 304, 330 (1987) (Stevens, J., dissenting) (stating that "only the most extreme regulations can constitute takings").

64. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 499 (1987) (holding that a regulation requiring 27 million tons of coal to be left in the ground to protect surface structures from subsidence is not a taking because petitioners did not prove "that they have been denied the economically viable use" of their overall coal mining operations).

65. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (stating that only "an undue burden is an unconstitutional burden").

66. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45 (2004) (Thomas, J., concurring) ("I would acknowledge that the Establishment Clause is a federalism provision, which, for this reason, resists incorporation.").

67. U.S. CONST. art. I, § 8, cl. 3, 11.

states by the Fourteenth Amendment.[68] Further, a provision that contains both a structural component and a liberty component is properly subject only to partial incorporation; thus, only the liberty component is capable of incorporation as a Fourteenth Amendment "liberty" protected by the Due Process Clause.[69]

When teaching cases interpreting the incorporated Establishment Clause, I always begin the discussion by asking students whether the law or policy being challenged deprives anyone of any fundamental liberty interest. Then I ask whether judicial invalidation of the law or policy would restrict anyone's liberty? If you keep your eye on liberty interests in Establishment Clause cases, rather than on a metaphor such as "the wall of separation between church and state" or a judge-made test such as the *Lemon* test or the endorsement test, you may see the real issues and the real human interests in the case from a new and startling perspective. Indeed, you may come to understand that the Court often interprets the Establishment Clause to restrict liberty, rather than to protect liberty.

B. Everson's Wall, The Lemon *Test, O'Connor's Gloss, and The Naked Public Square*

Professor Bruce Ledowitz poses an interesting question: Is America "a secular nation that tolerates religion [or] a religious nation that tolerates nonbelief[?]"[70] Perhaps the correct answer is neither of the above; perhaps America is best understood as a pluralistic nation that celebrates the religious and ethnic diversity of the various subgroups that have settled here. If this third option is correct, then the public culture—and the governmental symbols displayed in the public culture—should reflect that diversity and pluralism.

1. Everson's Wall

"Before I built a wall I'd ask to know
What I was walling in or walling out,
And to whom I was like to give offence.
Something there is that doesn't love a wall,

68. *See* Luke Meier, *Constitutional Structure, Individual Rights, and the Pledge of Allegiance*, 5 FIRST AMEND. L. REV. 162, 163–67 (2006).

69. *Id.*

70. BRUCE LEDEWITZ, CHURCH, STATE, AND THE CRISIS IN AMERICAN SECULARISM 23 (2011).

That wants it down."[71]

As Daniel Dreisbach points out, Frost's poem is actually a debate between the poem's narrator, who views walls as limiting the freedom of those who are "walled out," and the poem's antagonist, who believes that "[g]ood fences make good neighbors" and welcomes the protection from trespass that a good wall provides to the owner of private property.[72] Of course, when the wall surrounds the public square, those who are "walled out" may well take offense as they look over the wall from the outside and see others who are welcomed inside.

The Supreme Court's modern Establishment Clause jurisprudence begins with *Everson v. Board of Education.*[73] In *Everson,* the Court applied the Establishment Clause against state and local government for the first time.[74] Although the Court upheld a program that reimbursed parents for the cost of bus transportation to any public or private school, including private religious schools, Justice Black wrote a majority opinion that called for a "high and impregnable"[75] wall of separation between church and state:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa.* In the words of Jefferson, the clause against establishment of religion by law was intended to erect

71. ROBERT FROST, MENDING WALL, *reprinted in* COLLECTED POEMS OF ROBERT FROST 48 (1930).

72. DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 108–09 (2002).

73. Everson v. Bd. of Educ., 330 U.S. 1 (1947).

74. *Id.*

75. *Id.* at 18.

"a wall of separation between Church and State."[76]

Justice Black made no attempt to describe which fundamental individual liberty interest had been incorporated from the Establishment Clause against the states, nor did he explain whether Jefferson intended his metaphor of a wall of separation to limit state and local laws touching upon religion.[77] As Professor Jim Lindgren recently wrote: "The phrase 'Separation of Church and State' . . . is not in the language of the first amendment, was not favored by any influential framer at the time of the first amendment, and was not its purpose."[78]

Although the phrase was first used by Jefferson in private, political correspondence to a group of his political supporters,[79] Jefferson meant the term to illustrate the "wall" between the federal government and the state; he meant it as a wall that kept the federal government from interfering—one way or the other—with state laws respecting religious establishments.[80] In other words, for Jefferson the wall protected federalism; it was a compromise that allowed states like Virginia to disestablish religion and states like Maryland to establish religion. The autonomy of state governments in matters of religion was protected against the federal government—against any federal law respecting an establishment of religion. A federal law establishing a national religion was forbidden, as was a federal law outlawing state establishments of religion. Either would be an example of Congress making a law respecting an establishment of religion.[81]

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76. *Id.* at 15–16 (citing Reynolds v. United States, 98 U.S. 145, 164 (1878)).

77. *Id.* at 3–18.

78. Jim Lindgren, *How Separation of Church and State Was Read Into the Constitution (Hint: The KKK Got Its Way)*, THE VOLOKH CONSPIRACY (Oct. 20, 2010, 3:38 PM), http://www.volokh.com/2010/10/20/how-separation-of-church-and-state-was-read-into-the-constitution-hint-the-kkk-got-its-way/ [http://perma.cc/E8HM-W3YB].

79. Letter from Thomas Jefferson, President of the United States, to Nehemiah Dodge et al., Danbury Baptists (Jan. 1, 1802), *available at* http://www.loc.gov/loc/lcib/9806/danpre.html [http://perma.cc/8T33-GV8V].

80. As Professor Dreisbach explains, "A careful review of Jefferson's actions throughout his public career suggests that he believed, as a matter of federalism, that the national government had no jurisdiction in religious matters, whereas state governments were authorized to accommodate and even prescribe religious exercises." DREISBACH, *supra* note 72, at 59–60.

81. *Id.* at 67–71. "In short, the 'wall' Jefferson erected in the Danbury letter was between the federal government on one side and church authorities and state governments on the other." *Id.* at 68. Thus, Jefferson's "wall" protected state sovereignty "on matters pertaining to religion, thereby preventing the federal regime from interfering with religious establishments and practices endorsed by state governments." *Id. See also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 34

If it was not Jefferson's "wall" that the *Everson* Court erected as a defining metaphor for its strict separationist jurisprudence, then whose wall was it? In his *Everson* opinion, Justice Black neglected to mention his own remarkable personal history with the wall motif and the Ku Klux Klan.[82]

As Professor Philip Hamburger, a prominent legal historian on the Establishment Clause, observes: "Leaping from Jefferson's 1802 letter to Hugo Black's *Everson* opinion in 1947, the modern myth of separation omits any discussion of nativist sentiment in America and, above all, omits any mention of the Ku Klux Klan."[83] Before joining the Court in 1937, Hugo Black was not just an ordinary member, but rather held a leadership position in the Invisible Empire of the Ku Klux Klan.[84] Indeed, as Kladd of his Klan Klavern, the soon-to-be-Justice Black was charged with leading new members of the KKK in their recitation of the Klansman's oath of allegiance which included allegiance to "free public schools . . . separation of church and state . . . [and] white supremacy."[85] Moreover, Klan members often recited something called the "Klansman's Creed," which included a statement of their belief "in the eternal Separation of Church and State."[86]

After documenting these historical facts, Professor Hamburger provides interesting context to Justice Black's separationist opinion in *Everson*: "Black had long before sworn, under the light of flaming crosses, to preserve 'the sacred constitutional rights' of 'free public schools' and 'separation of church and state.' Subsequently, he had administered this oath to thousands of others in similar ceremonies."[87] Now in *Everson*, continues Hamburger, "Black had an opportunity to make separation the unanimous standard of the Court."[88] Moreover, Black was able to use "the fig leaf of Jefferson's letter" to obscure the naked truth that the Court was radically transforming the

(1998) ("The original establishment clause, on a close reading, is not antiestablishment but pro-states' rights; it is agnostic on the substantive issue of establishment versus nonestablishment and simply calls for the issue to be decided locally.").

82. *Everson*, 330 U.S. 1; Lindgren, *supra* note 78.

83. PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 399 (2002).

84. *Id.* at 422–26. "In September 1923 Black joined the powerful Richard E. Lee Klan No. 1 and promptly became Kladd of his Klavern—the officer who initiated new members." *Id.* at 426.

85. *Id.* at 409, 426.

86. *Id.* at 408.

87. *Id.* at 462.

88. *Id. See also* Lindgren, *supra* note 78.

nature of "the First Amendment's religious liberty."[89]

To return to Frost's poem, we might well ask exactly who was intended to be "walled out" when Justice Black and the *Everson* Court built a wall of separation? The answer is clear—Justice Black's anti-Catholic views have been well-established, and as Professor Hamburger puts it, "[h]olding such views . . . Black in 1947 led the Court to declare itself in favor of the 'separation of church and state.'"[90]

2. The *Lemon* Test and O'Connor's Gloss

Religious cleansing under the wall of separation had its high-water mark in *Lemon v. Kurtzman*, an Establishment Clause decision in which the Supreme Court struck down neutral state educational funding programs subsidizing nonpublic elementary and secondary schools.[91] As the Court itself acknowledged, these programs funded both secular and religious private schools, and were designed not to advance religion, but rather "to enhance the quality of the secular education in all schools covered by the compulsory attendance laws."[92] In other words, these laws were designed to advance the liberty of parents to choose an appropriate elementary and secondary education for their children; no one was deprived of any fundamental liberty under these programs.

However, without making any effort to identify an individual liberty interest in need of protection under these programs, the Court adopted the following strict separationist test for the incorporated Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[93]

Again, notice that this three-part test is not based upon individual liberty. Rather, it is a structural doctrine that defines

89. HAMBURGER, *supra* note 83, at 483.

90. *Id.* at 463. *See also* MARC O. DEGIROLAMI, THE TRAGEDY OF RELIGIOUS FREEDOM 193 (2013) (noting that this "virulently anti-Catholic" animus of strict separation "served as a cohesive political and cultural agent for an increasingly fragmented Protestant majority").

91. Lemon v. Kurtzman, 403 U.S. 602 (1971).

92. *Id.* at 613.

93. *Id.* at 612–13 (citations omitted) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

and limits the power of state and local governments.[94] Under this test, a law that lacks a "secular legislative purpose" will be unconstitutional even if it deprives no one of even the slightest liberty interest. The *Lemon* Court made clear that under its view of the Establishment Clause "religion must be a private matter for the individual, the family, and the institutions of private choice."[95] Therefore, even a neutral and modest program designed to help parents pay for the compulsory education of their children outside the public schools must be struck down as an unconstitutional establishment of religion if religious schools are included within its scope.

The first two prongs of the *Lemon* test were "clarifie[d]"[96] by Justice O'Connor's judicial creation of the so-called "endorsement test" or what one commentator calls the "'symbolic endorsement' test."[97] Under the endorsement test, the Court must determine whether a particular government display or expression "constitutes an endorsement or disapproval of religion."[98] The idea is that government must be "neutral in matters of religion" so that neither religious believers nor nonbelievers are sent a message from their government "that they are outsiders or less than full members of the political community."[99]

But when evaluating a public culture such as ours, in which government endorses many things and celebrates many causes,[100]

94. *See* Esbeck, *Unwanted Exposure to Religious Expression*, *supra* note 40, at 647. Professor Esbeck observes that in many of the Court's Establishment Clause decisions no one is harmed, coerced, or deprived of liberty; therefore, he concludes that the incorporated Establishment Clause has been construed by the Court "to operate in many respects like the structural clauses of the Constitution which separates the powers of the three federal branches." *Id.* Of course, this contradicts the Court's own theory of incorporation, which is based upon the idea that only individual fundamental liberties protected against the national government by the Bill of Rights are incorporated against deprivation by state and local government under the Due Process Clause of the Fourteenth Amendment. *See supra* notes 52–69 and accompanying text.

95. *Lemon*, 403 U.S. at 625.

96. Lynch v. Donnelly, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring) (stating that her focus "on endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device").

97. CHEMERINSKY, *supra* note 55, at 1237–38.

98. *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring).

99. Cnty. of Allegheny v. ACLU, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring).

100. *See* KEVIN SEAMUS HASSON, THE RIGHT TO BE WRONG: ENDING THE CULTURE WAR OVER RELIGION IN AMERICA 128 (2005) (observing that government "celebrates everything from National Catfish Day to National Jukebox Week"). I would add that government also celebrates many ethnic and cultural causes such as Cinco de Mayo, Gay Pride Month, Black History Month, Earth Day, and Kwanzaa. A truly "neutral" public

how are we to determine whether a Christmas nativity display in a local park or public school endorses religion? Or whether the removal of such a display by a federal court injunction endorses a message of disapproval of religion? Why are citizens who celebrate Christmas marked as favored insiders when the Christmas display is only one of hundreds appearing in the public square in the course of any given year? Indeed, when a religious display is singled out and cleansed from a public square open to all sorts of secular displays by a federal court applying the endorsement test, doesn't this judicial decree tell the religious display's willing audience that they are outsiders and less than full members of the political community?

3. The Naked Public Square: The Endorsement Test as a Heckler's Veto

The endorsement test has been used by the Court as a vehicle for allowing offended observers, who have suffered no serious deprivation of liberty, to impose heckler's vetoes on harmless religious expression in the public culture. Under the endorsement test, even a passive religious display erected by government, as one small part of the public culture, will be declared unconstitutional if the Court determines that either the purpose or the effect of the display was endorsement or disapproval of religion.[101]

The "touchstone" of the endorsement test, according to the Court, is "'governmental neutrality between religion and religion, and between religion and nonreligion.'"[102] However, a naked public square, open to an abundance of secular displays but cleansed of all religious displays, may be neutral among religions—all of which are excluded from public culture—but is most certainly anything but neutral between religion and

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culture in a pluralistic society should recognize and celebrate the full scope of its diversity, not merely secular subgroups and secular ideas.

101. According to Justice O'Connor, the endorsement test is merely a way of applying the purpose and effects prongs of the *Lemon* test:

> The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

Lynch, 465 U.S. at 690 (O'Connor, J., concurring).

102. McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 860 (2005) (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

nonreligion, between religious displays and nonreligious displays. In a pluralistic society, a neutral public culture should reflect not merely five hundred points of strictly secular light, but rather a thousand points of both religious and secular light. The naked public square does not reflect the pluralism and diversity of the actual community, and therefore fails the touchstone standard of neutrality. As Michael McConnell has put it so efficiently: "Secularism is not neutrality."[103]

When applying the endorsement test the Court discovers harm where there is no harm by concluding that when government displays a religious symbol, such as a Ten Commandments monument or a nativity scene in a public building or park, it somehow classifies citizens as either favored or disfavored members of the political community. Justice O'Connor has explained the harm caused by endorsement or disapproval of religion as follows: "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[104]

In theory this sounds like neutrality; but in practice it allows offended observers to censor religious displays from the public square, and thus to deprive the willing audiences of their right to view and enjoy these displays. Consider the following illustrative cases.

a. The County of Allegheny *Decision as a Heckler's Veto*

In *County of Allegheny v. American Civil Liberties Union*, the Supreme Court considered whether a Christmas display located on public property in Pittsburgh violated the incorporated Establishment Clause.[105] The challenged display was a nativity scene depicting "the infant Jesus, Mary, Joseph, farm animals, shepherds, and wise men, all placed in or before a wooden representation of a manger, which has at its crest an angel bearing a banner that proclaims 'Gloria in Excelsis Deo!'"[106] This display was "placed on the Grand Staircase of the Allegheny

103. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 163 (1992) [hereinafter McConnell, *Religious Freedom*].

104. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

105. Cnty. of Allegheny v. ACLU, 492 U.S. 573 (1989).

106. *Id.* at 580.

County Courthouse."[107] The Court applied the endorsement test and held that the nativity scene was an unconstitutional endorsement of "a patently Christian message: Glory to God for the birth of Jesus Christ."[108]

But who was harmed by this passive recognition that Christmas is a special season for many residents of Pittsburgh and Allegheny County? Whose liberty was restricted by the mere placement of this display on the staircase of a public building? Justice O'Connor argued that the Christmas display was harmful because it "convey[ed] a message to nonadherents of Christianity that they are not full members of the political community, and a corresponding message to Christians that they are favored members of the political community."[109]

But why should we think this is so? If we consider the Christmas display, together with all the other displays and expressions in the public culture of Pittsburgh over the course of any given year, why is the message not merely one of inclusion and recognition that the community is composed of many equally valued subgroups who celebrate many different holidays and ideas? For example, if Pittsburgh were to display a poster celebrating Cinco de Mayo in the Grand Staircase of the courthouse would Justice O'Connor perceive this as endorsing a message that Latinos were favored members of the political community and non-Latinos were of second-class status in the community? When a public school celebrates Black History Month, should Asians or Latinos view the celebration as sending a message of favored and disfavored racial or ethnic status? Does a Gay Pride poster in a public school send a message of favored and disfavored membership in the political community? Or should all of these passive displays be viewed as government merely recognizing that it represents a pluralistic society, one composed of many equally-valued subgroups. There is nothing wrong or harmful when government creates a public culture that recognizes the rich religious, ethnic, racial, and cultural diversity of the community it represents.

Indeed, it might be more reasonable to view the religious cleansing of Pittsburgh's public culture pursuant to the Court's

107. *Id.* at 578.
108. *Id.* at 601.
109. *Id.* at 626 (O'Connor, J., concurring).

decree in *County of Allegheny* as endorsing a message of disapproval of religion. Certainly Justice Kennedy interpreted the Court's strict separationist view of the Establishment Clause as reflecting "an unjustified hostility toward religion."[110] As Kevin Seamus Hasson observes, if religious displays are cleansed from a public culture open to a vast multitude of nonreligious displays, the resulting message is not one that is neutral toward religion:

> It's impossible for the government to be silent on religion in culture because its silence itself speaks volumes. If the government were uninvolved in our culture generally, there would be no problem with it being uninvolved in our religious expression. But it's not uninvolved at all. The government is a major force in the culture. It celebrates everything from National Catfish Day to National Jukebox Week. It proclaims national holidays to commemorate a wide variety of things, from Thanksgiving to Memorial Day to Martin Luther King Day. It runs a comprehensive public school system that purports to teach children what they need to know about everything from literature to sex. It provides public universities that not only educate in the arts, but are a major venue for their performance and display, as well as a formidable intellectual force in the debate about them. And the government's reach extends even further. It actually underwrites the arts of its choosing. Taken together, the government-run educational system, its subsidy of the arts, its proclamation of holidays all combine to create a cultural force of seismic proportions.[111]

Moreover, as Steven Smith notes, "alienation produced by Supreme Court decisions may be even more severe than alienation provoked by actions of legislatures or lower government officials."[112] This is so because when the Supreme Court cleanses religion from the public culture in the name of the Constitution, it sends a message to people of faith that "their central beliefs and values are incompatible with the fundamental and enduring principles upon which the Republic rests."[113]

It seems clear that if the Court were truly concerned about religious liberty under the incorporated Establishment Clause, it would not allow offended observers the right to censor this

110. *Id.* at 655 (Kennedy, J., concurring in part and dissenting in part).
111. HASSON, *supra* note 100, at 128.
112. Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 311 (1987).
113. *Id.*

harmless, passive nativity display from the public square. In *County of Allegheny*, the Court applied the Establishment Clause not to advance anyone's religious liberty, but rather to grant one group of citizens the power to deprive another group of citizens an opportunity to view and enjoy the nativity display.[114] In other words, as Justice Kennedy correctly observed, the Court in *County of Allegheny* actually created a heckler's veto pursuant to which the Court, at the request of offended observers, acted "as a censor, issuing national decrees as to what is orthodox and what is not."[115]

b. Silence is Verboten: Wallace v. Jaffree *as a Heckler's Veto*

In *Wallace v. Jaffree*, the State of Alabama enacted a law requiring public school teachers to begin each day by announcing "that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer."[116] This law did not in any way restrict the religious liberty of any person. No one was required to pray and each student was free to think or reflect on any subject or none at all.[117] Each student was free to pray, or meditate, or reflect on his Little League batting average, or worry about whether the Social Security system would remain solvent for her generation of future retirees.[118] The law was completely harmless and should have been of no concern to a judiciary charged with protecting fundamental liberties from deprivation by the states.

Be that as it may, the Supreme Court struck down this benign law under the incorporated Establishment Clause because it was enacted with "[t]he legislative intent to return prayer to the public schools."[119] Although the Court stated that its job was to vindicate "the individual freedoms protected by the First Amendment" against deprivation by "the several states,"[120] the Court's exclusive concern was not on individual freedom, but

114. As Justice Kennedy emphasized, Pittsburgh's nativity display was merely a passive symbol and offended observers were free to "ignore" it, to avert their eyes from it, "or even to turn their backs" to it. *Cnty. of Allegheny*, 492 U.S. at 662, 664 (Kennedy, J., concurring in part and dissenting in part).

115. *Id.* at 678.

116. ALA. CODE § 16-1-20.1 (Supp. 1984); Wallace v. Jaffree, 472 U.S. 38, 40 n.2 (1985).

117. *See* ALA. CODE § 16-1-20.1.

118. *See id.*

119. *Jaffree*, 472 U.S. at 59.

120. *Id.* at 48–49.

whether the Alabama legislature enacted the moment of silence law in pursuit of "a clearly secular purpose."[121] Relying primarily on a statement by Senator David Holmes, the sponsor of the moment-of-silence bill in the state senate, that the law was an "effort to return voluntary prayer to our public schools,"[122] the Court held that the law "was intended to convey a message of state approval of prayer activities in the public schools"[123] and as such was an unconstitutional establishment of religion under the *Lemon* test and the endorsement test.[124]

However, as Chief Justice Burger pointed out in his dissent, even if the statements of one state senator are sufficient to establish the legislative purpose of a particular state law, Senator Holmes's statements establish that the law was intended not simply to return prayer to the public schools, but importantly "to clear up a widespread misunderstanding that a schoolchild is legally *prohibited* from engaging in silent, individual prayer once he steps inside a public school building."[125] In other words, the law was designed to protect religious liberty in public schools by making clear that each child has a constitutional right to pray silently in school, and to provide all students an opportunity each day to exercise their right to silently meditate, pray, ponder, or think as they wish. As Justice Thomas has said in another Establishment Clause decision, "[w]hen rights are incorporated against the States through the Fourteenth Amendment they should advance, not constrain, individual liberty."[126]

As in *County of Allegheny*, the Court in *Jaffree* believed it was acting to protect nonadherents of prayer from a state-endorsed message that prayer "is favored or preferred."[127] But also, as in *County of Allegheny*, the Court's decision in *Jaffree* delegated to nonadherents—whose liberty to pray or not to pray was in no way restricted, burdened or deprived under the law—the power to enjoin the moment-of-silence law and thus to deny students who wished to pray a brief opportunity to do so. This amounts to a Court-ordered heckler's veto over the voluntary prayer of

121. *Id.* at 56.
122. *Id.* at 57 n.43 (emphasis omitted).
123. *Id.* at 61.
124. *See id.*
125. *Id.* at 87 (Burger, C.J., dissenting).
126. Zelman v. Simmons-Harris, 536 U.S. 639, 678 (2002) (Thomas, J., concurring).
127. *Jaffree*, 472 U.S. at 70 (O'Connor, J., concurring).

others and, moreover, as Chief Justice Burger observed, reflects not neutrality but rather "'a brooding and pervasive dedication to the secular'" and an "'active . . . hostility to the religious.'"[128]

c. When Insiders Are Outsiders and Outsiders Are Insiders: Cobb v. Selman County School District *as a Heckler's Veto*

In *County of Allegheny*, Justice Kennedy criticized the endorsement test as "flawed in its fundamentals and unworkable in practice."[129] It is a subjective and indeterminate test, "an incoherent mess" that can be used to reach any result you wish.[130] Interestingly, a recent empirical study of Establishment Clause decisions in federal courts concluded that "the Supreme Court's Establishment Clause jurisprudence invites even the most conscientious of judges to draw deeply on personal reactions to religious symbols and political attitudes about religious influence on public institutions or policies. Sadly, the Court's Establishment Clause doctrine has become an attractive nuisance for political judging."[131]

Perhaps there is no better example of the ambiguous and subjective nature of the endorsement test than *Selman v. Cobb County School District*, a case in which a federal district judge considered the constitutionality of a local school board's attempt to deal with the coverage of evolution in public school science classes.[132] The facts of the case are simple: Cobb County school officials adopted a policy designed to "strengthen evolution

128. *Id.* at 86 (Burger, C.J., dissenting) (quoting Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring)).

129. Cnty. of Allegheny v. ACLU, 492 U.S. 573, 669 (Kennedy, J., concurring in part and dissenting in part).

130. Steven G. Gey, *Vestiges of the Establishment Clause*, 5 FIRST AMEND. L. REV. 1, 4 (2006) ("One of the few things constitutional scholars of every stripe seem to agree about is the proposition that the Court's Establishment Clause jurisprudence is an incoherent mess."). *See also* Am. Jewish Cong. v. City of Chi., 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting) (stating that under the Court's Establishment Clause jurisprudence, "a judge can do little but announce his gestalt").

131. Gregory C. Sisk & Michael Heise, *Ideology "All The Way Down"? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201, 1263 (2012). This study demonstrated that the most important variable in predicting the outcome of Establishment Clause decisions in the lower federal courts was whether the judge was appointed by a Democratic president or a Republican president. *Id.* at 1204–05. The authors further concluded that "the subjectivity of Establishment Clause doctrine has passed the point of tolerability" and, as a result, "the door to unrestrained political judging has been thrown wide open." *Id.* at 1207.

132. Selman v. Cobb Cnty. Sch. Dist., 390 F. Supp. 2d 1286 (N.D. Ga. 2005), *vacated*, 449 F.3d 1320 (11th Cir. 2006).

instruction"[133] in the schools and, in pursuit of this goal, adopted a science textbook that provided "a comprehensive perspective of current scientific thinking regarding theory of origins."[134]

When some parents expressed concern about this, the school board responded to these complaints by requiring a Sticker that reads as follows to be placed in the science textbooks: "This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered."[135]

Of course, other parents objected to the Sticker. One such offended observer opined that she was alarmed because she "felt that the Sticker 'came from a religious source' because, in her opinion, religious people are the only people who ever challenge evolution."[136] Some of these offended observers sued in federal district court to challenge the Sticker's constitutionality under the incorporated Establishment Clause.[137]

District Judge Cooper applied the endorsement test to the Sticker and found that it served two clear secular purposes:

> First, the Sticker fosters critical thinking by encouraging students to learn about evolution and to make their own assessment regarding its merit. Second, by presenting evolution in a manner that is not unnecessarily hostile, the Sticker reduces offense to students and parents whose beliefs may conflict with the teaching of evolution.[138]

He thus concluded the Sticker satisfied the purpose prong of the *Lemon*/endorsement test and went on to consider "whether the statement at issue in fact conveys a message of endorsement or disapproval of religion to an informed, reasonable observer."[139]

Astonishingly, Judge Cooper decided that a "reasonable observer would interpret the Sticker to convey a message of endorsement of religion,"[140] and explained his conclusion as follows:

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133. *Id.* at 1290.
134. *Id.* at 1291.
135. *Id.* at 1292.
136. *Id.* at 1297.
137. *Id.* at 1288.
138. *Id.* at 1305.
139. *Id.*
140. *Id.* at 1306.

> That is, the Sticker sends a message to those who oppose evolution for religious reasons that they are favored members of the political community, while the Sticker sends a message to those who believe in evolution that they are political outsiders. This is particularly so in a case such as this one involving impressionable public school students who are likely to view the message on the Sticker as a union of church and state.[141]

In other words, the "political outsiders" are those whose views are comprehensively taught inside the textbook and the "favored" political insiders are those who get only the Sticker. Even an impressionable child knows that the real insiders are those who get the cake and the real outsiders are those who are allowed only to lick the crumbs off the table. The Sticker was a consolation prize designed to assure the real outsiders that the school's decision to strengthen its teaching of evolution was "not unnecessarily hostile" to parents whose religious beliefs contradict what their children are being taught in the public school classroom.[142] This message does not endorse religion, but rather religious tolerance and respect for "students and parents whose beliefs may conflict with the teaching of evolution."[143]

The Sticker did not deprive any parent or any child of any liberty protected by the First Amendment. However, by censoring the Sticker to appease the offended observers, Judge Cooper sent a clear message to those whose religious beliefs deny human evolution that they are entitled neither to the cake nor the crumbs. This is a court-ordered heckler's veto that denies the Sticker's willing audience access to a message designed, not to endorse their religion, but rather to assure them that no disrespect was intended by the school board's curricular decisions. The incorporated Establishment Clause was employed by the court in *Selman* not to advance but rather to restrict liberty. In a tolerant and pluralistic society, this case should come out the other way.

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141. *Id.*
142. *Id.* at 1305.
143. *Id.*

IV. PASSIVE RELIGIOUS DISPLAYS AND DEPRIVATIONS OF LIBERTY: A SUGGESTED APPROACH

A. The Lemon *Test vs. Liberty Test*

The *Lemon*/endorsement test is indeed a subjective, inconsistent, and incoherent mess of a way to evaluate the constitutionality of passive religious displays in the public square.[144] As Professor Steven Gey points out, when applying the endorsement test, the Supreme Court has "ruled that some officially sanctioned Christmas displays were permissible, while others were not."[145] Remarkably, if a nativity display includes secular objects, such as reindeer, a dancing elephant, and a talking wishing well, it will likely pass muster under the endorsement test;[146] however, if the nativity scene does not include such objects, it will likely fail the test.[147] Moreover, in two recent Supreme Court decisions, "a majority of the Court held that official displays of the Ten Commandments both were and were not constitutional."[148]

One can only guess how the Court would decide the constitutionality of the proposed Holocaust memorial at the Ohio statehouse which is planned to "feature two walkways leading to a set of 18-foot panels that meet and form a cutout in the shape of the six-point star, a symbol closely associated with Judaism."[149] The Freedom From Religion Foundation, a strict separationist organization, challenged the Ohio Holocaust memorial because "the Star of David is a religious symbol and a secular government is not supposed to be promoting religion."[150] Sez who?[151] The Constitution? Certainly not the written

144. *See supra* notes 129–131 and accompanying text.

145. Gey, *supra* note 130, at 5.

146. *See* Lynch v. Donnelly, 465 U.S. 668 (1984).

147. *See* Cnty. of Allegheny v. ACLU, 492 U.S. 573 (1984).

148. Gey, *supra* note 130, at 5 (citing Van Orden v. Perry, 545 U.S. 677 (2005) (upholding a Ten Commandments display in the area surrounding the Texas State Capitol) and McCreary Cnty. v. ACLU of Ky., 545 U.S. 844 (2005) (holding that Ten Commandments displayed in county courthouse violated the purpose prong of the *Lemon*/endorsement test)).

149. Katherine Bindley, *Ohio Statehouse Holocaust Memorial Star of David Design Prompts Lawsuit Threat*, HUFFINGTON POST (July 18, 2013), http://www.huffingtonpost.com/2013/07/18/ohio-statehouse-holocaust-memorial-star-of-david_n_3612373.html [http://perma.cc/8AJJ-E877].

150. *Id.*

151. *See* Arthur A. Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1230 (referring to "'the grand sez who'" which is the universal skeptical response to the authority of a person to assert a binding and unquestionable "normative proposition").

Constitution.[152] Justice Black and his associates in the Ku Klux Klan? Justice O'Connor? The Freedom From Religion Foundation? Sez who? Indeed, was there ever a time in American history when the *Lemon* test and the endorsement test, if submitted to the states as a proposed amendment to the written Constitution, could have been ratified by three-fourths of the several states as required by Article V?[153]

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152. Consider this honest assessment of the Establishment Clause by a leading First Amendment scholar, Professor Kent Greenawalt:

> The most plausible reading of the original Establishment Clause—based on its text, the history leading up to its enactment, and legislation enacted by Congress—is that Congress could not establish a national religion, could not enhance or interfere with state establishments, and could not establish religion within exclusively federal domains. A purely "jurisdictional" reading that Congress could have established religion within federal domains is mistaken. Actions by the First Congress under the Constitution do, however, suggest that its members did not have an expansive view of what measures were "respecting an establishment of religion."
>
> Because any jurisdictional aspect of the Establishment Clause that protected state establishments had vastly diminished in significance by the time of the Fourteenth Amendment, that clause, as well as the Free Exercise Clause, has sensibly been incorporated against the states—assuming that incorporation of other clauses of the Bill of Rights is appropriate. The modern Supreme Court's treatment of the scope of the religion clauses cannot be justified on originalist grounds, whether one concentrates on the original understanding of forbidden practices at the time of the adoption of the Bill of Rights or the original understanding of forbidden practices when the Fourteenth Amendment was adopted, but the latitude with which the Supreme Court has departed from these original understandings is no greater than it has exhibited with other parts of the First Amendment and with other guarantees in the Bill of Rights. Whatever bases one may have to criticize the Supreme Court's religion clause jurisprudence, it is not *distinctly* unfaithful to original understandings.

2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION 38–39 (Princeton Univ. Press 2008). In other words, because the Court has been unfaithful to other provisions of the Bill of Rights, we should overlook its unfaithfulness when interpreting the incorporated Establishment Clause. I appreciate Professor Greenawalt's candor, but I cannot concur with his conclusion. *See also* McConnell, *Religious Freedom*, *supra* note 103, at 154 ("[T]he endorsement test has no support in the history of the Religion Clauses.").

153. U.S. CONST. art. V. The Court's strict separationism has never been popular with the American public. For example, a Fox News poll conducted in December of 2005 found that most Americans disagree with many of the Supreme Court's modern Establishment Clause decisions:

> The new poll finds that almost eight in 10 Americans (77 percent) believe the courts have overreached in driving religion out of public life, and a 59 percent majority feels Christianity is under attack.
>
> Majorities of Republicans (89 percent), Democrats (73 percent) and independents (69 percent) think the courts have gone too far in taking religion out of public life.
>
> Overall, most Americans disagree with several Supreme Court rulings on the separation of church and state. For example, an overwhelming 87 percent favor allowing public schools to set aside time for a moment of silence, and 82 percent favor allowing voluntary prayer. Another 82 percent favor allowing public schools to have a prayer at graduation ceremonies, and 83 percent think

The problem with the *Lemon* test, the endorsement test, and similar separationist views of the Establishment Clause, and their impact on passive, state-sanctioned displays touching upon religion, is an almost complete failure to focus on the issue of deprivation of liberty under the Fourteenth Amendment. Under the Court's own theory of incorporation, the Establishment Clause is supposedly incorporated only against state and local deprivations of individual liberty amounting to religious establishment.[154] However, the *Lemon*/endorsement test is often employed, not to advance liberty, but rather to give offended observers a kind of court-ordered heckler's veto over the liberty of others, over the right of a willing audience to view a Nativity display, or a Ten Commandments display, or a Holocaust memorial depicting a Star of David. In other words, the Court has armed opponents of religious displays—opponents who suffer no deprivation of liberty, because they could easily avoid the unwelcome display merely by averting their eyes—"with an invincible weapon: their mere opposition [becomes] a basis for a finding of unconstitutionality."[155]

Rather than the *Lemon*/endorsement test, or any similar separationist structural test, the Court should analyze Establishment Clause litigation involving passive, state-sanctioned religious displays by asking three questions. First, has the religious display under attack deprived anyone of any liberty interest under the incorporated Establishment Clause? Second, would enjoining the display amount to a heckler's veto allowing one group of citizens the power to censor what another group of citizens—the willing audience for the display—is allowed to see? Third, would enjoining the display make the public square more

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nativity scenes should be allowed on public property.

> Not only do three-quarters of Americans (76 percent) think posting the Ten Commandments on government property should be legal, but also two-thirds (66 percent) say it is a good idea to post the commandments in public schools.

Dana Blanton, *12/01/05 FOX Poll: Courts Driving Religion Out of Public Life; Christianity Under Attack*, FOXNEWS.COM (Dec. 1, 2005), http://www.foxnews.com/story/2005/12/01/120105-fox-poll-courts-driving-religion-out-public-life-christianity-under/ [http://perma.cc/6KR4-QFV8]. Fox News is not alone in this finding. A survey conducted by the First Amendment Center found that "[n]early two-thirds of the public (65%) agree that 'teachers or other public school officials should be allowed to lead prayers in school.'" *The First Amendment in Public Schools: A Comprehensive Survey of How Administrators and Teachers View the Rights and Responsibilities of the First Amendment*, FREEDOMFORUM.ORG (Mar. 1, 2001), http://www.freedomforum.org/templates/document.asp?documentID=13390 [http://perma.cc/9992-CSCP].

154. *See supra* notes 52–69 and accompanying text.

155. McConnell, *Religious Freedom*, *supra* note 103, at 130.

or less neutral; to put it differently, would the injunction result in a public square that reflects the religious pluralism and cultural diversity of the local community, or would it result in a strictly secular public square that is a poor reflection of the local community?

Under this approach, a nativity display in a public park, with or without reindeer and talking wishing wells, would almost certainly be constitutional under the test of liberty and pluralism. Such a harmless, passive display does not deprive anyone of any realistic liberty interest. Offended observers are not required to worship the display or even to look at it. They can easily avoid it, either by averting their eyes or by altering their path by a few steps away from the site of the display.

The nativity display is best understood as neither a state-sanctioned assertion of the truth of "the Christian belief in the Incarnation,"[156] nor as a state-sanctioned secularization of the Incarnation.[157] Rather, it is best understood as simply an acknowledgement by the state that one of many valued subgroups in the community is celebrating a religious holiday. In other words, by displaying the nativity scene, the state is not asserting the truth of Christianity but is merely recognizing that some valued citizens are celebrating what *they* believe to be a supernatural miracle and a religious truth.[158]

Moreover, since the display is only one of many state-sanctioned messages in the public culture, it should not be perceived as classifying citizens as insiders and outsiders. Rather, it sends a message of inclusion, not exclusion, by reflecting the idea that there are no outsiders in the political community, only many different groups of valued insiders. Indeed, if offended observers are allowed to cleanse religious displays from the public culture, the message to religious subgroups in the community is one of secular triumphalism, not neutrality and pluralism. As Michael McConnell has observed:

> If the aspects of culture controlled by the government (public

156. Douglas Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernism*, 61 CASE W. RES. L. REV. 1211, 1213 (2011). Professor Laycock asserts that the only serious interpretation of a nativity display is that it represents a governmental statement "that Christianity is true." *Id.* at 1211, 1213.

157. *See id.* at 1212.

158. There is an important difference between the state recognizing a religious truth and the state merely acknowledging that there are those in the community who are celebrating what *they* believe to be a religious truth.

> spaces, public institutions) exactly mirrored the culture as a whole, then the influence and effect of government involvement would be nil: the religious life of the people would be precisely the way it would be if the government were absent from the cultural sphere. In a pluralistic culture, this is the best of the possible understandings of "neutrality," since it will lead to a broadly inclusive public sphere, in which the public is presented a wide variety of perspectives, religious ones included. If a city displays many different cultural symbols during the course of the year, a nativity scene at Christmas or a menorah at Hannukah is likely to be perceived as an expression of pluralism rather than as an exercise in Christian or Jewish triumphalism.[159]

Such a result is also faithful to the Court's own theory of incorporation of the Bill of Rights,[160] because it takes the question of deprivations of liberty seriously and does not allow the Establishment Clause to be used by one group of citizens to deny a First Amendment liberty to another group of citizens in the name of an extra-constitutional principle, i.e. strict separation of church and state. Our nation is neither a Christian nation nor a secular nation; it is a pluralistic nation comprising a rich stew of valued subgroups of citizens of all religions, ethnic origins, and ideological perspectives. Rather than a religiously naked public culture, the public square should be clothed in a coat of many colors representing the rich heterogeneity of the local community.

But what about the hypothetical involving a public school that displays a "Merry Christmas" poster portraying a nativity scene? How does the public school setting of this case differentiate it from the nativity scene in a public park just analyzed above?

In the public school setting, the offended observers are young and impressionable children attending public school in satisfaction of mandatory attendance laws. Some would argue that such impressionable children need more protection from state-sanctioned religious displays because they are more likely to feel coercive pressure to embrace school-sponsored religious messages.[161]

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159. McConnell, *Religious Freedom*, *supra* note 103, at 193.

160. *See supra* notes 52–69 and accompanying text.

161. *See* Lee v. Weisman, 505 U.S. 577, 592 (1992) ("[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.").

Of course, the "impressionable children" argument cuts both ways because the willing audience for the nativity display is also composed of impressionable children who, if religious displays are extirpated from a public school culture open to all sorts of secular displays, might well feel pressure to believe that only secular causes are true and worthy of recognition. If the nativity display might cause offended observers to feel like political outsiders, how much more so will religious children feel like political outsiders when the only displays cleansed from the public school culture are the ones that most make them feel equally regarded and welcome? As Justice Thomas observed in *Good News Club v. Milford Central School*, when taking account of the impressionable "minds of schoolchildren . . . we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint" if only religious displays are banned from the public school culture.[162]

The issue under the incorporated Establishment Clause should be whether the circumstances of the nativity display deprived students of any liberty interest by imposing "subtle coercive pressure"[163] to celebrate Christmas as a religious holiday. In other words, does the nativity display amount to "an attempt to employ the machinery of the State to enforce a religious orthodoxy,"[164] or is it merely one of many school displays designed to reflect the pluralism of the student body? The concern should be whether the religious display operates "to indoctrinate and coerce"[165] students into embracing a religious truth.

Context matters in the search for deprivations of liberty. There is a crucial distinction between a permanent copy of the Ten Commandments required by state law to be displayed "on a wall in each public elementary and secondary school classroom"[166] and a seasonal Christmas or Hannukah display put

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162. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 118 (2001).

163. *Lee*, 505 U.S. at 592. In *Lee*, the Court stressed that a school-sponsored commencement prayer placed coercive pressure on dissenting students to participate or approve of "the rabbi's prayer." *Id.* at 593.

164. *Id.* at 592.

165. *Id.*

166. Stone v. Graham, 449 U.S. 39, 39 n.1 (1980). *Stone* is a per curiam opinion that struck down the state statute under the *Lemon* test because it had "no secular legislative purpose." *Id.* at 41.

up in the hallways to reflect that religious holidays are only one of many occasions acknowledged on the walls of the public school. It should be quite easy for a dissenting student to avoid these temporary, passive displays by averting her eyes or taking a few steps out of her way.

Thus, the holding in *Stone*, striking down a state law mandating permanent display of the Ten Commandments in all public school classrooms, would not have to be overruled to uphold a passive, temporary nativity or menorah display in a particular public school. A state statute mandating the permanent display of the Ten Commandments in each and every classroom in the public schools is much more likely to "indoctrinate and coerce"[167] than are temporary, passive displays designed merely to acknowledge that religious subgroups are celebrating events that are of great significance *to them.* In the absence of any real deprivation of liberty, the incorporated Establishment Clause should not empower offended students to impose a heckler's veto over what other students may see and enjoy.

B. Standing or Substance?

Some commentators have suggested that the Court's "cases involving unwanted exposure to religious symbols . . . attributable to the government" are actually "reduced-rigor standing" decisions[168] that allow plaintiffs to sue under the Establishment Clause even though they lack "the individualized injury [normally] required for standing."[169] This is so, observes Professor Esbeck, because the Court has incorporated the Establishment Clause as a structural limitation on state power concerning matters relating to religion.[170] Thus, says Esbeck, "[a]n individual claimant need not show religious harm or personalized injury to win a claim under the Establishment Clause."[171] In other words, the Court's jurisprudence under the

167. *Lee*, 505 U.S. at 592.

168. Esbeck, *Unwanted Exposure to Religious Expression*, *supra* note 40, at 644.

169. *Id.* at 648.

170. *Id.* at 647. *See also* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998) [hereinafter Esbeck, *The Establishment Clause*].

171. Esbeck, *Unwanted Exposure to Religious Expression*, *supra* note 40, at 646. In other words, "the Supreme Court has allowed reduced-rigor standing so as to ease the path to reaching the merits." *Id.* at 644.

incorporated Establishment Clause protects an imaginary injury from a nonexistent deprivation.

This is an accurate perception of what the Court has done under its *Lemon*/endorsement test, which is precisely my point. Under the Court's own theory of incorporation under the Due Process Clause of the Fourteenth Amendment, states should be deemed to act unconstitutionally only when they deprive someone of a fundamental individual liberty. Literally, the rule of the incorporation doctrine is no harm, no foul.[172] Thus, when an offended observer can avoid a religious display merely by averting her eyes or walking a few steps out of her way, there is no deprivation of liberty triggering rights under the incorporated Establishment Clause.

If the Court is to honor its own theory of incorporation by liberty, it should protect offended observers from religious displays only when the display somehow deprives them of an actual liberty interest. In other words, only substantial burdens on Establishment Clause liberties should trigger a substantive claim under the incorporated Establishment Clause. Since rights under the incorporated Establishment Clause do not arise until a substantial burden on liberty has been established, slight burdens on liberty will not suffice. If offended observers can easily avoid the challenged religious display, the Establishment Clause will not be implicated. Such a requirement will add to the sum total of liberty because it will prevent courts from wielding the *Lemon*/endorsement test as a censor's sword. Thus, the liberty of one group to view the display will not be sacrificed unless the display somehow imposes a substantial burden on the liberty of someone else. Liberty is a precious coin, and courts should not be too quick to spend it to purchase a heckler's veto.

C. "Play in the Joints" and Federalism

Although one could argue that *Pico* and the Free Speech Clause protect audiences when government acts to censor passive religious displays merely to appease offended observers,[173] this area strikes me more as one that cries out for the Court to create room for "play in the joints" between what the Establishment Clause forbids and what the Free Speech

172. *See supra* Part III.A.
173. *See supra* Part II.

Clause protects.[174] At the very next opportunity—in a case involving offended observers who have suffered no real deprivation of liberty because they could have easily avoided a state-sanctioned, passive religious display—the Court should hold that the Constitution simply does not control the case. That is, state and local officials are free to act either way. They may remove the state-sanctioned religious display without violating the Free Speech Clause if they wish to accommodate the offended observers or they may allow the religious display to remain in place without violating the Establishment Clause if they wish to accommodate the willing audience of the display by creating a truly pluralistic public culture.

As Professor Gey explains, under the play-in-the-joints doctrine "the Supreme Court steps aside" and allows these matters to be decided at the local level.[175] "In some states," he continues, "the separationists will win the political battle; in other states the religious groups will prevail. Either way, the Constitution is satisfied."[176] Professor Gey thinks this is bad because he supports what he calls a "separationist mandate [which states] that limitations on government religious activity are largely a matter of national, rather than local concern."[177] However, there is no reason to think that the incorporated Establishment Clause has turned the sovereign states into impotent, "Hunger Games"-like vassal districts, without power even to decide which passive symbols to display in the local public square.[178]

Even if we accept that a clause designed to protect federalism

174. Locke v. Davey, 540 U.S. 712, 718–19 (2004) (stating that the State of Washington was free to either include or exclude devotional theology majors from a state-funded college scholarship program because there is "'room for play in the joints'" for "state actions permitted by the Establishment Clause but not required by the Free Exercise Clause" (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970))); Cutter v. Wilkinson, 544 U.S. 709, 713 (2005) (upholding federal law providing special protection for religious freedom of prison inmates because play in the joints creates space in which government may "accommodate religion beyond free exercise requirements, without offense to the Establishment Clause").

175. Gey, *supra* note 130, at 35.

176. *Id.*

177. *Id.* at 10.

178. *See* SUZANNE COLLINS, THE HUNGER GAMES (Scholastic Press 2008). The Hunger Games series is a trilogy of science fiction novels set in a future America "ruled by a tyrannical central government (the 'Capitol') that oppresses and exploits twelve subordinate districts." Ilya Somin, *The Politics of* The Hunger Games, THE VOLOKH CONSPIRACY (Mar. 17, 2012, 7:14 PM), http://www.volokh.com/2012/03/17/the-politics-of-the-hunger-games/ [http://perma.cc/QQV3-AZFD].

and state autonomy could somehow be incorporated *against the states* as an individual "liberty" protected by the Due Process Clause of the Fourteenth Amendment,[179] there remains a federalism component in the Establishment Clause. To the extent that a state-sanctioned, passive religious display does not deprive anyone of any real liberty interest, the Establishment Clause leaves the issue to be determined at the state and local level as one of the powers reserved to the states under the Tenth Amendment.[180] There is no reason to think that only the federal judiciary has the wisdom to decide which passive symbols are appropriate and which are inappropriate for display in each and every public park, building, and school in America. Indeed, rather than act like a National Board of Interior Decorators[181] deciding how many plastic reindeer are necessary to make a nativity display acceptable under the Establishment Clause, the Supreme Court should step aside and allow local officials to decide how to decorate public buildings.

State and local public officials are eminently capable of deciding which holidays and events to recognize in local public schools, parks, and buildings. Moreover, if the people of the

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179. *See supra* Part III.A. *See also* AMAR, *supra* note 81, at 34 ("The original establishment clause, on a close reading, is not antiestablishment but pro-states' rights . . . ."); STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 18 (1995) (noting that the Religion Clause is "simply an assignment of jurisdiction over matters of religion to the states—no more, no less"). For an excellent and recent reappraisal of the "jurisdictional" understanding of the Establishment Clause, *see* Steven D. Smith, *The Jurisdictional Establishment Clause: A Reappraisal*, 81 NOTRE DAME L. REV. 1843 (2006). As Professor Esbeck puts it so well, when incorporating the Establishment Clause in *Everson*, "the Court had to strain in order to squeeze a structural clause into a 'liberty' mold." Esbeck, *The Establishment Clause*, *supra* note 170, at 27. Professor Esbeck also observes that "[i]gnoring federalism in the Clause was an act of sheer judicial will" by the Court. *Id.* at 26.

180. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). As Madison put it in *The Federalist 45*, the power of the National Government is limited to a "few and defined" areas "exercised principally on external objects, as war, peace, negotiation, and foreign commerce," whereas "[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." THE FEDERALIST NO. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961). Public schools, public parks, and public buildings are local matters at the core of the Tenth Amendment's reserved powers of the states.

181. *See* Am. Jewish Cong. v. City of Chi., 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting) (noting that the Supreme Court's Establishment Clause jurisprudence requires judges to engage in work "more commonly associated with interior decorators than with the judiciary").

several states believe that constitutional law should govern the display of state-sanctioned religious symbols in the public square, they can look to their state constitutions to work out the appropriate balance of interests. Finally, if local officials somehow employ religious displays in a way that substantially deprives offended observers of an actual liberty interest, perhaps by placing coercive pressure on impressionable schoolchildren to embrace a religious truth, the incorporated Establishment Clause will be available to protect liberty against such deprivations. This is how federalism was designed to allocate power between the national government and local government, and I believe it is the best approach to the issue of religious symbols in the local public square.

D. Redundant or Complementary?

Some critics argue that if the Court interprets the incorporated Establishment Clause as triggered only by some substantial burden or deprivation of liberty it will become little more than a redundant echo of the Free Exercise and Free Speech Clauses. Professor Gey, for example, argues that a deprivation-of-liberty approach to the Establishment Clause "would seem to leave little for the Establishment Clause to do" because it would apply primarily to governmental actions that "already violate the Free Exercise or Free Speech Clauses."[182]

I disagree with this view. Only laws that burden a sincerely held religious belief trigger the Free Exercise Clause. Thus, for example, some Christians might have a sincerely held, free-exercise-of-religion objection to a law requiring them to eat only kosher foods in order to satisfy the dietary requirements of the Jewish religion.[183] On the other hand, a secular person—someone who has no *religious objection* to the kosher-food-only law—would not have a religious conscience claim under the Free Exercise Clause. However, everyone, including all secular dissenters, would have a claim under the incorporated Establishment Clause, because this law imposes a substantial

182. Gey, *supra* note 130, at 42, 56.

183. Some Christians may interpret the Apostle Peter's vision, reported in Acts 10 and 11, as a command that Christians should not be compelled to follow the dietary laws of the Old Testament. *See Acts* 10–11 (ESV). In Acts 10, Peter had a vision from God commanding him to kill and eat "all kinds of animals and reptiles and birds" because no animal made by God is "unclean." *Acts* 10:9–16 (ESV).

burden on the liberty not to be compelled by law to follow religious practices.

Similarly, a secular owner of a bar would have a claim under the Establishment Clause against a law that gives churches veto authority over liquor licenses issued to bars and restaurants located in the vicinity of the church.[184] Although such a delegation of governmental authority to a religious institution over secular businessmen would clearly burden the liberty protected by the incorporated Establishment Clause,[185] it would not appear to raise a claim under either the Free Speech or Free Exercise Clause.

In other words, the Establishment Clause protects a secular liberty—the individual right to choose whether to participate in a religious activity or to comply with a religious requirement—whereas the Free Exercise Clause gives citizens the right to "obey spiritual rather than temporal authority."[186] A secular person—one who recognizes no religious authority—would never have a free exercise claim, because he would never have a sincerely held religious objection to the law. The libertarian Establishment Clause, however, does protect burdens on secular liberty from laws requiring religious conformity. Thus, "properly understood, the two clauses are symmetrical and complementary—not redundant."[187]

V. A NARRATIVE AND A CONCLUSION

A. Narrative: Why Do I Care About Religious Symbols in the Public Culture?

When I discuss the issue of passive religious displays in the public culture I am often asked why I care so much about such a trivial issue. Why do I want a nativity display, a Ten Commandments monument, or a Holocaust memorial featuring a Star of David to be placed in the public square?

My answer to these questions is to state that I do not particularly want the government to put up *any* displays in public

184. *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (holding that a Massachusetts law giving churches veto power over governmental liquor-licensing authority violated the Establishment Clause).

185. *Id.* at 123.

186. McConnell, *Religious Freedom*, *supra* note 103, at 174.

187. *Id.* at 153 n.176.

buildings and spaces. As someone with Rand Paulian libertarian instincts, I prefer a quiet government, a government that decorates public buildings in calm, earth tones, and which maintains public spaces with well-maintained grass lawns, flowers and trees. I want government to be seen and not heard.

But our government is not a quiet one; it constantly decorates public spaces with displays, symbols, and celebrations of all sorts. And when it decides to include a symbolic display acknowledging a religious holiday or something of similar significance to a religious subgroup in the community, and when offended observers seek to extirpate that display precisely because it recognizes religion as a valued part of the lives of many citizens in the Republic, all bets are off. I will rush to defend the religious symbol against censorship and the tyranny of the offended observer.

Nothing in the First Amendment requires courts to empower one group of citizens to act as censors over which passive symbols are accessible to other citizens who wish to view them. I am tired of the war on Christmas, the war on the Ten Commandments, and the war on the Star of David. Heckler's vetoes are anathema to the First Amendment, and the Establishment Clause should not be interpreted to grant them to offended observers who have suffered no deprivation of liberty.

But what of the secular student who feels like an "outsider" when a public school puts up a display recognizing a religious holiday?[188] Well, in light of the fact that the dominant motif of public schools is otherwise almost strictly secular, there is no cause for alarm because secular students are the true insiders and religious students are the true outsiders. If a visitor from a distant galaxy toured public schools today, he would "not be aware that religion has played—and still plays—a major role in history, philosophy, science, and the ordinary lives of many millions of Americans."[189] Public schools have become engines of secularization in our society,[190] and a few passive religious

188. *See* Esbeck, *Unwanted Exposure to Religious Expression*, *supra* note 40, at 608 n.3.

189. Michael W. McConnell, *"God is Dead and We Have Killed Him!": Freedom of Religion in the Post-Modern Age*, 1993 BYU L. REV. 163, 181 [hereinafter McConnell, *"God is Dead and We Have Killed Him!"*].

190. "A secular school does not necessarily produce atheists, but it produces young adults who inevitably think of religion as extraneous to the real world of intellectual inquiry, if they think of religion at all." *Id.* Thus, McConnell concludes that "government has become a major factor in the secularization of society." *Id. See also* Michael W.

displays should not make secular children feel like outsiders in predominantly secular public schools. For a public school to passively recognize that "[u]nsecular America"[191] still exists, despite rumors to the contrary, does not harm any child nor deprive any child of liberty under the incorporated Establishment Clause.

If we truly care about neutrality in the public square and equal regard for all subgroups in the community, then religious displays should not be cleansed from a public square open to all sorts of secular displays. A strictly secular public culture is neither neutral between religion and nonreligion, nor is it a true reflection of the religious pluralism of our diverse society. It sends a message that people of faith are political outsiders, and that religion is not an important part of the culture. I will stand athwart that message until my last breath.

B. Conclusion

As Sanford Levinson observes: "Those who overthrow regimes often take as one of their first tasks the physical destruction of symbols—and the latent power possessed by these markers—of those whom they have displaced."[192] As America becomes an increasingly secular society, and as unsecular America is overthrown by secular America, we should not be surprised to see secularists march from sea to shining sea symbolically burning religious displays and monuments to cleanse the public culture of religious symbols. But if we focus seriously on liberty under the incorporated Establishment Clause, we will strip "the mask of the law"[193] from this purposeful attempt to distort the public culture so that it no longer reflects the rich diversity and

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McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 162 (1986) ("Studious silence on a subject that parents may say touches all of life is an eloquent refutation.").

191. McConnell, *"God is Dead and We Have Killed Him!"*, *supra* note 189, at 166.

192. SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 12 (1998).

193. *See* JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS 25 (Univ. of Cal. Press 2002) (1976). Courts and judges often use legal masks and metaphors, such as the "wall of separation," to disguise an unpopular or harsh legal rule. The most egregious example of legal masking, of course, was "the masking of humanity" by a legal system that insisted that slaves were "property" not human beings. Thus, "[i]t was difficult for participants in the legal process to think they acted badly when they applied the mask the law provided to hide humanity. It was difficult for anyone in their society to think that what such intelligent, enlightened, liberal men were doing was wrong." JOHN T. NOONAN, JR., A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES 153 (1979).

religious pluralism of the community.

Whenever government speaks through a symbol or display in the public square, some citizens will be pleased and some will be offended: war monuments may offend pacifists; gay pride displays may offend social conservatives; Columbus Day displays may offend those who identify with indigenous population groups; Confederate flags and monuments may offend African-Americans; and Christmas displays featuring a nativity scene or Holocaust memorials featuring a Star of David may offend strict separationists.[194] But each of these displays also will have a willing audience that seeks an opportunity to view the display. As Professor Marshall has observed, "[o]utside the establishment area, the state's use of controversial symbols does not give rise to constitutional concern no matter how offensive those symbols might be" to offended observers.[195] To put it differently, outside the establishment area, the Court will not give offended observers a heckler's veto over the content of the public square. The remedy for those who suffer "symbolic alienation"[196] is to avoid the offensive display, not to censor the content of the public square.

The same should be true for passive, state-sponsored religious displays challenged under the incorporated Establishment Clause. Under the Court's own theory of incorporation, only when a religious display amounts to a substantial deprivation of individual liberty should the courts act to protect offended observers under the Establishment Clause. The Establishment Clause should not be interpreted to grant one group of citizens a heckler's veto empowering it to censor which public displays another group of citizens may view in the public square. In other words, so long as offended observers may avert their eyes or otherwise reasonably avoid the objectionable religious display, the Establishment Clause is satisfied and the issue is left to be decided at the level of state and local government.[197]

194. *See* William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L.J. 351, 358–59 (1991).

195. *Id.*

196. *Id.* at 357.

197. As this Article was going to press, the Supreme Court decided *Town of Greece v. Galloway*, a 5-4 decision upholding the practice of government-sponsored, ceremonial prayer, including sectarian prayer, at meetings of local legislative bodies. Town of Greece v. Galloway, 134 S.Ct. 1811 (2014). In *Galloway*, Justice Kennedy addressed the issue of citizens who are offended by the sectarian content of legislative prayer and concluded: "legislative bodies do not engage in impermissible coercion merely by exposing

A public culture cleansed of religious displays is neither neutral nor is it a true reflection of the diversity and pluralism of the community it is designed to reflect. The Establishment Clause is not violated by a "broadly inclusive public [culture], in which the public is presented a wide variety of perspectives, religious ones included."[198] If public schools and local governments display "many different cultural symbols during the course of the year,"[199] there should be no Establishment Clause concerns when religious symbols, such as nativity scenes, menorahs, or Holocaust memorials featuring a Star of David, are also displayed.[200] Constitutional scrutiny should be reserved for displays that somehow impose substantial burdens on the liberty of offended observers.[201]

It is a constitutional tragedy when the Court interprets the incorporated Establishment Clause to deny to a willing audience the liberty to view and enjoy a religious display for no better reason than to appease the hurt feelings of offended observers whose liberty is in no way burdened by the challenged symbol. Rather than protecting individual liberty under the First Amendment, Justice Black and the *Everson* Court incorporated an extra-constitutional metaphor with a very tainted historical pedigree. But this is easy to correct. All the Court need do when evaluating passive religious displays under the Establishment Clause is to keep its focus on liberty rather than on adding yet another brick in the wall keeping religious citizens from inclusion in a public square open to everyone else.

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constituents to prayer they would rather not hear and in which they need not participate." *Id.* at 1827. So long as offended observers are not "singled out... for opprobrium" and are not "dissuaded from leaving the meeting room during the prayer, arriving late, or even, as happened here, making a later protest," there is no Establishment Clause violation. *Id.* at 1826–27.

198. McConnell, *Religious Freedom*, *supra* note 103, at 193.

199. *Id.*

200. *See id.*

201. *Id.* Professor McConnell believes that "[j]udicial scrutiny should be reserved for cases in which a particular religious position is given such public prominence that the overall message becomes one of conformity rather than pluralism." *Id.* at 193–94. Even here, the "best solution" is for "members of minority religions ... to request fair treatment of alternative traditions, rather than censorship of more mainstream [religious] symbols." *Id.* at 193.

THE RULE OF LAW AND THE RISE OF CONTROL OF EXECUTIVE POWER

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The literature on the rule of law takes for granted that part of the core of the meaning of the rule of law is that government power is to be limited and controlled by the law. The prevention of arbitrary and capricious government power to the detriment of the individual is the starting point of the meaning of the rule of law. From this starting point, the literature focuses on the how, when, and who of this truism of power control. This article seeks to address the why behind the basic truism of the rule of law with a focus on the legal, philosophical, and political development of the idea that executive power can and should be controlled, and why arbitrary government power should be avoided. This article will review the ideas of the Enlightenment as well as religious and political ideas that form the foundation for the core truism of the rule of law: that no government is above the law.

I. INTRODUCTION:

Per Me reges regnant, et legum conditores iusta decernunt.[1]
Unde quantum ad Dei judicium, princeps non est solutus a lege.[2]

After the events of 9/11, the Bush Administration determined that (1) the attacks were acts of war, (2) those responsible would not be treated as prisoners of war and were not protected under the Geneva Convention, and (3) the use of enhanced interrogation techniques on captured enemy combatants and terrorists was not prohibited by domestic or international law.[3]

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1. *Proverbs* 8:15 (Latin Vulgate). *Proverbs 8:15 VUL/NIV, Online Parallel Bible*, BIBLESTUDYTOOLS.COM, http://www.biblestudytools.com/parallel-bible/passage.aspx?q=proverbs+8:15&t=vul&t2=niv [http://perma.cc/CCK3-2SQB] (last visited May 24, 2014) ("By me kings reign and rulers make laws that are just." (translating "*Per Me reges regnant, et legum conditores iusta decernunt*")). *See also Daniel* 4:17 ("[T]he Most High rules in the kingdom of men, [and] Gives it to whomever He will . . . ."); *Proverbs* 21:1 ("The king's heart *is* in the hand of the LORD, *Like* the rivers of water; He turns it wherever He wishes."); *Exodus* 9:12 ("But the LORD hardened the heart of Pharaoh; and he did not heed them, just as the LORD had spoken to Moses."). All citations to the Bible are to the New King James Version if not otherwise stated.

2. "Hence, in the judgment of God, the sovereign is not exempt from the law . . . ." THOMAS AQUINAS, SUMMA THEOLOGICA IA-IIÆ, at 324 (Fathers of the English Dominican Province trans., Benziger Bros. ed. 1947) [hereinafter AQUINAS, QUESTION 96].

3. *See, e.g.*, DAVID COLE, THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE 2–4 (2009); JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 22–23 (2007); JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR (2006); Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SEC. L. & POL'Y 455, 455 (2005); Janet Cooper Alexander, *John Yoo's War Powers: The Law Review and the World*, 100 CALIF. L. REV. 331, 334–36 (2012); Arthur H. Garrison, *Hamiltonian and Madisonian Democracy, the Rule of*

The Bush Administration was thereafter accused of violating the rule of law and acting as a law unto itself.[4] Leaving aside the

Law and Why the Courts Have a Role in the War on Terrorism, 8 J. INST. JUST. & INT'L STUD. 120, 130 (2008) [hereinafter Garrison, *Hamiltonian and Madisonian Democracy*]; Arthur H. Garrison, *The War on Terrorism on the Judicial Front, Part II: The Courts Strike Back*, 27 AM. J. TRIAL ADVOC. 473, 474 (2004) [hereinafter Garrison, *The War on Terrorism*]; Arthur H. Garrison, *The Judiciary in Times of National Security Crisis and Terrorism:* Ubi Inter Arma Enim Silent Leges, Quis Custodiet Ipsos Custodes?, 30 AM. J. TRIAL ADVOC. 165, 165 (2006) [hereinafter Garrison, *The Judiciary*]; Arthur H. Garrison, Hamdan v. Rumsfeld, *Military Commissions, and Acts of Congress: A Summary*, 30 AM. J. TRIAL ADVOC. 339, 339–40 (2006) [hereinafter Garrison, Hamdan v. Rumsfeld, *Military Commissions, and Acts of Congress*]; Arthur H. Garrison, Hamdi, Padilla *and* Rasul: *The War on Terrorism on the Judicial Front*, 27 AM. J. TRIAL ADVOC. 99, 107–09 (2003) [hereinafter Garrison, Hamdi, Padilla *and* Rasul]; David J. Gottlieb, *How We Came to Torture*, 14 KAN. J. L. & PUB. POL'Y 449, 449–50 (2005); George C. Harris, *The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11*, 1 J. NAT'L SEC. L. & POL'Y 409, 410–11 (2005); Dawn E. Johnsen, *All the President's Lawyers: How to Avoid Another "Torture Opinion" Debacle*, AM. CONST. SOC. FOR L. & POL'Y 5 (2007), *available at* http://www.acslaw.org/files/Dawn%20Johnsen%20July%202007.pdf [http://perma.cc/TG46-NKH5]; Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1560 (2007); Joseph Lavitt, *The Crime of Conviction of John Choon Yoo: The Actual Criminality in the OLC During the Bush Administration*, 62 ME. L. REV. 155, 157–58 (2010); Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 811–12 (2005); Cornelia Pillard, *Unitariness and Myopia: The Executive Branch, Legal Process, and Torture*, 81 IND. L.J. 1297, 1297 (2006); Louis-Philippe F. Rouillard, *Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum*, 21 AM. U. INT'L L. REV. 9, 10–11 (2005); Michael P. Scharf, *The Torture Lawyers*, 20 DUKE J. COMP. & INT'L L. 389, 394 (2010); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1681 (2005).

4. *See, e.g.*, Johannes van Aggelen, *A Response to John C. Yoo, "The Status of Soldiers and Terrorists under the Geneva Conventions,"* 4 CHINESE J. INT'L L. 167, 181 (2005); Julie Angell, *Ethics, Torture, and Marginal Memoranda at the DOJ Office of Legal Counsel*, 18 GEO. J. LEGAL ETHICS 557, 558 (2005); David Brennan, *Torture of Guantanamo Detainees with the Complicity of Medical Heath Personnel: The Case for Accountability and Providing a Forum for Redress for These International Wrongs*, 45 U.S.F. L. REV. 1005, 1005–06 (2011); Steven Giballa, *Saving the Law from the Office of Legal Counsel*, 22 GEO. J. LEGAL ETHICS 845, 848 (2009); Aaron R. Jackson, *The White House Counsel Torture Memo: The Final Product of a Flawed System*, 42 CAL. W. L. REV. 149, 164 (2005); Lavitt, *supra* note 3, at 166–67; Bradley Lipton, A *Call for Institutional Reform of the Office of Legal Counsel*, 4 HARV. L. & POL'Y REV. 249, 249–50 (2010); Marisa Lopez, *Professional Responsibility: Tortured Independence in the Office of Legal Counsel*, 57 FLA. L. REV. 685, 688 (2005); Peter Margulies, *Reforming Lawyers into Irrelevance?: Reconciling Crisis and Constraint at the Office of Legal Counsel*, 39 PEPP. L. REV. 809, 810–11 (2012); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1451–52 (2010); Eric A. Posner, *Deference to the Executive in the United States After September 11: Congress, the Courts, and the Office of Legal Counsel*, 35 HARV. J.L. & PUB. POL'Y 213, 215 (2012); Rachel Ward Saltzman, *Executive Power and the Office of Legal Counsel*, 28 YALE L. & POL'Y REV. 439, 440 (2010); Robert F. Turner, *What Went Wrong? Torture and the Office of Legal Counsel in the Bush Administration*, 32 CAMPBELL L. REV. 529, 533 (2010); Fran Quigley, *Torture, Impunity, and the Need for Independent Prosecutorial Oversight of the Executive Branch*, 20 CORNELL J.L. & PUB. POL'Y 271, 271 (2010); Rouillard, *supra* note 3, at 23; Ross L. Weiner, Note, *The Office of Legal Counsel and Torture: The Law as Both a Sword and Shield*, 77 GEO. WASH. L. REV. 524, 526 (2009); Tung Yin, *Great Minds Think Alike: The "Torture Memo," Office of Legal Counsel, and Sharing the Boss's Mindset*, 45 WILLAMETTE L. REV. 473, 482 (2009).

legal and public policy rationalizations and justifications of these policies,[5] this article seeks to address a more fundamental question: Why was the accusation that the Bush Administration had violated the rule of law such a significant accusation?

As a constitutional matter, why is the rule of law significant? What is the value of the rule of law? What does the rule of law establish or represent in the American political and legal culture? Why is rule by law rejected in favor of rule of law in western legal tradition? Put simply, why does the rule of law matter? While much has been written on the constitutional powers of the president in general and that the policies of the Bush Administration violated the rule of law specially, the significance of the rule of law post 9/11 has been treated as a given rather than being defined.

This article will review the historical and philosophical meaning of the rule of law as it developed through the original writings of the men of the Enlightenment, which formed the foundation for the constitutional principles used by drafters of the U.S. Constitution and created the cornerstone of American legal thought. This article explores both how and why the rule of law defines the limits and scope of governmental power in general, and executive power specifically, within the United States constitutional and political system.

II. THERE HAS ALWAYS BEEN THE RULE OF LAW

> That is the law. And no Spartan, subject or citizen, man or woman, slave or king, is above the law.[6]
> Where-ever law ends, tyranny begins.[7]

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5. For a discussion of the legal and public policy rationalizations and justifications made by the Bush Administration, see Arthur H. Garrison, *The Bush Administration and the Office of Legal Counsel (OLC) Torture Memos: A Content Analysis of the Response of the Academic Legal Community*, 11 CARDOZO PUB. L. POL'Y & ETHICS J. 1 (2012); Arthur H. Garrison, *The History of Executive Branch Legal Opinions on the Power of the President as Commander-in-Chief from Washington to Obama*, 43 CUMB. L. REV. 375 (2013); Arthur H. Garrison, *The Office of Legal Counsel "Torture Memos": A Content Analysis of What the OLC Got Right and What They Got Wrong*, 49 CRIM. L. BULL., Fall 2013; Arthur H. Garrison, *The Opinions by the Attorney General and the Office of Legal Counsel: How and Why They Are Significant*, 76 ALB. L. REV. 217 (2012–2013); Arthur H. Garrison, *The Role of the OLC in Providing Legal Advice to the Commander-in-Chief After September 11th: The Choices Made by the Bush Administration Office of Legal Counsel*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 648 (2012).

6. *300* (Warner Bros. 2006).

7. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 202 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690).

The rule of law in its broadest sense is based on the ideas of natural law espoused by Thomas Hobbes and John Locke in which there is an acknowledgement that man, left to his original state in nature, has a right to enjoy all of his rights unlimited by government, but he is unable to do so because the nature of mankind is for each man to engage in war and infringe upon the liberty and property rights of others.[8] This state of nature makes it impossible for anyone to enjoy the natural rights of life, liberty, and the pursuit of happiness. Both Hobbes[9] and Locke[10]

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8. *See* Arthur H. Garrison, *The Traditions and History of the Meaning of the Rule of Law*, 12 GEO. J.L. & PUB. POL'Y (forthcoming 2014) [hereinafter Garrison, *Traditions and History*]. James Madison famously explained:

> So strong is this propensity of mankind to fall into mutual animosities that where no substantial occasion presents itself the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts. But the most common and durable source of factions has been the various [sic] and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation and involves the spirit of party and faction in the necessary and ordinary operations of government.

THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961).

9. *See* THOMAS HOBBES, LEVIATHAN 76 (Edwin Curley ed., Hackett Publ'g Co. 1994) (1651) ("Hereby it is manifest, that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war as is of every man against every man. . . . [W]here every man is enemy to every man, . . . men live without other security than what their own strength and their own invention [provides]. . . . In such condition, there is no place for industry . . . no arts; no letters; no society; and which is worst of all, continual fear and danger of violent death, and the life of man, solitary, poor, nasty, brutish, and short.").

10. According to Locke the nature of man, the law of war and the law of nature can be explained as follows:

> [There is a] state of war [between men,] a state of enmity and destruction: and therefore declaring by word or action, not a passionate and hasty, but a sedate settled design upon another man's life, puts him in a state of war with him against whom he has declared such an intention . . . it being reasonable and just, I should have a right to destroy that which threatens me with destruction: for, by the fundamental law of nature, man being to be preserved as much as possible, when all cannot be preserved, the safety of the innocent is to be preferred: and one may destroy a man who makes war upon him . . . . [Thus] [t]o avoid this state of war (wherein there is no appeal but to heaven, and wherein every the least difference is apt to end, where there is no authority to decide between the contenders) is one great reason of men's putting themselves into society, and quitting the state of nature: for where there is an authority, a power on earth, from which relief can be had by appeal, there the continuance of the state of war is excluded, and the controversy is decided by that power.

conclude that executive power, i.e., government, is needed to control the nature of man,[11] which is to harm other men.[12] Although both Hobbes and Locke agreed on this point regarding the importance of the *Law,* they disagreed on the source of the law; Hobbes asserted that the law originated with government while Locke asserted that it originated in the state of nature itself, predating government.[13] Locke, Montesquieu,

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LOCKE, *supra* note 7, §§ 16, 21 (emphasis omitted). *See also* LOCKE, *supra* note 7, §§ 57–59. Locke elaborated that "the plain difference between the state of nature and the state of war, which however some men have confounded, are as far distant, as a state of peace, good will, mutual assistance and preservation, and a state of enmity, malice, violence and mutual destruction, are one from another." LOCKE, *supra* note 7, § 19 (emphasis omitted).

11. In his explanation for why government was formed, Locke stated:

> If man in the state of nature be so free, as has been said; if he be absolute lord of his own person and possessions, equal to the greatest, and subject to no body, why will he part with his freedom? [W]hy will he give up this empire, and subject himself to the dominion and controul of any other power? To which it is obvious to answer, that though in the state of nature he hath such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of others: for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very unsecure. This makes him willing to quit a condition, which, however free, is full of fears and continual dangers: and it is not without reason, that he seeks out, and is willing to join in society with others, who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties and estates, which I call by the general name, property.
>
> The great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property. To which in the state of nature there are many things wanting.

LOCKE, *supra* note 7, §§ 123–24 (emphasis omitted).

12. As Locke concluded:

> That in the state of nature every one has the executive power of the law of nature, I doubt not but it will be objected, that it is unreasonable for men to be judges in their own cases, that selflove [sic] will make men partial to themselves and their friends: and on the other side, that ill nature, passion and revenge will carry them too far in punishing others; and hence nothing but confusion and disorder will follow, and that therefore God hath certainly appointed government to restrain the partiality and violence of men.

LOCKE, *supra* note 7, § 13 (emphasis omitted).

13. One of the key differences between Hobbes and Locke, the two key writers on the social compact, concerned the nature of law. Hobbes asserted there is no law outside of government:

> To this war of every man against every man, this also is consequent; that nothing can be unjust. The notions of right and wrong, justice and injustice, have there no place. Where there is no common power, there is no law; where no law, no injustice. Force and fraud are in war the two cardinal virtues. Justice and injustice are none of the faculties neither of the body, nor mind. If they were, they might be in a man that were alone in the world, as well as his senses and passions.

HOBBES, *supra* note 9, at 78. Locke, on the other hand, asserted that law—the law of

Madison, Hamilton, Wilson, Lord Chief Justices Bracton and Coke, and Chief Justice Marshall, among others, all concluded, unlike Hobbes, that once executive power is established to control the natural violence of man through government, that power itself must be controlled.[14] Otherwise tyranny would replace the state of war and leave men in no better position than the state of nature.[15]

The rule of law addresses two issues. First, the justification for government per se, which, as Locke and Hobbes defined it, is the protection of individuals from the natural state of war that exists between men in the state of nature, to ensure the rights of liberty.[16] The second issue addressed by the rule of law is control of the power given to government to meet its justification and purpose.[17] To paraphrase Madison, the rule of law at its core

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nature—existed and governed man before government and the purpose of government is to protect and enforce law in a more formal and just manner. LOCKE, *supra* note 7, §§ 13, 123–24.

14. LOCKE, *supra* note 7, §§ 13, 123–24; MONTESQUIEU, *On the Corruption of the Principles of the Three Governments, in* MONTESQUIEU: THE SPIRIT OF THE LAWS 112, 114 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748); THE FEDERALIST NO. 51 (James Madison); Garrison, *Hamiltonian and Madisonian Democracy, supra* note 3, at 135; Hampton L. Carson, *Heralds of a World Democracy: The English and American Revolutions*, 4 A.B.A. J. 583, 592–93 (1918); Prohibitions Del Roy, (1607) 77 Eng. Rep. 1342 (K.B.); 12 Co. Rep. 63; Case of Proclamations, (1610) 77 Eng. Rep. 1352 (K.B.) 1353; 12 Co. Rep. 74, 75; Dr. Bonham's Case, (1610) 77 Eng. Rep. 638 (C.P.) 652; 8 Co. Rep. 107, 114; Marbury v. Madison, 5 US (1 Cranch) 137, 177–178 (1803).

15. As Locke conceded:

> I easily grant, that *civil government* is the proper remedy for the inconveniencies of the state of nature, which must certainly be great, where men may be judges in their own case, since it is easy to be imagined, that he who was so unjust as to do his brother an injury, will scarce be so just as to condemn himself for it: but I shall desire those who make this objection, to remember, that *absolute monarchs* are but men; and if government is to be the remedy of those evils, which necessarily follow from men's being judges in their own cases, and the state of nature is therefore not to be endured, I desire to know what kind of government that is, and how much better it is than the state of nature, where one man, commanding a multitude, has the liberty to be judge in his own case, and may do to all his subjects whatever he pleases, without the least liberty to any one to question or control [sic] those who execute his pleasure and in whatsoever he doth, whether led by reason, mistake or passion, must be submitted to. Much better it is in the state of nature, wherein men are not bound to submit to the unjust will of another. And if he that judges, judges amiss in his own, or any other case, he is answerable for it to the rest of mankind.

LOCKE, *supra* note 7, § 13.

16. HOBBES, *supra* note 9, at 235–36 (alluding to the primary purpose of the sovereign's rule, which is to "defend . . . from foreign enemies and from the injuries of one another"); LOCKE, *supra* note 7, §§ 123–24.

17. LOCKE, *supra* note 7, § 135 (concluding that the legislative power "is *limited to the public good* of the society. It is a power, that hath no other end but preservation, and

addresses the problem that men are neither angels nor are they governed by them, so the issue is how to have the government govern the violence of men and then govern its own power.[18] The rule of law provides a framework and value system in which institutions, principles, and rules are implemented to "reign in the arbitrary exercise of state power and to prevent the abuse of power, to ensure predictability and stability, to make sure that individuals know that their lives, their liberty, their property will not be taken away from them arbitrarily and abusively."[19] It is from this core of understanding that constitutional law, criminal law, criminal procedure, due process, equal protection, international law, the laws of war, and human rights law find their moral, ethical, philosophical, and political justification in controlling the actions of executive power.

The biblical figures of Moses and Solomon; the Greek philosophers Socrates, Plato, and Aristotle; the Romans Cicero and Paul; the medieval church scholar Aquinas; the philosophers of the Enlightenment Hobbes, Locke, Beccaria, Bentham, and Montesquieu; and the writers of our Constitution Madison, Wilson, and Hamilton all wrote on the virtue of the *Law* and advocated the principle of the rule of law over the

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therefore can never have a right to destroy, enslave, or designedly to impoverish the subjects").

18. As Madison famously stated:

> But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

THE FEDERALIST NO. 51, at 321–22 (James Madison) (Clinton Rossiter ed., 1961). *See* also LOCKE, *supra* note 7, §§ 16–24.

19. Rosa Brooks, Presentation at the New America Conference: The Drone Next Door, *Flying Mission Creep: What We Can Learn from the Pentagon's History with Drones*, C-SPAN (May 7, 2013), http://www.c-span.org/video/?312601-5/RosaB [http://perma.cc/SR7C-EXZ2].

mere power of man.[20] The *Law*, tempered and administered by *Justice*, is what brings man from despotism and injustice and returns him one step back to the state of peace he enjoyed before original sin.[21] It was this view, that the *Law* is a tool to protect the individual from the power of the government and that government could be made, as Madison explained, to govern as well as to govern itself,[22] that the rule of law has been valued within the American legal and political contexts both before[23] and after the shot that was heard around the world was fired.[24] The rule of law involves the control of government power and supports a value system regarding how free people are to be governed.[25] Madison's observation that the government must both govern and be governed has been one of

20. One manifestation of this view was the development of the social contract theory. The social contract theory, first developed by Thomas Hobbes, proposes that man existed in a state of nature free from government. HOBBES, *supra* note 9, at 76. The significant point of social contract theory is that man preceded government and government did not precede man. *Id.* Thus government was instituted to serve the needs of man. But what was that state of nature? It is this question that separates the work of Hobbes (1651) from Locke (1690) and Montesquieu (1748). Locke and Montesquieu viewed the state of nature as one in which mankind was equal to each other, at peace with each other, and man was free to achieve his desired ends. LOCKE, *supra* note 7, § 123; MONTESQUIEU, *supra* note 14, at 114. But the need to protect that which was secured created the need for government. LOCKE, *supra* note 7, § 123; MONTESQUIEU, *supra* note 14, at 114. Montesquieu wrote that "In the state of nature, men are born in equality, but they cannot remain so" because the natural state of human "[s]ociety makes them lose their equality." MONTESQUIEU, *supra* note 14, at 114. The Western tradition of the purpose of law builds upon this view of the state of nature and why man created government. Montesquieu explained that the natural state of society takes away the equality of man and "they become equal again only through the laws." *Id.* It is this principle that sovereign power of government is developed to protect the natural rights of man that were enjoyed before the formation of government that forms the basis for the principle of the rule of law and that raw political or military might is not the essence of good governance.

21. *Cf.* C.S. LEWIS, THE ABOLITION OF MAN 35–37 (C. Touchstone 1996) (discussing the need for virtue to rule in the individual as well as in society, paraphrasing Plato to note that "the head rules the belly through the chest," referencing *nuos, eros,* and *thumos,* the three elements of the tripartite soul.).

22. THE FEDERALIST NO. 51 (James Madison).

23. *See, e.g.*, Steven G. Calabresi, *The Historical Origins of the Rule of Law in the American Constitutional Order*, 28 HARV. J.L. & PUB. POL'Y 273, 276 (2004) (discussing foundations of the rule of law in America and the roots in English law, subsequently providing a more detailed historical view).

24. *See, e.g.*, John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 83 (1989) (noting generally that government officials who violate the rule of law may be held to account through both the statutes and the common law, using 42 U.S.C. § 1983 litigation and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971)).

25. *Part I: What is The Rule of Law?*, AM. BAR ASS'N DIV. FOR PUB. EDUC., http://www.americanbar.org/content/dam/aba/migrated/publiced/features/Part1DialogueROL.authcheckdam.pdf [http://perma.cc/93KN-PAR6].

the key aspects of the American system.[26] But the rule of law includes a broader moral narrative.

The rule of law, as a principle, establishes that raw political or military might is not the essence of governance. The rule of law can be understood as a Lockean concept[27] that asserts that although the king is above men, the king is under *Law* and the king is King because of the *Law*.[28] Rule by law is based on a different premise and can be understood as a Hobbesian concept.[29] Rule by law asserts that, "[s]ince the ruler is the source of all law, and stands above the law, there are no limits or effective checks on the ruler's arbitrary power."[30] Hobbes wrote that the sovereign can be one person, a monarchy, or an assembly of men but regardless of structure, the law is a tool of government to control the governed, but it is not a tool that governs the government.[31]

This Hobbesian approach to the rule by law was not new. Thomas Aquinas, on writing on the power of the sovereign,

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26. James M. Buchanan, *Madison's Angels*, CATO INST. (2002), http://www.cato.org/publications/commentary/madisons-angels [http://perma.cc/YA67-M69N] (last visited May 24, 2014).

27. John Locke, in his 1689 book *Two Treatises On Government*, asserted that, in the state of nature, all men were equal with each other in "*a state of perfect freedom* of acting and disposing of their own possessions and persons as they think fit within the bounds of the law of nature." JOHN LOCKE, TWO TREATISES ON GOVERNMENT: A TRANSLATION INTO MODERN ENGLISH 106 (Indus. Sys. Research 2009) (emphasis added). But man formed society and government, because, although all men were free, equal, and able to organize their affairs as they saw fit:

> [I]n the state of nature . . . the enjoyment of it is very uncertain . . . the enjoyment of the property he has in this state is very unsafe, very unsecure. This makes him willing to . . . join in society with others, who are already united, or have a mind to unite, for the mutual *preservation* of their lives, liberties and estates, which I call by the general name, *property*.

LOCKE, *supra* note 7, § 123. The rule of law is a Lockean theory in that it provides for security of life, liberty, and property while preserving most of the rights an individual enjoyed in nature.

28. Garrison, *Hamiltonian and Madisonian Democracy*, *supra* note 3, at 135.

29. *See* HOBBES, *supra* note 9, at 76. In *Leviathan* (1651), Hobbes provided the foundation of modern western social contract political theory with his proposition that man's natural nature is for war and conflict and government was established in order to protect the right to life, liberty and property. He famously asserted that in the state of nature life was "solitary, poore, nasty, brutish, and short" and government was instituted to create order and institute safety. *Id.* Thus the social contract required man to submit to the sovereign power of government in order to live in safety. Rule by law is a Hobbesian theory in that rule by law is how the sovereign creates order, by force of its own will and determinations. Under the rule by law, the individual is under the law but the sovereign is above it.

30. Kenneth Winston, *The Internal Morality of Chinese Legalism* 2 (KSG Working Paper No. RWP05-041, 2005), *available at* http://ssrn.com/abstract=757354 [http://perma.cc/WB5X-U8W3].

31. HOBBES, supra note 9, at 173–74.

observed

> The prince is said to be freed from the law with reference to the coercive force of the law, for no one, properly speaking, can be forced by himself. Thus, therefore, the prince is said to be free from the law because no one can make condemnatory judgment against him, for law has its coercive force only from the power of the prince, if he acts contrary to the law.[32]

Nor was Aquinas novel in his description of absolute power in the hand of the sovereign. Many a millennia before Aquinas, even before the reign of David, the prophet Samuel warned the people of Israel[33] before he anointed Saul the first King of ancient Israel in 1047 B.C. The prophet Samuel warned of the absolute power of the sovereign[34] over his kingdom, people and the administration of the law and justice.[35] Under rule by law, the King holds the power of life and death and his writings are without appeal.[36] For as Pilate responded under the appeals of the Sanhedrin that his conviction order of Jesus was wrong, "What I have written I have written."[37] Although rule by law has

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32. AQUINAS, QUESTION 96, *supra* note 2, at 332.

33. *1 Samuel* 9:10.

34. *1 Samuel* 8:10–17 ("So Samuel told all the words of the LORD to the people who asked him for a king. And he said, 'This will be the behavior of the king who will reign over you: He will take your sons, and appoint them for his own chariots and to be his horsemen; and some will run before his chariots. He will appoint captains over his thousands, and captains over his fifties, will set some to plow his ground, and reap his harvest, and some to make his weapons of war and equipment for his chariots. He will take your daughters to be perfumers, cooks, and bakers. And he will take the best of your fields, your vineyards, and your olive groves, and give them to his servants. He will take a tenth of your grain and your vintage, and give to his officers and servants. And he will take your male servants, your female servants, your finest young men, and your donkeys, and put them to his work. He will take a tenth of your sheep. And you will be his servants.") (emphasis omitted). *See also Proverbs* 31:4–5 (noting that it is for the foregoing reason that a mother told her son, the King, "*It is* not for kings to drink wine; Nor for princes intoxicating drink; Lest they drink, and forget the law, And pervert the justice of all the afflicted.").

35. *See 1 Kings* 10:9 (supporting the premise that from the earliest days of government, the law and the administration of justice were in the hands of the sovereign alone "the LORD . . . set[] you on the throne . . . to do justice and righteousness."); *Proverbs* 8:15 ("By [the LORD] kings reign, And rulers decree justice"). This power was absolute, for as Pilate said, "Do You not know that I have power to crucify You, and power to release You?" *John* 19:10. But it was Roman justice that exampled how the law governs the power of the sovereign as Paul demanded its protections in the face of a mob and the King himself. *Acts* 22, 24–25.

36. *See generally Esther* 8:8 ("[F]or whatever is written in the king's name and sealed with the king's signet ring no one can revoke."); *Daniel* 6:8 ("Now, O king, establish the decree and sign the writing, so that it cannot be changed, according to the law of the Medes and Persians, which does not alter.").

37. *John* 19:22. Upon sending Jesus to crucifixion, Pilate ordered that the charge authorizing his death placed over his head on the cross would read "Jesus of Nazareth,

a very old pedigree, its opposite, the rule of law, is not without its own ancient longevity in the governance of men.

Returning to St. Thomas Aquinas, although the prince was seen as the source of the governing law and the power of the law flowed from and through him, Aquinas also made clear that the prince was not without restraint.[38] Aquinas cautioned that the power of positive law to rule over men "comes from the Eternal law from which they are derived."[39] Although "there is no man who can judge the acts of the king," Aquinas warned those who rule in the following manner:

> Moreover, the Lord reproaches those who say but do not do, and those who "impose heavy burdens on others, and themselves lift not a finger to remove them", as is said in Matt. xxiii, 3 [4].
>
> Hence, as regards the judgment of God, the prince is not free from the law in reference to its directive force and ought voluntarily, and not through being forced, fulfill the law. And also the prince is above the law in the sense that, if it is expedient, he can change it or dispense from it according to place and time.[40]

The assertion by Aquinas that the rule of law subordinated all men because the power to govern originated from God Himself was an echo of Cicero who wrote in 51 B.C. that the law is the result of reason given by God to man as a guide to live by.

> True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands . . . . We cannot be freed from its obligations . . . we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law,

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The King of the Jews" in Hebrew, Greek, and Latin. When the Jews, who accused Jesus, protested that the charge should be that he claimed to be king of the Jews, not that he was the king of the Jews, Pilate said "What I have written, I have written." *John* 19:19–22.

38. *See* THOMAS AQUINAS, THE TREATISE 'DE REGIMINE PRINCIPUM' OR 'DE REGNO', Book I, Ch. IV–V, *reprinted in* AQUINAS: POLITICAL WRITINGS 5, 11–16 (R.W. Dyson ed., 2002); James M. Blythe, *The Mixed Constitution and the Distinction Between Regal and Political Power in the Work of Thomas Aquinas*, 47 J. HIST. IDEAS 547, 548 (1986).

39. AQUINAS, QUESTION 96, *supra* note 2, at 324 (Article 4: Whether Human Law Binds Man in Conscience?).

40. *Id.* at 332–33 (Article 5: Whether Everyone is Subject to the Law?).

> its promulgator, and its enforcing judge. . . .[41]

Paul of Tarsus echoed Cicero's observation that God's universal law is inherently known to mankind. Paul wrote, soon after the crucifixion of Jesus, that the

> wrath of God is revealed from heaven against all ungodliness and unrighteousness of men . . . because what may be known of God is manifest in them; for God hath shown *it* to them. For since the creation of the world His invisible *attributes* are clearly seen, being understood by the things that are made, *even* His eternal power and Godhead, so that they are without excuse . . . .[42]

Luke provided an example of the universal law of God being manifest in men without excuse when he wrote of Paul's visit to Athens.[43] When Paul went to Athens, he stood in the Athenian theater and observed that the citizens were very religious.[44] When he saw that they had erected an altar "To The Unknown God," he said to the Athenians, "[T]he One whom you worship without knowing, Him I proclaim to you: 'God, who made the world and everything in it . . . .'"[45]

The idea that the rule of law is a higher moral and ethical principle that checks the power of the King has served as a guiding principle of governance and the foundation of Western democracy. It dates back to the heyday of Athens and the Roman Republic (509–45 B.C.), interrupted by the rise and fall of the Roman Empire (47–576 A.D.) and the Dark Ages (500–1000 A.D.), to reemerge during the high Middle Ages (eleventh through thirteenth centuries), the Renaissance (fourteenth through seventeenth centuries) and the Age of Enlightenment (late seventeenth through eighteenth centuries) in Western Europe.[46] In its earliest formulation the rule of law did not mean that all people were equal under the law, for the law "recognized categories of individuals . . . with different legal implications."[47] The earliest formulation of the rule of law,

41. W. Burnett Harvey, *The Rule of Law in Historical Perspective*, 59 MICH. L. REV. 487, 488 (1961).

42. *Romans* 1:18–20 (emphasis omitted).

43. *Acts* 17:16–34; *Romans* 1:20.

44. *Acts* 17:22.

45. *Acts* 17:22–24.

46. *See, e.g.*, BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 7–59 (2004).

47. *Id.* at 7.

however, required that all were equal before the law and bar of justice.[48] The rule of law in ancient Greece maintained that the law "would be applied to all in accordance with its terms without regard to whom, whether aristocrat or lowly artisan, stood before it."[49]

This principle that the rule of law requires equality before the bar of justice has a long tradition in human history. In ancient Israel, because it was known that "dishonest scales *are* an abomination to the LORD,"[50] Moses, soon after the time of the exodus from Egypt (1447 B.C.), commanded the judges of Israel to "[h]ear *the cases* between your brethren, and judge righteously between a man and his brother or the stranger . . . You shall not show partiality in judgment . . . for the judgment *is* God's."[51] King David wrote that the reason those who judge and rule are commanded to do justice is because God himself executes justice for the oppressed, gives food to the hungry, gives freedom to the prisoners, opens the eyes of the blind, raises those who are bowed down, watches over the stranger, and relieves the fatherless and the widow.[52] Those who rule are

48. *Id.*

49. *Id.*

50. *Proverbs* 11:1. For the Law of Moses made clear "You shall do no injustice in judgment, in measurement of length, weight, or volume. You shall have honest scales, honest weights [because] I *am* the LORD your God, who brought you out of the land of Egypt." *Leviticus* 19:35–36.

51. *Deuteronomy* 1:16–17. *See also Leviticus* 19:33 ("[I]f a stranger dwells with you in your land, you shall not mistreat him."); *Deuteronomy* 16:19–20 (Complete Jewish Bible) ("You are not to distort justice or show favoritism, and you are not to accept a bribe, for a gift blinds the eyes of the wise and twists the words of even the upright. Justice, only justice, you must pursue."). In the 1599 Geneva Bible, Deuteronomy 16:20 is explained in footnote [K] to command, "The magistrate must constantly follow the tenor of the Law, and in nothing decline from justice." Justice is to be impartial regardless of the status of the litigants. *See Exodus* 23:3 ("You shall not show partiality to a poor man in his dispute."); *Exodus* 23:6 ("You shall not pervert the judgment of your poor in his dispute."); *Leviticus* 19:15 ("You shall do no injustice in judgment. You shall not be partial to the poor, nor honor the person of the mighty. In righteousness you shall judge your neighbor."). *See also* 28 U.S.C. § 453 (2012) (Oaths of Justices and Judges); *infra* note 208 (showing the same reflected in the United States Judicial Oath of Office).

52. *Psalm* 146:5–9; *Psalm* 109:31 ("For [God] shall stand at the right hand of the poor, To save *him* from those who condemn him."). *See also Job* 34:10–12, 19; *Numbers* 27:1–8; *Psalm* 9:9–10, 12, 18; *Psalm* 12:5; *Psalm* 34:6; *Psalm* 50:15. God the Father describes sending Christ to fulfill this purpose. *Isaiah* 42:6–7 ("I, the LORD, have called you in righteousness, . . . I will keep You and give You as a covenant to the people . . . To open blind eyes, To bring out prisoners from the prison, Those who sit in darkness from the prison house."). This plays out in the story of Ruth, a widow, and Boaz, her kinsman redeemer. When Ruth asks Boaz, "Why have I found favor in your eyes . . . since I *am* a foreigner?" Boaz, a powerful and wealthy man in the kingdom of Judah, answered Ruth, "[A] full reward be given you by the LORD God of Israel, under whose wings you have come for refuge." Ruth then responded to Boaz, "[Y]ou have comforted me, and have

required to do the same—for all authority to rule is by the hand of God, by His allowance and in His name.[53] The Law of Moses commanded that those who rule are to be judged and are expected to atone for wrong in the same manner as those who are ruled.[54] Neither those who rule nor those who are ruled are above the law.[55] In addition to being under the law, the Law of Moses also required those who rule to do so justly.[56] The prophet Isaiah warned those who govern,

> Woe to those who decree unrighteous decrees, Who write misfortune . . . To rob the needy of justice, And [act] to take what is right from the poor of My people [for] What will you do in the day of punishment . . . ? To whom will you flee for help?[57]

Matthew similarly records that to the religious authorities who abused their positions for their own gain, it was said, "Woe to you . . . ! For you devour widows' houses . . . . [Y]ou will receive greater condemnation."[58] To the King of Judah it was said what the Lord requires of those who govern:

> "Execute judgment and righteousness, and deliver the plundered out of the hand of the oppressor. Do no wrong and do no violence to the stranger, the fatherless, or the widow, nor shed innocent blood in this place. . . . But if you will not [do these things], I swear by Myself," says the LORD, "that this

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spoken kindly to your maidservant, though I am not like one of your maidservants." *Ruth* 2:10, 12–13.

53. *See Daniel* 4:17; *Deuteronomy* 1:16–17; *Exodus* 9:12; *Proverbs* 21:1; *Romans* 13:1–7.

54. *Leviticus* 4:22–23, 27–28.

55. *Id.*

56. *See* 2 *Samuel* 23:3. *See also 2 Chronicles* 9:7–8; *2 Chronicles* 19:5–7; *Jeremiah* 22:3.

57. *Isaiah* 10:1–3. For the Law of Moses said that the Lord warned:

> you shall not oppress a stranger . . . . If you afflict them [the stranger, the widow or the fatherless child] in any way, *and* they cry at all to Me, I will surely hear their cry; and My wrath will become hot, and I will kill you with the sword [because] when he cries to Me, I will hear, for I *am* gracious.

Exodus 22:22–24, 27. *See also 2 Samuel* 12:1–15. For when David had killed Uriah and taken Bathsheba as his wife God's judgment of the King, out of David's own mouth, was "*As* the LORD lives, the man who has done this shall surely die . . . . because he did this thing and because he had no pity." *2 Samuel* 12:5–6.

58. *Matthew* 23:14. As Solomon warned, "Do not let your heart envy sinners . . . For surely there is a hereafter." *Proverbs* 23:17–18. "[J]ustice *is* before [God], and you must wait for Him." *Job* 35:14. However, "[d]o not be deceived, God is not mocked; for whatever a man sows, that he will also reap." *Galatians* 6:7. This is so because "God requires an account of what is past." *Ecclesiastes* 3:15. As King Solomon observed at the end of his reign "God shall judge the righteous and the wicked, For there *is* a time there for every purpose and for every work." *Ecclesiastes* 3:17.

[kingdom] shall become a desolation."[59]

After four years of civil war in which more than 620,000 men were killed,[60] the truth of biblical desolation impressed upon President Lincoln that the war was not over the enforcement of the Constitution, his election, or the protection of the American republic,[61] but was the rightful judgment of a just God.

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59. *Jeremiah* 22:3, 5. *See also Ezekiel* 16:44–59. For Ezekiel condemned the behavior of Judah and Jerusalem to be worse than Sodom and Gomorrah, worse than the Hittites and Amorites and worse than Samaria:

> "You did not walk in their ways nor act according to their abominations; but, as *if that were* too little, you became more corrupt than they in all your ways. *As* I live," says the Lord GOD, "neither your sister Sodom nor her daughters have done as you and your daughters have done. Look, this was the iniquity of your sister Sodom: She and her daughter had pride, fullness of food, and abundance of idleness; neither did she strengthen the hand of the poor and needy. And they were haughty and committed abomination before Me; therefore I took them away as I saw *fit.* Samaria did not commit half of your sins . . . ."

Ezekiel 16:47–51. As King David warned regarding the judgment of God and his attention to the poor and the weak:

> The LORD also will be a refuge for the oppressed, A refuge in times of trouble. And those who know Your name will put their trust in You; For You, LORD, have not forsaken those who seek You. . . . When He avenges blood, He remembers them; He does not forget the cry of the humble. . . . For the needy shall not always be forgotten; The expectation of the poor shall *not* perish forever.

Psalm 9:9–10, 12, 18. As King David wrote regarding the Lord, "You have established equity; You have executed justice and righteousness in Jacob" and having set the example "the King's strength also loves justice." *Psalm* 99:4. *See also Psalm* 25:9–10 ("He guides in justice . . . . All the paths of the LORD *are* mercy and truth . . . .").

60. The desolation of the Civil War included the raising of 2.5 million soldiers and sailors in the North and 750,000 soldiers and sailors in the South, which resulted in a total 640,000 dead and wounded—or one out of three Northern soldiers, and sailors dead and one out five Southern soldiers and sailors dead. In addition, the South suffered a loss of 2.4 billion dollars through the loss of its slave wealth (one third of the total net wealth of the south) and another ten percent loss in non-slave net wealth. Allen C. Guelzo, Lecture for The Great Courses Lecture Series on the American Mind on The Failure of the Genteel Elite (2005).

61. On December 20, 1860, South Carolina adopted an ordinance of secession. 1 JOHN W. BURGESS, THE CIVIL WAR AND THE CONSTITUTION: 1859–1865, at 88 (Cosimo, Inc. 2004) (1901). Other states soon followed: Mississippi (January 9, 1861), Florida (January 10, 1861), Alabama (January 11, 1861), Georgia (January 19, 1861), Louisiana (January 25, 1861), and Texas (February 1, 1861). *Id.* at 104, 112, 121. Lincoln was sworn into office on March 4, 1861. *Id.* at 113. Then on April 12, 1861, Confederate forces attacked and forced the surrender of Fort Sumter. *Id.* at 113, 168–69. The states of Virginia (April 17, 1861), Arkansas (May 6, 1861), North Carolina (May 20, 1861), and Tennessee (June 8 1861), followed in succession. *Id.* at 177, 182–86. *See also* LUCIUS EUGENE CHITTENDEN, RECOLLECTIONS OF PRESIDENT LINCOLN AND HIS ADMINISTRATION 70 (1891) ("No delegate from a slave state had voted for [Lincoln] . . . .").

At the beginning of the war, Lincoln saw the war as a rebellion against his election. At his first inaugural address he made clear "there needs to be no bloodshed or violence; and there shall be none, unless it be forced upon the national authority. . . . In *your* hands, my dissatisfied fellow countrymen, and not in *mine*, is the momentous issue of civil war." Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* JOSEPH R.

Lincoln lamented on this truth just two months before the end of the war:

> Neither party expected for the war, the magnitude, or the duration which it has already attained. Neither anticipated that the *cause* of the conflict might cease with, or even before, the conflict itself should cease. Each looked for an easier triumph, and a result less fundamental and astounding. Both read the same Bible, and pray to the same God; and each invokes His aid against the other. It may seem strange that any men should dare to ask a just God's assistance in wringing their bread from the sweat of other men's faces; but let us judge not, that we be not judged. The prayers of both could not be answered; that of neither has been answered fully. The Almighty has his own purposes. "Woe unto the world because of offences!; for it must needs be that offences come; but woe to that man by whom the offence cometh!" *If we shall suppose that American Slavery is one of those offences which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South, this terrible war,* as the woe due to those by whom the offence came, shall we discern therein any departure from those divine attributes which the believers in a Living God always ascribe to Him? Fondly do we hope—fervently do we pray—that this mighty scourge of war may speedily pass away. *Yet, if God wills that it continue, until all the wealth piled by the bond-man's two hundred and fifty years of*

FORNIERI, THE LANGUAGE OF LIBERTY: THE POLITICAL SPEECHES AND WRITINGS OF ABRAHAM LINCOLN 566, 570, 573 (2003). On July 4, 1861, before a special joint session of Congress, Lincoln made clear "that those who can fairly carry an election can also suppress a rebellion; that ballots are the rightful and peaceful successors of bullets; and that when ballots have fairly and constitutionally decided, there can be no successful appeal back to bullets; that there can be no successful appeal except to ballots themselves, at succeeding elections." Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in* LANGUAGE OF LIBERTY, *supra*, at 574, 587.

After two and a half years of war in which more than 286,000 men had been killed or wounded, Lincoln was less resolute that the war was about the unlawful succession of the South and the enforcement of election results. At Gettysburg, a more somber and reflective Lincoln said America was "a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal" and it was now "engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure." President Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), *in* LANGUAGE OF LIBERTY, *supra*, at 684. He concluded "that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth." *Id.* at 685. The war was now about the higher principles of liberty and freedom, not the enforcement of an election result.

By the end of the war Lincoln had resolved that the war was not about the law, the enforcement of a fair election or liberty. The carnage of the war had made Lincoln see the war as judgment of a just God for the evil of slavery.

> *unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword,* as was said three thousand years ago, so still it must be said "the judgments of the LORD, are true and righteous altogether."[62]

The judgment of a just and righteous God was proclaimed by Micah, who decried the injustice of the rule of the rich and powerful in the kingdom of Judah and warned those in power that what is right above all else in the eyes of God is that they should do justice, love mercy, and walk humbly before God.[63] As Micah wrote, so did Matthew record regarding what was important to the "weightier matters of the law: justice and mercy and faith."[64] Although the power of government is to be respected,[65] supported,[66] and obeyed[67] by those under its jurisdiction, justice demands that those under such authority are to be protected by the law.[68] More specifically, those who

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62. President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), *in* LANGUAGE OF LIBERTY, *supra* note 61, at 710 (emphasis added) (citing *Matthew* 7:1, 18:7, and *Psalm* 19:9). As Lincoln asserted during his seventh and last debate with Douglas:

> That is the real issue. That is the issue that will continue in this country when these poor tongues of Judge Douglas and myself shall be silent. It is the eternal struggle between these two principles—right and wrong—throughout the world. They are the two principles that have stood face to face from the beginning of time; and will ever continue to struggle. The one is the common right of humanity and the other the divine right of kings. It is the same principle in whatever shape it develops itself. *It is the same spirit that says, "You work and toil and earn bread, and I'll eat it." [Loud applause.] No matter in what shape it comes, whether from the mouth of a king who seeks to bestride the people of his own nation and live by the fruit of their labor, or from one race of men as an apology for enslaving another race, it is the same tyrannical principle.*

Abraham Lincoln, Seventh and Last Debate with Stephen A. Douglas at Alton, Illinois (Oct. 15, 1858), *in* III COLLECTED WORKS OF ABRAHAM LINCOLN, 1858–1860, at 283, 315 (Roy P. Basler ed., 1953) (emphasis added) [hereinafter LINCOLN COLLECTED]. To a nation that honored democracy and freedom and maintained slavery, Lincoln warned that "This is a world of compensations; and he who would *be* no slave, must consent to *have* no slave. Those who deny freedom to others, deserve it not for themselves; and, under a just God, can not long retain it." Letter from Abraham Lincoln, to Henry L. Pierce and Others (Apr. 6, 1859), *in* III LINCOLN COLLECTED, *supra*, at 374, 376. He also said that "As I would not be a *slave*, so I would not be a *master*. This expresses my idea of democracy. Whatever differs from this, to the extent of the difference, is no democracy." Abraham Lincoln, Definition of Democracy (Aug. 1, 1858), *in* II COLLECTED WORKS OF ABRAHAM LINCOLN, 1848–1858, at 532, 532 (Roy P. Basler ed., 1953).

63. *Micah* 6:8. *See also Amos* 5:15; *Genesis* 18:19; *Hosea* 6:6; *Hosea* 12:6; *Isaiah* 1:17; *Isaiah* 56:1; *Isaiah* 61:8; *Jeremiah* 22:15–16; *Proverbs* 19:5; *Proverbs* 21:3; *Proverbs* 24:23–24; *Proverbs* 29:6; *Psalm* 10:17–18; *Psalm* 99:4; *Psalm* 106:3; *1 Samuel* 15:22.

64. *Matthew* 23:23 (emphasis omitted).

65. *Exodus* 22:28. *See also Mark* 12:17.

66. *1 Timothy* 2:1–4.

67. *See Acts* 25:11; *1 Peter* 2:13–17; *Romans* 13:1–7. *See also* William H. Pryor Jr., *Christian Duty and the Rule of Law*, 34 CUMB. L. REV. 1 (2004).

68. *Acts* 25:10–12.

exercise governmental power to tax and enforce criminal laws are commanded to "[c]ollect no more than what is appointed for you" and not to "intimidate anyone or accuse falsely . . . ."[69]

From the Age of Enlightenment to the modern era "Christian thought built on these foundations and provided a theory of government and law which appeared to reconcile authority and justice."[70] From these foundations it is established that to the police officer it is left to enforce the law; to the attorney, to seek justice and defend the weak; to the judge, to hear the rich and the poor and apply the law without favor to either and do so with mercy in the face of men; and to the king and those who govern, under the hand of a just and all seeing God, it is left to protect both the law and justice in the affairs of men and for the benefit of society as a whole.[71]

In Plato's dialogue, the *Laws of Plato*, the Athenian Stranger[72] summarizes the principle of the rule of law when he explains to the gentleman Clinias that those who rule should be understood to be "servants of the laws" because such an understanding makes clear that those who rule are not masters.[73] Through the words of the Athenian Stranger, Plato warned:

> Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state.[74]

The Athenian Stranger rejected the concept that those who govern should be those who have power or status or were victorious in political contest, for such a governmental structure

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69. *Luke* 3:13–14.

70. Harvey, *supra* note 41, at 488. "As early as the end of the eighth or beginning of the ninth century" it was told to the king that "the king as the representative of God [is] entrusted with the duty of 'facere justitiam et judicium'" and the duty of governing rightly "prohibits him from committing any abuse of his power and obliges him to render justice according to the law and without any consideration of the personalities of the parties." André Tunc, *The Royal Will and the Rule of Law: A Survey of French Constitutionalism Under the Ancien Regime, in* GOVERNMENT UNDER LAW 401, 404 (Arthur E. Sutherland ed., 1955).

71. *See Deuteronomy* 16:18–20; *Deuteronomy* 25:1–4; *1 Kings* 3:16–28; *2 Samuel* 8:15.

72. The Athenian Stranger is not named but is thought to be either Plato or Socrates. THE LAWS OF PLATO 511 (Thomas L. Pangle trans., 1980).

73. Plato, *The Laws, in* PLATO: COMPLETE WORKS 1318, 1402 (John M. Cooper & D.S. Hutchinson eds., 1997).

74. *Id.*

is not genuine.[75] The Athenian Stranger asserted that the Greek society in which Clinias lived was not such a government and the laws passed were not designed to benefit those who were in power.[76] Moreover, the Athenian Stranger asserted that in a "genuine political system . . . laws which are not established for the good of the whole state are bogus laws . . . their authors are not citizens . . . and people who say those laws have a claim to be obeyed are wasting their breath."[77] Aristotle also echoed the view of his teacher Plato (the student of Socrates) by arguing that understanding law through reason is what separates man from the beast and that the nobility of the law flows from the ability of man to reason.[78] The ability to reason is God's gift to man and as such, the law at its highest state is the natural law given to man, by God, to understand and to live by.[79]

With the fall of Greece and the rise of Rome as the center of world prominence, the classical rule of law concept that law must be developed for the good of society as a whole was advanced by Cicero, who asserted that the law was supreme and its supremacy was the basis of justice.[80] The fall of the republic and the rise of the empire—which began with Julius Caesar being elected dictator in 47 B.C.[81] and was completed by Octavian taking the title Augustus (a religious title of near divinity) in 27 B.C.[82]—transitioned the focus of sovereign power from the rule of law to the rule by law.[83]

To legitimize the fall of republican government to that of empire, *Lex Regia* was asserted. *Lex Regia*, law by rulers, proposed that the emperors had a right to absolute rule because the people had provided the sovereign with such power for the

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75. *Id.* at 1401–02 ("When offices are filled competitively, the winners take over the affairs of state so completely that they totally deny the losers and the losers' descendants any share of power. . . . Of course, our position is that this kind of arrangement is very far from being a genuine political system; we maintain that laws which are not established for the good of the whole state are bogus laws . . . .").

76. *Id.*

77. *Id.*

78. *See generally* ALEXANDER MOSELEY, ARISTOTLE 92 (Continuum Int'l Publ'g 2009).

79. *See* Liesbeth Huppes-Cluysenaer, *Reasoning Against a Deterministic Conception of the World*, *in* ARISTOTLE AND THE PHILOSOPHY OF LAW: THEORY, PRACTICE AND JUSTICE 33, 44 (Liesbeth Huppes-Cluysenaer & Nuno M.M.S. Coelho eds., 2013).

80. TAMANAHA, *supra* note 46, at 12.

81. EUGENE LAWRENCE & WILLIAM SMITH, THE HISTORY OF ROME: FROM EARLY TIMES TO THE ESTABLISHMENT OF THE EMPIRE 365 (2010).

82. *Id.* at 400.

83. HOBBES, *supra* note 9, at 188–89.

betterment and protection of society.[84] By the time of Justinian (527 A.D.), the Emperor in the Eastern Empire (333–1453 A.D), and what has come to be known as *Corpus Juris Civilis* (the Justinian Code), *Lex Regia* had come to be understood to support the conclusion that "[w]hat has pleased the prince has the force of law; . . . the prince is not bound by the laws."[85] But although the prince was above the law, the Justinian Code also noted that "[i]t is a statement worthy of the majesty of a ruler for the Prince to profess himself bound by the laws."[86] Although the code supported the rule by law approach, it was acknowledged by the earliest kings of Europe that legitimacy of their rule was established, in no small part, by acknowledging the *Law* and that they were subject to it.[87]

With the fall of the Western Empire in 476 A.D. and the advent of the Dark Ages, the only unifying institution in Western Europe was the Catholic Church,[88] which adopted the role of governance in many areas of Europe.[89] During the Dark Ages, a feudal governance system formed, and as the Dark Ages ended (by early 1000 A.D.), kings and lords exercised complete authority over those who lived on their lands.[90] The complete works of Plato, Aristotle, Cicero, and Justinian, which were

84. TAMANAHA, *supra* note 46, at 12.

85. *Id.* at 13 (internal quotation marks omitted).

86. *Id.* at 14. *See also* LOCKE, *supra* note 7, § 206; Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, SING. J. LEGAL STUD., 232 (2012).

87. *See* Tamanaha, *The History and Elements of the Rule of Law*, *supra* note 86, at 237 ("Notwithstanding the assertion that the Prince is not bound by the laws, it was generally understood in practice that the Emperor was subject to existing rules within the legal tradition, although he undoubtedly had the power to modify the law if he desired.").

88. *See* THOMAS R. VAN DERVORT, INTERNATIONAL LAW AND ORGANIZATION: AN INTRODUCTION 7 (Peter Labella & Sanford Robinson eds., SAGE Publications 1998) ("The Roman Catholic Church was the major unifying force in Western Europe, but its power and influence developed slowly.").

89. *See id.* at 8–9. ("[T]he most important integrative element of the medieval period was the Catholic Church, a single religion, which increasingly centralized its institutional administration and developed a set of common legal standards . . . . This ecclesiastical law, often referred to as canon law, influenced many areas regarded today as lying within the sphere of international law. It included the conclusion of treaties and their observance, authority over territory, the right of conquest with the sanction of the Church, papal activity in arbitration, and the general emphasis in canon law on arbitration as a desirable method for settling disputes. Above all, the Church exerted an influence on and attempted to regulate many facets of warfare.")

90. *See* ALBERT P. MELONE & ALLAN KARNES, THE AMERICAN LEGAL SYSTEM: PERSPECTIVES, POLITICS, PROCESSES, AND POLICIES 60 (Rowman & Littlefield Publishers, Inc., 2d ed. 2008) ("[The] local lords were the authority figures, who maintained law and order within the local communities . . . . Those who controlled the land controlled the wealth of the nation. As a result, local landowners . . . enjoyed power throughout the countryside that rivaled the king's authority.").

rediscovered during the eleventh through sixteenth centuries,[91] came into conflict with the views of both the kings of Europe[92] and the Catholic Church.[93] Over time, the kings and popes of Europe disputed which institution was supreme: the state or the church.[94] The idea that the *Law* was sovereign over the king was adopted by the Church, which asserted that the king was under the *Law*, the *Law* was from God, and the Pope represented God on earth and His divine right to rule over the European kings.[95] The Church reasserted the view of Plato and Aristotle that the *Law* is the result of reason,[96] a gift given by God,[97] and the rule of kings is lawful only so far as they were subject to the reason and justice of natural or divine law.[98] History, while agreeing

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91. *See* TAMANAHA, *supra* note 46, at 18 (noting that the "rediscovery of Aristotle's works (which had been preserved by the Muslims) and the Justinian Code, in the twelfth and thirteenth centuries, coincided with a substantial rise in the number of educated men"). *See also* JAMES K. FEIBLEMAN, RELIGIOUS PLATONISM: THE INFLUENCE OF RELIGION ON PLATO AND THE INFLUENCE OF PLATO ON RELIGION 207 (Routledge Library Editions 2013) ("The big news of the Renaissance was the rediscovery of Plato, after more than a millennia of ignorance of his works . . . ."); RALPH BLUMENAU, PHILOSOPHY AND LIVING 167 (Imprint Academic 2002) ("Cicero's writings had disappeared; his letters would not be rediscovered until the end of the fourteenth century, nor his books until the nineteenth century.").

92. *See, e.g.*, JOHN NEVILLE FIGGIS, THE DIVINE RIGHT OF KINGS, 36–37, 64, 67 (1922) (noting generally and then examining France and England to establish that "it appears that Kingship has ever been regarded as in some especial way protected by a Divine authority; that the influence of Christianity has in all ages been held to support this view; . . . in the thirteenth century there were ample materials for men in a later age, devoid of the historical sense and imbued with the theory of sovereignty, to suppose that the English Kingship towards the close of the Middle Ages was strictly hereditary and unconditioned by constitutional restraints").

93. *See id.* at 18–20 (discussing generally the widespread notion of the divine right of kings, and highlighting the views of aspiring popes Hildebrand, and legates George and Theophylact (c. 787)).

94. *See id.* at 38–65. In discussing the historical and philosophical battle between papal and regal supremacy, Figgis highlighted papal victories regarding Henry IV's journey to Canossa and Boniface VIII's dispute with Philip the Fair. "In a word, to the Divine Right of the Pope must be opposed the Divine Right of the Emperor." *Id.* at 55.

95. *See id.* at 27 (noting that the "right to the Crown was no longer [after the ascension of England's Edward II] that of election or of coronation, but that of the next heir, whom God alone can make").

96. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 294 (2d ed. 2011) ("In both Aristotle . . . and 'Cicero' . . . Aquinas finds the important notion that (human, positive) law *includes* natural law (as well as many elements that are not of natural law, but are consistent with it and intelligibly, but *not* deductively, derived from it)."); Anna Taitslin, *The Competing Sources of Aquinas' Natural Law: Aristotle, Roman Law and the Early Christian Fathers*, *in* 22 IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE; THE THREADS OF NATURAL LAW: UNRAVELLING A PHILOSOPHICAL TRADITION 47, 50 (2013).

97. *See* AUSTIN FAGOTHEY, S.J., RIGHT & REASON: ETHICS IN THEORY AND PRACTICE 401 (Tan Books & Publishers, Inc., 2d ed. 2000) (1959) ("The state gets its superior powers from God through the natural law.").

98. *See id.* at 399 (noting the views of Bellarmine and Suarez on popular consent,

with the Church that the monarchs' power was not absolute, determined to replace the Church as the final authority over executive power with the principle of the rule of law.[99]

History would not settle the dominance of the rule of law over the power of the king in Great Britain until the seventeenth century.[100] Although the final subjugation of executive power to the *Law* took more than a few centuries to come to fruition, part of the foundation for the principle was laid by Lord Chief Justice Henry Bracton who wrote in 1260, during the reign of King Henry III:

> But the King has a superior, for instance, God. Likewise the law, through which he has been made King. . . . [A]nd therefore if the King be without a bridle, that is without law, they ought to put a bridle upon him. [F]or he is king whilst he rules well, and a tyrant when he oppresses with violent dominion the people entrusted to him. Let him therefore temper his power by law, which is the bridle of power, that he live according to laws, because a human law has sanctioned that laws bind the law giver himself.[101]

At the dawn of the nineteenth century, medieval scholar Father Figgis wrote of the common law and its historical and philosophical foundations in England.[102] He wrote that:

> The Common Law is pictured invested with a halo of dignity, peculiar to the embodiment of the deepest principles and to the highest expression of human reason and of the law of nature implanted by God in the heart of man. As yet men are not clear that an Act of Parliament can do more than declare the Common Law. It is the Common Law, which men set up as the object of worship. They regard it as the symbol of ordered life and disciplined activities, which are to replace the licence and violence of the evil times now passed away. . . . Instead of the caprice . . . pleasure of some great noble, . . . there shall rule in England a system, older than Kings and

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that God grants authority to the state to meet the "natural needs and inclinations" of the civilly united people who are governed by their consent). *See also* Sean B. Cunningham, *In Defense of Law: The Common-Sense Jurisprudence of Aquinas*, 1 LIBERTY U. L. REV. 73, 97 (2006).

99. *See* TAMANAHA, *supra* note 46, at 3.

100. *See* Hampton L. Carson, *Heralds of a World Democracy: The English and American Revolutions*, 4 A.B.A. J. 583 (1918) (reviewing the history of the development of the rule of law as a governing concept in Great Britain).

101. *Id.* at 592–93.

102. *See* JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 88 (1927); FIGGIS, *supra* note 92, at 228–29.

> Parliaments . . . . [T]he Common Law is the perfect ideal of law; for it is natural reason developed and expounded by the collective wisdom of many generations. By it kings reign and princes decree judgment. By it are fixed the relations of the estates of the realm, and the fundamental laws of the constitution. Based on long usage and almost supernatural wisdom its authority is above, rather than below that of Acts of Parliament or royal ordinances . . . .[103]

The principle that the monarch has only limited power provides both protection against tyranny and a foundation for defining justice. If freedom from tyranny is part of justice, and if justice is the chief end of laws, then freedom requires the rule of law.[104] As John Locke wrote in the *Second Treatise of Government*,

> the end of law is not to abolish or restrain, but to preserve and enlarge freedom: for in all the states of created beings capable of laws, where there is no law, there is no freedom: for liberty is, to be free from restraint and violence from others; which cannot be, where there is no law . . . .[105]

Locke explained that justice requires law, and the law must be known, which requires reason.[106] As Locke explained the relationship of law and justice, Isaiah lamented over the state of Israel and the lack of justice due to the abuse of power by the king and priests. He wrote that, "Justice is turned back, And righteousness stands afar off; For truth is fallen in the street, And equity cannot enter."[107]

When the law and truth fall, there can be no justice, righteousness, or equity. The principle that law, justice, and freedom are interconnected is entrenched in the American popular imagination, traditions, and values; as reflected in the popular television series *Law and Order*, when Jack McCoy echoes both Isaiah and Locke when he tells his jury that, "without the law there can be no freedom, and without justice there can be no law."[108]

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103. FIGGIS, *supra* note 92, at 228–30; *see also* DICKINSON, *supra* note 102, at 88.
104. LOCKE, *supra* note 7, § 57 (emphasis omitted).
105. *Id.*
106. *Id.*
107. *Isaiah* 59:14.
108. *Law & Order: Nullification* (NBC television broadcast Nov. 5, 1997). The television series *Law and Order* (the longest running crime drama in American television history, running twenty seasons from September 13, 1990, to May 24, 2010) would comment on both the quality of the American justice system as well as the meaning and application of justice and the rule of law, usually through the character Jack McCoy.

Plato wrote that a law is just when it is made for the benefit of the society as a whole.[109] The battle between the Church and the kings of Europe resulted in justice being defined in Christian terms with the principle that the king is King because of God's will and God's will is reflected in divine or Natural Law which is understood through reason.[110] In *The Laws*, Plato explains that

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In the episode *Patriot*, Jack McCoy argued to his boss, the District Attorney, that "Justice is not a moving target." *Law and Order: Patriot* (NBC television broadcast May 22, 2002). "We can't just forget the rule of law because we don't like who lays claim to it." *Id.*

In the episode *Promote This!*, Jack defended a prosecution by asserting that "Justice is not a finite commodity." *Law and Order: Promote This!* (NBC television broadcast Apr. 29, 2009). "Just because justice is given to one does not mean it's denied to another. But justice denied to one is denied to all." *Id.*

In the episode *Vaya Con Dios*, Jack defied the District Attorney and the U.S. government by charging a former dictator who was responsible for torture and took the case to the Supreme Court. *Law and Order: Vaya Con Dios* (NBC television broadcast May 24, 2000). He argued that the principle of no one being above the rule of law must always be defended—even against the government—because:

> Man has only those rights he can defend. Our most basic right is life. It's enshrined not only in our Constitution, but in the charter of the United Nations. The prohibition against taking a life is found in our most ancient texts and in the statutes of every nation. Every murder, whether in Brooklyn, Santiago, Rwanda or Kosovo, demands punishment by whatever legal means possible. Otherwise, the right to life is just an empty promise. [In response to a question] Timidity in the pursuit of murderers is no virtue. The founding fathers affirmed life as an absolute right. If the laws protecting that right are to have any meaning, they must be given the broadest interpretation. [In response to a question as to whether criminal prosecution of foreign leaders would set a bad precedent in foreign policy,] [t]he precedent has already been set. Heads of state can be tried for war crimes. An American president sent the marines to Panama to arrest President Noriega for drug smuggling. And if this case gives our own leaders pause before they drop a load of napalm on a village full of children in a neutral country, that can't be a bad thing. The law against murder applies to all. No matter the perpetrator, the victim, or the country where the murder is committed. It is the one moral law that recognizes no national, racial or religious boundaries. It can tolerate no exceptions. There is one law. One law! And when that law is broken it is the duty of every officer of any court to rise in defense of that law, and bring their full power and diligence to bear against the lawbreaker. Because Man has only those rights he can defend. Only those rights!

Id.

In the episode *Confidential*, an attorney bound under the attorney-client privilege did not divulge that her client confessed to killing someone, and instead an innocent man was convicted of the crime. *Law and Order: SVU: Confidential* (NBC television broadcast Mar. 10, 2010). When she divulged the confession after her client was killed, she said, "I prayed the law would catch up with [him]," to which Detective Stabler said, "The law doesn't always guarantee justice." *Id.*

In the episode *Secrets*, the character Captain Cragen observed, "The law isn't always about justice," and in the episode *Babes*, the character Sgt. John Munch warned against manipulating the meaning of the law to punish immorality because, "what is always immoral is not always illegal." *Law and Order: SVU: Secrets* (NBC television broadcast Feb. 2, 2001); *Law and Order: SVU: Babes* (NBC television broadcast Nov. 11, 2008).

109. *See* PLATO, *supra* note 73, at 1401–02.

110. *See* FIGGIS, *supra* note 92.

"laws which are not established for the good of the whole state are bogus laws."[111] Aquinas echoed this idea centuries later, asserting that for laws to be considered just they must be "ordered to the Common Good [and its] burdens . . . imposed on the subjects according to proportionate equality for the Common Good."[112] The Christian tradition of the law—that all law comes from the eternal law of God, to which the king is also subject—found fertile ground in the medieval nations of Europe as they reemerged from the Dark Ages and again it was expected that the kings would be subject to the law and serve as guardians of the law.[113] As a famous king observed, blessed is the man who executes justice for the oppressed and gives food to the hungry.[114] "The later permeation of Germanic customary law with Christian understandings solidified the identification of law with justice."[115] That law included the "right of resistance" which provided that a "man may resist his king and judge when he acts contrary to law and may even help to make war on him," and a ruler who breaches the law has forfeited the right to expect the obedience of his subjects.[116] These ideas and principles found iteration in the *Declaration and Resolves of the First Continental Congress* (October 20, 1774)[117] and later in the *Declaration of Independence.*[118] Both works echo Locke and the idea that the power of the sovereign is limited by the law.[119]

111. PLATO, *supra* note 73, at 1401.
112. AQUINAS, QUESTION 96, *supra* note 2, at 325.
113. Taitslin, *supra* note 96, at 48–51.
114. *Psalm* 146:7.
115. TAMANAHA, *supra* note 46, at 24.
116. *Id.*
117. *Declaration and Resolves of the First Continental Congress*, COLONIAL WILLIAMSBURG, http://www.history.org/almanack/life/politics/resolves.cfm [http://perma.cc/MM4W-HDQ6] (last visited May 24, 2014) [hereinafter *Declarations and Resolves*].
118. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776).
119. On the purpose of government, Locke explained:

> The reason why men enter into society, is the preservation of their property; and the end why they chuse and authorize a legislative, is, that there may be laws made, and rules set, as guards and fences to the properties of all the members of the society, to limit the power, and moderate the dominion, of every part and member of the society: for since it can never be supposed to be the will of the society, that the legislative should have a power to destroy that which every one designs to secure, by entering into society, and for which the people submitted themselves to legislators of their own making; whenever the *legislators endeavour to take away, and destroy the property of the people*, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any farther obedience, and are left to the common refuge, which God hath provided for all men, against force and violence. Whensoever therefore the *legislative* shall transgress this fundamental rule of society; and either by ambition, fear, folly or corruption,

Under British law, the Magna Carta (1215),[120] the British Bill of Rights (1689),[121] and the Common Law[122] all provided certain protections and rights to citizens of the empire. Violations of those rights were considered unconstitutional.[123] The 1774 *Declaration and Resolves of the First Continental Congress* asserted the various rights that the colonists had under British law and claimed that the King and Parliament were violating those rights.[124] Two years later, when war was determined to be the

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> *endeavour to grasp* themselves, *or put into the hands of any other, an absolute power* over the lives, liberties, and estates of the people; by this breach of trust they *forfeit the power* the people had put into their hands for quite contrary ends, and it devolves to the people, who have a right to resume their original liberty, and, by the establishment of a new legislative, (such as they shall think fit) provide for their own safety and security, which is the end for which they are in society. What I have said here, concerning the legislative in general, holds true also concerning the supreme executor, who having a double trust put in him, both to have a part in the legislative, and the supreme execution of the law, acts against both, when he goes about to set up his own arbitrary will as the law of the society.

LOCKE, *supra* note 7, § 222. *Compare* LOCKE, *supra* note 7, §§ 169–74, *with* LOCKE, *supra* note 7, §§ 199–210. "*Political power* is that power, which every man having in the state of nature, has given up into the hands of the society, and therein to the governors, whom the society hath set over itself, with this express or tacit trust, that it shall be employed for their good, and the preservation of their property . . . ." LOCKE, *supra* note 7, § 171.

120. *See* ANTHONY GEORGE RAVLICH, FREEDOM FROM OUR SOCIAL PRISONS: THE RISE OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS 84 (2008) ("[A] dispute . . . led to the signing of the Magna Carta which promised citizens 'freedom from imprisonment, dispossession, prosecution or exile . . . .'").

121. *See id.* at 89 ("Following the Revolution, the English Bill of Rights 1689 represented a social contract largely between the middle classes and the monarchy.").

122. *See id.* at 52 ("Common law protections of the freedom of person and property are provided by habeas corpus and other civil and criminal remedies." (quoting Sir Ivor Richardson, *Rights Jurisprudence—Justice For All?*, *in* ESSAYS ON THE CONSTITUTION (Phillip A. Joseph ed., 1995))).

123. *See id.* at 52.

124. *Declarations and Resolves*, *supra* note 117.

The First Continental Congress wrote:

> That the inhabitants of the English colonies in North-America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts, have the following RIGHTS:
>
> Resolved, N.C.D. 1. That they are entitled to life, liberty and property: and they have never ceded to any foreign power whatever, a right to dispose of either without their consent.
>
> Resolved, N.C.D. 2. That our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England.
>
> Resolved, N.C.D. 3. That by such emigration they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their descendants now are, entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy.
>
> Resolved, 4. That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council:

only way to protect and enjoy those rights,[125] the *Declaration of*

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and as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed: But, from the necessity of the case, and a regard to the mutual interest of both countries, we cheerfully consent to the operation of such acts of the British parliament, as are bonfide, restrained to the regulation of our external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members; excluding every idea of taxation internal or external, for raising a revenue on the subjects, in America, without their consent.

Resolved, N.C.D. 5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.

Resolved, N.C.D. 6. That they are entitled to the benefit of such of the English statutes, as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances.

Resolved, N.C.D. 7. That these, his Majesty these, his Majestych of the English statutee immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws.

Resolved, N.C.D. 8. That they have a right peaceably to assemble, consider of their grievances, and petition the king; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal.

Resolved, N.C.D. 9. That the keeping a standing army in these colonies, in times of peace, without the consent of the legislature of that colony, in which such army is kept, is against law.

Resolved, N.C.D. 10. It is indispensably necessary to good government, and rendered essential by the English constitution, that the constituent branches of the legislature be independent of each other; that, therefore, the exercise of legislative power in several colonies, by a council appointed, during pleasure, by the crown, is unconstitutional, dangerous and destructive to the freedom of American legislation.

Id.

125. Thomas Jefferson, *A Declaration by the Representatives of the United Colonies of North-America, Now Met in Congress at Philadelphia, Setting Forth the Causes and Necessity of Their Taking Up Arms (July 6, 1775)*, AVALON PROJECT, http://avalon.law.yale.edu/18th_century/arms.asp [http://perma.cc/HPT8-MWTH] (last visited May 24, 2014) [hereinafter *Declaration of Causes*].

In the resolution, issued after the battles at Lexington and Concord, the Second Continental Congress explained that the colonists took up arms in defense of Boston in Continental Congress explained that the colonists took up arms in defense of Boston in order to defend their constitutional rights as British citizens, not to seek independence. After explaining the deprivations of law that the Parliament had imposed, the resolution concluded:

> Lest this declaration should disquiet the minds of our friends and fellow-subjects in any part of the empire, we assure them that we mean not to dissolve that union which has so long and so happily subsisted between us, and which we sincerely wish to see restored. Necessity has not yet driven us into that desperate measure, or induced us to excite any other nation to war against them. We have not raised armies with ambitious designs of separating from Great-Britain, and establishing independent states. We fight not for glory or for conquest. We exhibit to mankind the remarkable spectacle of a people

Independence declared:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness,—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.
>
> . . . .
>
> We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have

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attacked by unprovoked enemies, without any imputation or even suspicion of offence. They boast of their privileges and civilization, and yet proffer no milder conditions than servitude or death.

In our own native land, in defence of the freedom that is our birthright, and which we ever enjoyed till the late violation of it—for the protection of our property, acquired solely by the honest industry of our fore-fathers and ourselves, against violence actually offered, we have taken up arms. We shall lay them down when hostilities shall cease on the part of the aggressors, and all danger of their being renewed shall be removed, and not before.

With an humble confidence in the mercies of the supreme and impartial Judge and Ruler of the Universe, we most devoutly implore his divine goodness to protect us happily through this great conflict, to dispose our adversaries to reconciliation on reasonable terms, and thereby to relieve the empire from the calamities of civil war.

Declaration of Causes, supra. One year later, the tone of the Second Congress had changed from a conciliatory affection for the British people to one of hostility:

> Nor have We been wanting in attentions to our British brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

THE DECLARATION OF INDEPENDENCE para. 31 (U.S. 1776).

> full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor. [126]

In writing the *Declaration of Independence*, to justify independence from England, Jefferson evoked the rich tradition of Germanic customary law, the right to resistance, and Plato's writings of the "common good." Under these principles, independence was being lawfully demanded not only because of the imposition of a tax on imported tea without their consent, but because the King had failed in his duties by refusing "his Assent to Laws, the most wholesome and necessary for the public good"; repeatedly dissolving Representative Houses "for opposing with manly firmness his invasions on the rights of the people"; obstructing "the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers"; making "Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries"; for taxing "without our Consent"; and for often depriving citizens "of the benefits of Trial by Jury: . . . transporting us beyond Seas to be tried for pretended offences,"; and abdicating "Government here, by declaring us out of his Protection and waging War against us."[127] Jefferson asserted that the King had violated the requirement of the government to pass laws with the assent of the people, to enforce the laws for the protection of the people, and to protect law and justice by protecting the judiciary. The King's actions thereby justified the dissolution of the political bonds between the King and the colonies. [128]

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126. The DECLARATION OF INDEPENDENCE paras. 2, 32 (U.S. 1776). Jefferson concluded:

> But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security. . . . The history of the present King of Great Britain is a history of repeated injuries and usurpations. . . .

Id. at para. 2.

127. *Id.* at paras. 3, 7, 10, 11, 19, 20, 21, 25.

128. Jefferson evoked the principles of the enlightenment that (1) the power to govern originated from the people governed, (2) the failure of the government, either

Long before Jefferson and Locke, the principles of justified right of resistance and the kingly forfeiture of the right to govern when a King refuses assent to the laws were enshrined in the writing of the *Magna Carta* in 1215 when the barons revolted against King John.[129]

Although King John and the Pope invalidated the *Magna Carta*, history provided its reinstatement and over time it was recognized in England—and in the colonies—as a foundational document controlling the power of the king and asserting the rights of men to be free from arbitrary exercises of such power.[130] The thirteenth-century document advanced a key

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the legislature or the executive (the King) or both, to assent and obey the law as well as enforce the law is justification for the people to act against the government, and (3) it is left to the people to make determinations as to whether such a failure has occurred. As Locke concluded in his treatise:

> Here, it is like, the common question will be made, *Who shall be judge*, whether the prince or legislative act contrary to their trust? This, perhaps, ill-affected and factious men may spread amongst the people, when the prince only makes use of his due prerogative. To this I reply, *The people shall be judge*; for who shall be *judge* whether his trustee or deputy acts well, and according to the trust reposed in him, but he who deputes him, and must, by having deputed him, have still a power to discard him, when he fails in his trust? If this be reasonable in particular cases of private men, why should it be otherwise in that of the greatest moment, where the welfare of millions is concerned, and also where the evil, if not prevented, is greater, and the redress very difficult, dear, and dangerous?
>
> But farther, this question, (*Who shall be judge?*) cannot mean, that there is no judge at all: for where there is no judicature on earth, to decide controversies amongst men, *God* in heaven is *judge*. He alone, it is true, is judge of the right. But *every man* is *judge* for himself, as in all other cases, so in this, whether another hath put himself into a state of war with him, and whether he should appeal to the Supreme Judge, as *Jeptha* did.
>
> If a controversy arise betwixt a prince and some of the people, in a matter where the law is silent, or doubtful, and the thing be of great consequence, I should think the proper *umpire*, in such a case, should be the body of the *people*: for in cases where the prince hath a trust reposed in him, and is dispensed from the common ordinary rules of the law; there, if any men find themselves aggrieved, and think the prince acts contrary to, or beyond that trust, who so proper to *judge* as the body of the *people*, (who, at first, lodged that trust in him) how far they meant it should extend? But if the prince, or whoever they be in the administration, decline that way of determination, the appeal then lies no where but to heaven; force between either persons, who have no known superior on earth, or which permits no appeal to a judge on earth, being properly a state of war, wherein the appeal lies only to heaven; and in that state the *injured party must judge* for himself, when he will think fit to make use of that appeal, and put himself upon it.

LOCKE, *supra* note 7, §§ 240–42.

129. *See Featured Documents: Magna Carta Translation*, NAT'L ARCHIVES & RECORDS ADMIN., http://www.archives.gov/exhibits/featured_documents/magna_carta/translation.html [http://perma.cc/3YZ4-YD5K] (last visited May 24, 2014).

130. *Id.*

concept within the rule of law: the government's power (the king) over the individual was not absolute, but instead was under the *Law.*[131] Within a few decades of King John signing the Magna Carta, Lord Chief Justice Henry Bracton would find agreement with the Christian traditions of law and justice and the *Treatise on Law* by Aquinas (1225–1275) in his treatise *On the Laws and Customs of England* (1220s–1230s).[132] This work focused on the importance of the rule of law, the rejection of rule by law, and sovereignty of the *Law* over the sovereign in English law. The Lord Chief Justice wrote:

> His power, therefore, is that of justice and not of injustice and since he himself is the author of justice, an occasion of injustice ought not arise from the source whence justice comes, and likewise he who has the right from his office to prohibit others, ought not commit this same injustice himself. . . . Indeed it is said that he is king from ruling well and not from reigning, because he is king while he rules well and he is a tyrant when he oppresses with violent domination the people under his charge. Let him temper his power through the law which is the bridle of power, that he might live according to the law because a human law has established it as inviolable that the laws bind the lawgiver (*lator*), and elsewhere in the same (*lex humana*) it is said that it is worthy of the majesty of one who reigns that the prince avow himself bound by the laws.[133]

Lord Justice Bracton explained *why* sovereign power should be under the *Law* by invoking both the Christian and moral history and principles of English Common Law.[134]

> The king himself must be, not under Man, but under God and the Law, because the law makes the king. . . . For there is no king where arbitrary will dominates, and not the Law. And that he should be *under* the Law because he is God's vicar, becomes evident through the similitude with Jesus Christ in whose stead he governs on earth. For He, God's true Mercy, though having at His disposal many means to recuperate ineffably the human race, chose before all other expedients the one which applied

131. *Id.*

132. The exact date for both works is open to dispute among scholars. The dates reflected here reflect the generally accepted date ranges for both works.

133. II LORD JUSTICE HENRY BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE [ON THE LAWS AND CUSTOMS OF ENGLAND] (Woodbine ed., 1942), *reprinted in* S.J.T, Miller, *The Position of the King in Bracton and Baumanoir,* 31 (2) SPECULUM 263, 269 (1956).

134. *See* Garrison, *Hamiltonian and Madisonian Democracy, supra* note 3, at 134.

> for the destruction of the devil's work; that is, not the strength of power, but the maxim of Justice, and therefore he wished to be under the Law in order to redeem those under the Law. For he did not wish to apply force, but reason and judgment.[135]
>
> And so therefore, the king ought to [do likewise], lest his power remain unchecked (infrenata). Therefore there ought to be none greater than he in the administration of justice (in exhibitione juris), but he ought to be the least, or nearly so, in submitting to judgment if he seeks it.[136]
>
> The king ought, therefore, to exercise the power of justice as the vicar and minister of God on earth because that power is from God alone; however, the power of injustice is from the devil and not from God, and the king will be the minister of him whose work he does. Therefore while he does justice he belongs to the Eternal King; when he turns toward injustice he is the minister of the devil.[137]

"Under the Rule of Law, the *Law* makes the king, King; it is not the king that makes the law, *Law*. . . . [t]he sovereign must not act contrary to the law, for the sovereign is under the Law."[138] Under this principle, in 1607 and 1610, Chief Justice Edward Coke[139] held that (1) the King had no authority to rule on the meaning of the law for that was the province of the judiciary, (2) the King could not make law by proclamation, and (3) parliamentary laws that violated the higher Common Law were void.[140]

In November 1607, Chief Justice Edward Coke defended the role of the judiciary and the sovereignty of the *Law* over executive power in the famous *Prohibitions Del Roy* case.[141] King James I asserted that he had the power to sit as a judge to determine a dispute over the jurisdiction of the Ecclesiastical Judges.[142] Chief Justice Coke, while standing before King James, asserted that the King had no such power under the law for it was written in the laws of England that legal disputes were to be

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135. BRACTON, *supra* note 133, at 156 (alteration in original).
136. *Id.* at 272.
137. *Id.* at 269.
138. Garrison, *Hamiltonian and Madisonian Democracy, supra* note 3, at 135.
139. *Id.*
140. Prohibitions Del Roy, (1607) 77 Eng. Rep. 1342 (K.B.); 12 Co. Rep. 63; Case of Proclamations, (1610) 77 Eng. Rep. 1352 (K.B.); 12 Co. Rep. 74; Dr. Bonham's Case, (1610) 77 Eng. Rep. 638 (C.P.); 8 Co. Rep. 114.
141. *Prohibitions Del Roy*, 77 Eng. Rep. 1342.
142. *Id.*

settled in the courts of the Common Pleas, subject to appeal to the King's Bench, and subject to further appeal to the House of Lords.[143] More important to his defense of the judiciary was his reason why the King could not sit alone to hear disputes and determine the meaning of the law on his own authority.[144] Chief Justice Coke asserted that "if the king give any judgment, what remedy can the party have[?] . . . [I]f it be a wrong to the party grieved, he can have no remedy . . . ."[145] In this early variation of a separation of powers dispute, King James claimed that he could interpret and apply the law equally as well as the judicial bench. Chief Justice Coke responded that although the King was well versed in logic and reason, he was not schooled in the law, and could not apply it to secure safety and peace within the realm.[146] Replying to the King's displeasure that the understanding and application of the law was for lawyers and judges and not for him, Chief Justice Coke echoed Lord Justice Bracton, stating "*Rex non debet esse sub homine, sed sub Deo et lege, quia lex facit regem.*"[147]

Three years later, Chief Justice Coke further defended the principle that the King was under the law when he ruled in the *Case of Proclamations* that the king had no power to change the law by proclamation alone.[148] In November 1610, the court was presented with a question of whether the King could prohibit new building construction by his own authority.[149] After conferring with the other Chief Justices of the bench, Lord Chief Justice Coke answered that "the King cannot change any

143. *Id.*

144. *Id.* ("And it appears by the Act of Parliament . . . that neither by the Great Seal, nor by the Little Seal, justice shall be delayed; *ergo*, the King cannot take any cause out of any of his Courts, arid give judgment upon it himself . . . . [N]o king after the Conquest assumed to himself to give any judgment in any cause whatsoever, which concerned the administration of justice within this realm, but these were solely determined in the Courts of Justice . . . .").

145. *Id.*

146. *Id.* ("[T]hen the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England . . . .").

147. *Id.* Let the King not be under any man, but he is under God and the Law for the Law makes the King. WILLIAM FRANCIS HENRY KING, CLASSICAL AND FOREIGN QUOTATIONS, LAW TERMS AND MAXIMS, PROVERBS, MOTTOES, PHRASES, AND EXPRESSIONS IN FRENCH, GERMAN, GREEK, ITALIAN, LATIN, SPANISH, AND PORTUGUESE 474 (Whitacker & Sons 1887).

148. Case of Proclamations, (1610) 77 Eng. Rep. 1352 (K.B.) 1353; 12 Co. Rep. 74.

149. *Id.*

part of the common law, nor create any offence, by his proclamation, which was not an offence before, without Parliament."[150] But more importantly for the protection of rule of law and the rejection of rule by law, Lord Chief Justice Coke explained that "the King cannot create any offence by his prohibition or proclamation, which was not an offence before, for that was to change the law, and to make an offence which was not... *ergo*, that which cannot be punished without proclamation, cannot be punished with it."[151] After making clear that the King by "proclamation cannot make a thing unlawful, which was permitted by the law before," Coke affirmed prior judicial rulings which concluded that executive power is separate from legislative power and as such, the making of criminal laws subject to fines and imprisonment is for the legislature alone to create.[152]

Under a system of rule of law, the King was without power to make law through proclamation, and the source of the *Law* was the common law, statutory law, and custom—not the whims of the King.[153] The principle that once a law is made it is sovereign, even sovereign over the power of the King, is as old as the Scriptures[154] as illustrated in the Old Testament *Book of Esther.* For when the King was told that a law was made and published under his seal, the King himself ruled that the law was without appeal or repeal and had to be implemented because "whatever is written in the king's name and sealed with the king's signet ring no one can revoke," not even the King himself.[155]

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150. *Id.*

151. *Id.*

152. Lord Coke wrote:

> the King by his proclamation cannot create any offence which was not an offence before, for then he may alter the law of the land by his proclamation in a high point; for if he may create an offence where none is, upon that ensues fine and imprisonment: also the law of England is divided into three parts, common law, statute law, and custom; but the King's proclamation is none of them: also *malum aut est malum in se, aut prohibitum,* that which is against common law is *malum in se, malum prohibitum* is such an offence as is prohibited by Act of Parliament, and not by proclamation.
>
> Also it was resolved, that the King hath no prerogative, but that which the law of the land allows him

Id.

153. *Id.*

154. *See Daniel* 6:8, 15 ("Now, O king, establish the decree and sign the writing, so that it cannot be changed, according to the law of the Medes and Persians, which does not alter"; and "Know, O king, that *it is* the law of the Medes and Persians [605–562 B.C.] that no decree or statute which the king establishes may be changed.").

155. *Esther* 8:8. Lord Bracton echoed the scriptural principle that the king is bound

Lord Justice Coke also planted the seeds for the principle that Parliament was also bound to restraint in making laws in the *Dr. Bonham's Case.*[156] The case involved a lawsuit for false imprisonment filed by Dr. Thomas Bonham.[157] Bonham was charged, fined, and imprisoned by the Royal College of Physicians of London for practicing without a license from the College.[158] Bonham brought his case to the Court of Common Pleas and was heard by Lord Chief Justice Coke.[159] The College defended its action by asserting that under a patent granted by King Henry VIII, it had the authority to require doctors to have a license granted by the College and to levy fines and imprison doctors who failed to secure such licenses.[160] Lord Coke ruled against the College, holding that although it had the power to grant licenses, collect fees, and enforce those fees by imprisonment, it exercised these powers in conflict with the Common Law.[161] In what some have argued was dicta,[162] Lord Justice Coke asserted, "It appears in our books, that in many cases, the common law will control acts of Parliament and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such an Act to be void . . . ."[163] Less than two hundred years later, the idea of a supreme law that would govern the power of the legislature to make law and be protected by the judiciary found fertile ground in American law.[164] As Lord Chief Justice Coke found that a law in violation

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by the *Law* and by the laws he himself makes as follows:

> Let him, therefore, temper his power by law, which is the bridle of power, that he may live according to the laws, for *the law of mankind has decreed that his own laws bind the lawgiver,* and elsewhere in the same source, it is a saying worthy of the majesty of a ruler that *the prince acknowledges himself bound by the laws.*

Martin Krygier, *The Rule of Law: Legality, Teleology, Sociology,* UNIV. NEW S. WALES FAC. L. RES. SERIES 7 (2007), *available at* http://law.bepress.com/cgi/viewcontent.cgi?article=1067&context=unswwps-flrps [http://perma.cc/57W4-6P6U] (emphasis added) (quoting BRACTON, *supra* note 133, at 305–06).

156. Dr. Bonham's Case, (1610) 77 Eng. Rep. 638 (C.P.); 8 Co. Rep. 114.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. George P. Smith, II, *Dr. Bonham's Case and the Modern Significance of Lord Coke's Influence,* 41 WASH. L. REV. 297, 304 (1966).

163. *Dr. Bonham's Case,* 8 Co. Rep. at 118.

164. *See* United States v. Callender, 25 F. Cas. 239 (C.C.D. Va. 1800) (No. 14,709). In

of the Common Law was void, so too Chief Justice Marshall asserted that laws contradicting the Constitution were void:

> The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.
>
> If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: . . . an act of the legislature, repugnant to the constitution, is void.
>
> . . . .
>
> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.[165]

Under the rule of law, the *Law* is sovereign. Echoing the writings of Lord Coke, Chief Justice Marshall settled that in the United States, the judiciary interprets, protects, and applies the *Law*.

III. THE RULE OF LAW: THE PURPOSE AND CONTROL OF EXECUTIVE POWER

> [T]he special and greatest point of difference that is between a rightful king and an usurping tyrant, is this, that whereas the proud and ambitious tyrant doth think his kingdom and people are only ordained for satisfaction of his desires and unreasonable appetites, the righteous and just king doth by the contrary acknowledge himself to be ordained for the

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this case, Justice Chase held that the defense could not argue that Congress had granted to petit juries the power to determine if a law was constitutional because such a power belonged to the Judicial Department and if Congress had so acted the law would be void. Although Coke's argument did not take hold in England, it found acceptance in colonies as early as 1657 and was part of the legal arguments against the Alien and Sedition Acts of 1798. *See also* Arthur H. Garrison, *The Internal Security Acts of 1798: The Founding Generation and the Judiciary During America's First National Security Crisis*, 34 J. SUP. CT. HIST. 1, 19 (2009) (quoting *The Trial of James Thomson Callender for Seditious Libel (May 1800)*, 10 AM. STATE TRIALS 813); Smith, *supra* note 162, at 313–14.

165. Marbury v. Madison, 5 US (1 Cranch) 137, 177–78 (1803).

> procuring of the wealth and property of his people.[166]

The rule of law, historical development and philosophy aside, also addresses various operational and policy questions regarding the use of executive power.

Recall the questions posed at the beginning of this article: Why was the accusation that the Bush Administration had violated the rule of law such a significant accusation? As a constitutional matter, why is the rule of law significant? What is the value of the rule of law? The answer to all of these questions is that the rule of law, on an operational level, prevents executive power from the taking of life, liberty, and property without legal justification.[167] The *Law*—the rule of law—governs, legitimizes, and defines the scope of executive actions.[168] The rule of law leverages the limitations and virtues of a democracy to preserve that democracy from tyranny.[169] Madison and Hamilton,[170] and before them, Locke and Hobbes,[171] and even before them, the Scriptures, make clear that God himself said, "the imagination of man's heart *is* evil from his youth,"[172] and that man will seek to achieve his interests at the expense of his fellow man within society.[173] Still, man is rational, and the men of the Enlightenment thought that man was capable of governing himself through rational thought and inherent understanding of natural law.[174] The rule of law and positive law support the operation of liberal Democracy (majority rule under the rule of law with protections for individual rights) and the ability for man to govern himself without kings. As Reinhold Niebuhr explained:

> A free society requires some confidence in the ability of men to reach tentative and tolerable adjustments between their

166. LOCKE, *supra* note 7, § 200 (quoting King James I, First speech to the Parliament (Mar. 19, 1603)).

167. U.S. CONST. amend. V ("No person shall ... be deprived of life, liberty, or property, without due process of law ....").

168. *Id.*

169. THE FEDERALIST NO. 10 (James Madison).

170. *See, e.g., id.*; FORREST MCDONALD, ALEXANDER HAMILTON: A BIOGRAPHY 42 (1982).

171. *See, e.g.*, LOCKE, *supra* note 7, §§ 16, 19, 21; HOBBES, *supra* note 9, at 219–20.

172. *Genesis* 8:21. *See also Genesis* 6:5 ("[T]he LORD saw that the wickedness of man was great in the earth, and that every intent of the thoughts of his heart was only evil continually.") (emphasis omitted).

173. THE FEDERALIST NO. 10 (James Madison).

174. *See, e.g.*, JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT: OR, THE PRINCIPLES OF POLITICAL RIGHT (Kessinger Publ'g 2004) (1762).

competing interests and to arrive at some common notions of justice which transcend all partial interests. A consistent pessimism in regard to man's rational capacity for justice invariably leads to absolutistic political theories; for they prompt the conviction that only preponderant power can coerce the various vitalities of a community into a working harmony. But a too consistent optimism in regard to man's ability and inclination to grant justice to his fellows obscures the perils of chaos which perennially confront every society, including a free society. In one sense a democratic society is particularly exposed to the dangers of confusion. If these perils are not appreciated they may overtake a free society and invite the alternative evil of tyranny.

But modern democracy requires a more realistic philosophical and religious basis, not only in order to anticipate and understand the perils to which it is exposed; but also to give it a more persuasive justification. Man's capacity for justice makes democracy possible; but man's inclination to injustice makes democracy necessary. In all non-democratic political theories the state or the ruler is invested with uncontrolled power for the sake of achieving order and unity in the community. But the pessimism which prompts and justifies this policy is not consistent; for it is not applied, as it should be, to the ruler. If men are inclined to deal unjustly with their fellows, the possession of power aggravates this inclination. That is why irresponsible and uncontrolled power is the greatest source of injustice.

The democratic techniques of a free society place checks upon the power of the ruler and administrator and thus prevent it from becoming vexatious. The perils of uncontrolled power are perennial reminders of the virtues of a democratic society; particularly if a society should become inclined to impatience with the dangers of freedom and should be tempted to choose the advantages of coerced unity at the price of freedom.[175]

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175. REINHOLD NIEBUHR, THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS: A VINDICATION OF DEMOCRACY AND A CRITIQUE OF ITS TRADITIONAL DEFENSE xxxi–xxxiii (Univ. of Chi. Press 2011) (1944). Niebuhr concluded:

> The consistent optimism of our liberal culture has prevented modern democratic societies both from gauging the perils of freedom accurately and from appreciating democracy fully as the only alternative to injustice and oppression. When this optimism is not qualified to accord with the real and complex facts of human nature and history, there is always a danger that sentimentality will give way to despair and that a too consistent optimism will alternate with a too consistent pessimism.
>
> I have not sought to elaborate the religious and theological convictions upon which the political philosophy of the following pages rests. It will be apparent,

Protecting the rule of law when it stands in the way of utility and efficiency is no academic exercise. It is a practical and difficult task that requires sacrifice in the face of strong impulses and difficulties. Those with executive power, in both world and American history, do not always favor limits on their power to act.[176] It is the struggle to make the law prevail over temporary need, utility, or the fear of national or social danger which is at the heart of the control of executive power on the operational and policy level.[177] The problem lies not only in the existence of the struggle, but also in societal impatience with the struggle and the falsehood that those with power will *always* act in accordance with the law under political or military threats.[178]

In the famous interview between Richard Nixon and David Frost the following discussion occurred:

> ***David Frost (narration):*** The wave of dissent in America, occasionally violent, which followed the incursion into Cambodia by US and Vietnamese forces in 1970 prompted President Nixon to demand better intelligence about the people who were opposing him on the domestic front. To this end, the deputy White House Counsel, Tom Huston, arranged a series of meetings with representatives of the CIA, the FBI and other police and intelligence agencies. These meetings produced a plan, the Huston Plan, which advocated the systematic use of wiretappings, burglaries, or so-called black bag jobs, mail openings and infiltration against anti-war groups and others. Some of these activities, as Huston emphasized to Nixon, were clearly illegal. Nevertheless, the President approved the plan. Five days later, after opposition from the FBI director, J. Edgar Hoover, the plan was withdrawn, but the President's approval was later to be listed in the articles of impeachment as an alleged abuse of Presidential power.
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> . . . .
>
> ***David Frost:*** . . . . [W]ouldn't it have been better here

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however, that they are informed by the belief that a Christian view of human nature is more adequate for the development of a democratic society than either the optimism which democracy has become historically associated or the moral cynicism which inclines human communities to tyrannical political strategies.

Id. at xxxiii–xxxiv.

176. *See* Arthur H. Garrison, *The History of Executive Branch Legal Opinions on the Power of the President as Commander-in-Chief from Washington to Obama*, 43 CUMB. L. REV. 375 (2013).

177. *Id.* at 401–02.

178. *Id.*

though, to have done what you were going to do legally, rather than doing something that was illegal? . . .

Richard Nixon: Ah, basically, the proposition you've just stated in theory is perfect; in practice, it just won't work. To get legislation, specific legislation, to have warrantless entries for the purpose of obtaining information and the rest, would not only have raised an outcry, but it would have made it terribly difficult to move in on these organizations, because basically they would be put on notice by the very fact that the legislation was on the books that they'd be potential targets. An action's either going to be covert or not.

David Frost: So, what in a sense you're saying is that there are certain situations, and the Huston Plan or that part of it was one of them, where the President can decide that it's in the best interests of the nation or something, and do something illegal.

Richard Nixon: Well, when the President does it, that means that it is not illegal.

David Frost: By definition.

Richard Nixon: Exactly. Exactly. If the President . . . if, for example, the President, approves something, approves an action, because of the national security, or in this case because of a threat to internal peace and order of significant magnitude, then the President's decision in that instance, is one that enables those who carry it out to carry it out without violating a law. Otherwise, they're in an impossible position.

. . . .

David Frost: Yeah. No. But all I was saying was: where do we draw the line? If you're saying that Presidential fiat can, in fact, mean that someone who does one of these black-bag jobs, these burglaries, is not liable to criminal prosecution, [why couldn't the same power allow the President to order someone killed?]

Richard Nixon: Because, as you know, after many years of studying and covering the world of politics and political science, there are degrees, there are nuances, which are difficult to explain, but which are there. As far as this particular matter is concerned, each case has to be considered on its merits.

David Frost: . . . But, the point is: just the dividing line, is that in fact the dividing line is the President's judgment?

Richard Nixon: Yes, the dividing line . . . just so that one does not get the impression that a President can run amok in this country and get away with it, we have to have in mind that a President has to come up before the electorate. We also have

to have in mind that a President has to get appropriations from the Congress.[179]

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179. Interview by David Frost with President Richard Nixon (May 19, 1977), *reprinted in* THE POWER OF THE PRESIDENCY: CONCEPTS AND CONTROVERSY 178–80 (Robert S. Hirschfield ed., 3rd ed. 1982). *See also* SIR DAVID FROST WITH BOB ZELNICK, FROST/NIXON: BEHIND THE SCENES OF THE NIXON INTERVIEWS 262–70 (2007) [hereinafter FROST, BEHIND THE SCENES]. In his chapter on the Huston Plan, Frost reprinted the following conversation:

> ***Frost:*** You called a meeting on June the fifth, 1970, about the Huston plan and eventually approved it in July. It got your okay on July the fourteenth, didn't it? And in the Huston plan it stated very clearly, with reference to the entry that was being proposed, it said very clearly, use of this technique is clearly illegal, it amounts to burglary . . . however, it is also one of the most fruitful tools and it can produce the type of intelligence which cannot be obtained in any other fashion. Why did you approve a plan that included an element like that . . . that was clearly illegal?
>
> ***Nixon:*** Because as president of the United States . . . ah . . . I had to make a decision, as has faced most presidents, in fact, all of them, ah . . . in which, ah . . . the national security in terms of a threat from abroad, ah. . . and the security of the individual . . . individual violence at home had to be put first. Ah . . . I think Abraham Lincoln has stated it better than anybody else, as he does in so many cases. When he said, "Must a government be too strong for the liberties of its people? Or too weak to defend or maintain its own existence?" That's the dilemma that presidents have had to face . . . . Now let's first, let's second understand what the surreptitious entry is limited to. You will note that a surreptitious entry in cases involving national security and specifically mentions, ah . . . two, ah . . . groups of, ah . . . internal organizations who had no foreign connections as far as we know. Ah . . . the Weathermen and the Black Panthers.
>
> . . . .
>
> ***Frost:*** Yeah . . . but I mean, that action, as Huston warned, is illegal. . . .
>
> ***Nixon:*** Let me say that it is legal in my view [referring to presidential action in times of war and crisis, specifically Lincoln's suspension of habeas corpus and the internment of the Japanese Americans during WWII]. Was that legal? Was it right? In retrospect, no.
>
> But on the other hand, a president makes an order, has to issue an order where you are involved in war or in the case of our people the Weathermen, the Black Panthers, if you have thirty thousand bombings on your hand . . . I mean three thousand bombings . . . you gotta do something about it. The question is maintaining the proper balance. Ah . . . and what you do in these instances, ah . . . cannot always be public.
>
> . . . .
>
> ***Nixon:*** . . . Burglaries per se are illegal. Let's begin with that proposition. Second, when a burglary, as you have described a black-bag job, ah . . . is one that is undertaken because of an expressed policy decided by the president, ah . . . in the interests of the national security . . . and when the device will be used in a very limited and cautious manner and responsible manner . . . when it is undertaken, then, then that means that what would otherwise be technically illegal does not subject whose [sic] who engage in such activity to criminal prosecution. That's the way that I would put it.

FROST, BEHIND THE SCENES, *supra*, at 254–55, 262, 264, 266–67. It was within this context of addressing the need to use illegal methods to deal with a greater national security problem that Nixon made his famous assertion "Well, when the president does it . . . that means that it is not illegal." *Id.* at 266. In the colloquy with Frost, Nixon did not admit that his actions under Huston plan were illegal. *Id.* at 264. The quotation from Lincoln that Nixon referred to is as follows:

A few decades later, former Secretary of Defense Dick Cheney opined in a *Frontline* documentary on the power of President George H.W. Bush to use military force to halt the military invasion of Kuwait by Iraq.[180]

> **NARRATOR:** As Secretary of Defense, Cheney argued the president should not seek congressional authorization for the Gulf war.
>
> **Rep. MICKEY EDWARDS (R-OK), 1977–1992:** The leadership in Congress generally was telling the first President Bush, "You have to get permission from Congress to go into the Gulf war." The president didn't think that was the case. He resisted it.
>
> **RICHARD CHENEY, Fmr. Defense Secretary:** [*FRONTLINE 1996*] I argued that we did not need congressional authorization, and that legally and from a constitutional standpoint, we had all the authority we needed.
>
> **JACK GOLDSMITH:** Secretary of Defense Cheney's advice was that it was unnecessary and imprudent—unnecessary because the Constitution did not require it, imprudent because Congress might say no.
>
> **RICHARD CHENEY:** [*FRONTLINE 1996*] If we'd lost the vote in the Congress, I would certainly have recommended to the president that we go forward anyway.
>
> **NARRATOR:** In the end, Cheney's view did not prevail. The president agreed to a congressional vote.[181]

Less than a decade later—five days after 9/11—Vice President Cheney made clear in an interview that the utility of methods to address national security was the primary objective.[182]

> **VICE PRESIDENT CHENEY:** I'm going to be careful here, Tim,

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> [T]he question, whether a constitutional republic . . . can . . . maintain its territorial integrity, against its own domestic . . . discontented individuals, too few in numbers to control administration [who seek to] break up their Government [can be resisted.] . . . It forces us to ask: "Is there, in all republics, this inherent, and fatal weakness?" "Must a government, of necessity, be too *strong* for the liberties of its own people, or too *weak* to maintain its own existence?"

Abraham Lincoln, President of the U.S., Message to Congress in Special Session (July 4, 1861), *in* IV COLLECTED WORKS OF ABRAHAM LINCOLN, 1860–1861, at 421, 426 (Roy P. Basler ed., 1953).

180. *Frontline: Cheney's Law* (PBS television broadcast Oct. 16, 2007) (transcript available at http://www.pbs.org/wgbh/pages/frontline/cheney/etc/script.html [http://perma.cc/AJ4Z-QMHB]).

181. *Id.*

182. *Meet The Press: Interview with Vice President Dick Cheney* (NBC News television broadcast Sept. 16, 2001) (transcript available at http://www.fromthewilderness.com/timeline/2001/meetthepress091601.html [http://perma.cc/7VAK-KPJ9]) [hereinafter *Meet the Press*].

> because I—clearly it would be inappropriate for me to talk about operational matters, specific options or the kinds of activities we might undertake going forward. We do, indeed, though, have, obviously, the world's finest military. They've got a broad range of capabilities. And they may well be given missions in connection with this overall task and strategy.
>
> We also have to work, though, sort of the dark side, if you will. We've got to spend time in the shadows in the intelligence world. A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we're going to be successful. That's the world these folks operate in, and so it's going to be vital for us to use any means at our disposal, basically, to achieve our objective.[183]

On the issue of the applicability of the law in times of terror, the Vice President was more interested in making changes to expand executive power rather than to constrain it.[184]

> **MR. RUSSERT:** There have been restrictions placed on the United States intelligence gathering [methods], reluctance to use unsavory characters, those who violated human rights, to assist in intelligence gathering. Will we lift some of those restrictions?
>
> **VICE PRESIDENT CHENEY:** Oh, I think so. I think the—one of the by-products, if you will, of this tragic set of circumstances is that we'll see a very thorough sort of reassessment of how we operate and the kinds of people we deal with. There's—if you're going to deal only with sort of officially approved, certified good guys, you're not going to find out what the bad guys are doing. You need to be able to penetrate these organizations. You need to have on the payroll some very unsavory characters if, in fact, you're going to be able to learn all that needs to be learned in order to forestall these kinds of activities. It is a mean, nasty, dangerous dirty business out there, and we have to operate in that arena. I'm convinced we can do it; we can do it successfully. But we need to make certain that we have not tied the hands, if you will, of our intelligence communities in terms of accomplishing their mission.
>
> **MR. RUSSERT:** These terrorists play by a whole set of different rules. It's going to force us, in your words, to get mean, dirty and nasty in order to take them on, right? And they should realize there will be more than simply a pinprick bombing.

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183. *Id.*
184. *Id.*

> **VICE PRESIDENT CHENEY:** Yeah, the—I think it's—the thing that I sense—and, of course, that's only been a few days, but I have never seen such determination on the part of—well, my colleagues in government, on the part of the American people, on the part of our friends and allies overseas, and even on the part of some who are not ordinarily deemed friends of the United States, determined in this particular instance to shift and not be tolerant any longer of these kinds of actions or activities.[185]

After the attacks of 9/11, the Bush Administration's position was that 9/11 was an act of war, unlike the criminal acts of terror that America had previously endured,[186] and that the

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185. *Id.*

186. Nine days after the attacks of 9/11, President Bush established the position of the United States regarding the attacks:

> On September the 11th, enemies of freedom committed an act of war against our country. Americans have known wars—but for the past 136 years, they have been wars on foreign soil, except for one Sunday in 1941. Americans have known the casualties of war—but not at the center of a great city on a peaceful morning. Americans have known surprise attacks—but never before on thousands of civilians. All of this was brought upon us in a single day—and night fell on a different world, a world where freedom itself is under attack.
>
> . . . .
>
> Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.
>
> . . . .
>
> . . . We will direct every resource at our command—every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war—to the disruption and to the defeat of the global terror network.
>
> This war will not be like the war against Iraq a decade ago, with a decisive liberation of territory and a swift conclusion. It will not look like the air war above Kosovo two years ago, where no ground troops were used and not a single American was lost in combat.

President George W. Bush, Address to the Joint Session of the 107th Congress (Sept. 20, 2001), *in* SELECTED SPEECHES OF GEORGE W. BUSH: 2001–2008, at 65, 66–69, *available at* http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf [http://perma.cc/3JMJ-FQPF] [hereinafter SELECTED BUSH]. Vice President Cheney echoed this view in his interview with Tim Russert:

> **VICE PRES. CHENEY:** I think the important thing here, Tim, is for people to understand that, you know, things have changed since last Tuesday. The world shifted in some respects. Clearly, what we're faced with here is a situation where terrorism is struck home in the United States. We've been subject to targets of terrorist attacks before, especially overseas with our forces and American personnel overseas, but this time because of what happened in New York and what happened in Washington, it's a qualitatively different set of circumstances.
>
> It's also important for people to understand that this is a long-term proposition. It's not like, well, even Desert Storm where we had a buildup for a few months, four days of combat, and it was over with. This is going to be the

President's determination alone was sufficient in determining how to treat those captured in the resulting military conflict with members of al Qaeda and the Taliban.[187] Specifically the Administration asserted that Congress had little and the judiciary had no role at all in the policies regarding the capture, questioning, and treatment of enemy combatants.[188] Further, the Administration determined that those captured were not subject to the protection of the U.S. Constitution or U.S. courts.[189]

These assertions did not go unchallenged, but the reason for the challenge was more than disagreement on policy grounds;[190] the dispute and challenge were also based on protection of the rule of law.[191] The rule of law, in operation, rejects the assertion that executive power is unlimited in times of crisis. The rejection of unlimited power is not based on the personality or character of those who rule, or the correctness of the policies. Rather, the rejection originates from the first principles of Lockean and Hobbesian theory, those who rule cannot do so

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> kind of work that will probably take years because the focus has to be not just on any one individual, the problem here is terrorism. And even in this particular instance, it looks as though the responsible organization was a group called al-Qaida. It's Arabic for "The Base."

Meet the Press, *supra* note 182. Three years later, President Bush continued this policy narrative in his State of the Union Address:

> I know that some people question if America is really in a war at all. They view terrorism more as a crime, a problem to be solved mainly with law enforcement and indictments. After the World Trade Center was first attacked in 1993, some of the guilty were indicted, [tried, convicted], and sent to prison. But the matter was not settled. The terrorists were still training and plotting in other nations, and drawing up more ambitious plans. After the chaos and carnage of September the 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States, and war is what they got.

President George W. Bush, *State of the Union Address* (Jan. 20, 2004), *in* SELECTED BUSH, *supra*, at 197, 201.

187. *See, e.g.*, YOO, *supra* note 3; Garrison, *The Judiciary*, *supra* note 3; Garrison, Hamdan v. Rumsfeld, *Military Commissions, and Acts of Congress*, *supra* note 3; Pillard, *supra* note 3.

188. *See* Garrison, Hamdi, Padilla *and* Rasul, *supra* note 3; Garrison, *The War on Terrorism*, *supra* note 3; Garrison, *Hamiltonian and Madisonian Democracy*, *supra* note 3.

189. *See* Garrison, Hamdi, Padilla *and* Rasul, *supra* note 3; Garrison, *The War on Terrorism*, *supra* note 3; Garrison, *Hamiltonian and Madisonian Democracy*, *supra* note 3.

190. *See* Garrison, *The Judiciary*, *supra* note 3; Garrison, Hamdan v. Rumsfeld, *Military Commissions, and Acts of Congress*, *supra* note 3.

191. *See* Garrison, *The Judiciary*, *supra* note 3; Garrison, Hamdan v. Rumsfeld, *Military Commissions, and Acts of Congress*, *supra* note 3. *See also* Kate Martin & Joe Onek, *"Enemy Combatants," The Constitution and the Administration's "War on Terror,"* AM. CONST. SOC'Y FOR L. & POL'Y (2004), *available at* http://www.acslaw.org/pdf/enemycombatants.pdf [http://perma.cc/84M8-HWRV].

with absolute power because they will use that power to the detriment of others if left unchecked.[192] Under the rule of law, even in times of national security and terrorist threats, executive power is not an absolute.[193] The "*Law* makes the King, King."[194] As Locke explains, the government rests upon the rule of law, making actions of the executive outside of the rule of law equivalent to the dissolution of the government, for the government exists only under the law.[195] Locke explains that the law is the heart of government:

> Why, in such a constitution as this, the *dissolution of the government* in these cases is to be imputed to the prince, is evident; because he, having the force, treasure and offices of the state to employ, and often persuading himself, or being flattered by others, that as supreme magistrate he is uncapable of controul; he alone is in a condition to make great advances toward such changes, under pretence of lawful authority, and has it in his hands to terrify or suppress opposers, as factious, seditious, and enemies to the government . . . .
>
> There is one way more whereby such a government may be dissolved, and that is, when he who has the supreme executive power, neglects and abandons that charge, so that the laws already made can no longer be put in execution. This is demonstratively to reduce all to anarchy, and so effectually *to dissolve the government*: for laws not being made for themselves, but to be, by their execution, the bonds of the society, to keep every part of the body politic in its due place and function . . . . Where there is no longer the administration of justice, for the securing of men's rights, nor any remaining power within the community to direct the force, or provide for the necessities of the public, there certainly is *no government left*. Where the laws cannot be executed, it is all one as if there were no laws; and a government without laws is, I suppose, a mystery in politics, unconceivable to human capacity, and inconsistent with human society.[196]

192. *See generally Rule of Law: Essential Principles*, DEMOCRACY WEB, http://www.democracyweb.org/rule/principles.php [http://perma.cc/F5PX-RVAD] (last visited May 24, 2014). *See also Plato and Aristotle on Tyranny and the Rule of Law*, BILL OF RIGHTS IN ACTION (Constitutional Rights Found.) (Fall 2010), *available at* http://www.crf-usa.org/bill-of-rights-in-action/bria-26-1-plato-and-aristotle-on-tyranny-and-the-rule-of-law.html [http://perma.cc/X6PF-59ZN] (last visited May 24, 2014).

193. *War Powers*, LAW LIBRARY OF CONG., http://www.loc.gov/law/help/war-powers.php [http://perma.cc/8PZQ-PJ8H] (last visited May 24, 2014).

194. ARTHUR H. GARRISON, SUPREME COURT JURISPRUDENCE IN TIMES OF NATIONAL CRISIS, TERRORISM, AND WAR: A HISTORICAL PERSPECTIVE 439 (2011).

195. LOCKE, *supra* note 7, §§ 211, 219.

196. *Id.* §§ 218–19.

The point being executive power exists for the protection of men's rights to enjoy liberty and that purpose limits the power of the executive and justifies its operation. From the men of the Enlightenment[197] to the men of the Constitutional Convention,[198] from those who voted to impeach President Nixon[199] to those on the U.S. Supreme Court[200] and in the Bush Administration[201] who rose in opposition[202] and forced President Bush to change his policies after 9/11, all did so to defend the principle of the rule of law—regardless of the political utility of disregarding it. Nixon and Cheney were in error.[203] *Executive action in times of crisis, by definition, does not*

197. *See* Jim Powell, *John Locke: Natural Rights to Life, Liberty, and Property*, THE FREEMAN, Aug. 1, 1996, http://www.fee.org/the_freeman/detail/john-locke-natural-rights-to-life-liberty-and-property [http://perma.cc/U8XS-VBDD]. *See also* Alexander Moseley, *John Locke: Political Philosophy*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, http://www.iep.utm.edu/locke-po/ [http://perma.cc/TPH-296N] (last visited May 24, 2014).

198. *See The Constitution of the United States*, THE HERITAGE FOUND., http://www.heritage.org/initiatives/first-principles/primary-sources/the-constitution-of-the-us [http://perma.cc/8JEA-75Y7] (last visited May 24, 2014).

199. *See* Richard Lyons & William Chapman, *Judiciary Committee Approves Article to Impeach President Nixon, 27 to 11*, WASH. POST, July 28, 1974, http://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/072874-1.htm [http://perma.cc/32GK-J5RJ].

200. *See* Rasul v. Bush, 542 U.S. 466 (2004); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Boumediene v. Bush, 553 U.S. 723 (2008).

201. See Memorandum from Colin Powell, U.S. Sec'y of State, to Counsel to the President, Assistant to the President for Nat'l Sec. Affairs (Jan. 26, 2002), *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 122 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter THE TORTURE PAPERS]; Memorandum from William H. Taft, IV, Legal Advisor to the State Dep't, to Alberto Gonzales, U.S. Attorney General (Feb. 2, 2002), *in* THE TORTURE PAPERS, *supra*, at 129; Memorandum from Alberto J. Mora, Former General Counsel for the U.S. Navy, to Inspector General, Dep't of the Navy (June 18, 2004), *available at* http://www.aclu.org/files/pdfs/safefree/mora_memo_july_2004.pdf [http://perma.cc/ACT4-DMUH]; *To Receive Testimony on the Origins of Aggressive Interrogation Techniques: Part I of the Committee's Inquiry into the Treatment of Detainees in U.S. Custody: Before the S. Comm. On Armed Services*, 110th Cong. (2008) (statement of Alberto J. Mora, Former General Counsel for the U.S. Navy) (transcript available at http://www.loc.gov/rr/frd/Military_Law/pdf/Senate-Armed-Services-June-17-2008.pdf [http://perma.cc/NX55-79PP]); Alberto J. Mora, Former General Counsel for the U.S. Navy, Speech at the ABA's Ctr. for Human Rights Fourth Annual House of Delegates Luncheon (Feb. 2008).

202. *See supra* note 5.

203. Locke answers both Nixon's assertion "Well, when the president does it, that means it is not illegal" and Cheney's assertion "But we need to make certain that we have not tied the hands, if you will, of our intelligence communities in terms of accomplishing their mission" with an admonishment to remember that under the rule of law executive power has limits:

> [T]he limitations of the law, which if any one transgress, the king's commission excuses him not: for the king's authority being given him only by the law, he cannot impower any one to act against the law, or justify him, by his commission, in so doing; the *commission*, or *command of any magistrate, where*

define legality; it is the law that defines executive action as legal. The rule of law is not a means to an end; the rule of law is an end which justifies the means.[204]

IV. CONCLUSION

> Law is more than the words that put it on the books; law is more than any decisions that may be made from it; law is more than the particular code of it stated at any one time or in any one place or nation; more than any man, lawyer or judge, sheriff or jailer, who may represent it. True law, the code of justice, the essence of our sensations of right and wrong, is the conscience of society.[205]

Although control of executive power is at the core of the value and meaning of the rule of law, the meaning of the rule of law involves more than just the control of arbitrary governmental power. The rule of law maintains that no one is above the dictates of the law and no one is below or outside the protection of the law.[206] Under the rule of law, executive power

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> *he has no authority*, being as *void* and insignificant, as that of any private man; the difference between the one and the other, being that the magistrate has some authority so far, and to such ends, and the private man has none at all: for it is not the *commission*, but the *authority*, that gives the right of acting; and *against the laws there can be no authority.*

LOCKE, *supra* note 7, § 206.

204. *See* Garrison, *Traditions and History*, *supra* note 8.

205. WALTER VAN TILBURG CLARK, THE OX-BOW INCIDENT 49 (1940). In the 1943 movie adaptation of the book, Donald Martin, a man who was to be lynched, is allowed to write a letter to his wife. In his letter, he discusses the universal nature of the law and justice and how the violation of the universal nature of the law hurts not only the individual but society and all who live in it.

> My dear Wife, Mr. Davies will tell you what's happening here tonight. He's a good man and has done everything he can for me. I suppose there are some other good men here, too, only they don't seem to realize what they're doing. They're the ones I feel sorry for. 'Cause it'll be over for me in a little while, but they'll have to go on remembering for the rest of their lives. A man just naturally can't take the law into his own hands and hang people without hurtin' everybody in the world, 'cause then he's just not breaking one law but all laws. Law is a lot more than words you put in a book, or judges or lawyers or sheriffs you hire to carry it out. It's everything people ever have found out about justice and what's right and wrong. It's the very conscience of humanity. There can't be any such thing as civilization unless people have a conscience, because if people touch God anywhere, where is it except through their conscience? And what is anybody's conscience except a little piece of the conscience of all men that ever lived? I guess that's all I've got to say except kiss the babies for me and God bless you. Your husband, Donald.

THE OX-BOW INCIDENT (Twentieth Cent. Fox Film Corp. 1943).

206. TAMANAHA, *supra* note 46, at 7; *see also supra* note 51 and accompanying text. As Theodore Roosevelt stated at the beginning of the twentieth century, "No man is above the law and no man is below it; nor do we ask any man's permission when we require

is under justice and thus it is obedient to the law.[207] While being subject to law and justice, executive power is also its protector.[208] From the prophets and kings of the Bible[209] to the men of ancient Rome and Greece[210] to the men of the Enlightenment[211] to the writers of the Declaration of Independence and the U.S. Constitution,[212] it is commanded that those who rule are required to preserve justice[213] and apply the law with mercy,[214] and those under such authority have the right[215] to expect and seek justice[216] from those in authority. Solomon knew this, as he

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him to obey it. Obedience to the law is demanded as a right; not asked as a favor." President Theodore Roosevelt, Third Annual Message to Congress (Dec. 7, 1903), *available at* http://www.presidency.ucsb.edu/ws/?pid=29544 [http://perma.cc/6SJ7-YTDJ].

207. *See supra* notes 100, 103, 112, 133–137 144, 148 and 206 and accompanying text.

208. *See supra* notes 12, 51–59, 63–70, and 114 and accompanying text. *Compare* U.S. CONST. art. II, § 1, cl. 8, § 3, *with* 5 U.S.C. § 3331 (1988), *and* 28 U.S.C. § 453 (1988). This distinction is seen in the oaths of office taken by different government officials. The Constitution requires that the President swear to "the best of [his] Ability, preserve, protect and defend the Constitution of the United States," and that while in office, among other duties, "he shall take Care that the Laws be faithfully executed." The oath taken by all other government officers only requires that the officer "will support and defend the Constitution . . . [and] bear true faith and allegiance to the same." Additionally, judicial officers pledge to "administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as (title) under the Constitution and laws of the United States." The President is the only officer charged with preserving and protecting the Constitution, as well as the only officer with a constitutionally mandated oath.

209. *See supra* notes 57–59, 63–64, 107 and accompanying text.

210. *See supra* notes 32–41, 72–77 and accompanying text.

211. *See supra* notes 9–15 and accompanying text.

212. *See supra* notes 8, 124–125, 165 and accompanying text.

213. *See supra* notes 50–52, 69–70 and accompanying text. As was told to a King:

> [I]t is not for kings to drink wine, or for rulers to desire strong drink,
> Lest they drink and forget the law *and* what it decrees, and pervert the justice due any of the afflicted.
> . . . .
> Open your mouth for the dumb [those unable to speak for themselves], for the rights of all who are left desolate *and* defenseless;
> Open your mouth, judge righteously, and administer justice for the poor and needy.

Proverbs 31:4–5, 8–9.

214. *Supra* note 57 and accompanying text.

215. Luke 3:13–14. *See supra* note 69 and accompanying text.

216. *See* U.S. CONST. amend. I ("Congress shall make no law respecting . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

The parable of the persistent widow exemplifies the right of the people to demand justice. Jesus said to his disciples:

> "There was in a certain city a judge who did not fear God nor regard man. Now there was a widow in that city; and she came to him, saying, 'Get justice for me from my adversary.' And he would not for a while; but afterward he said within himself, 'Though I do not fear God nor regard man, yet because

prayed at the beginning of his government for both wisdom and understanding so as to discern justice:

> Therefore thou shalt give to thy servant a heart able to be taught, *that is, enlightened of thee,* that he may deem thy people, and judge betwixt good and evil . . . . (And so give thou to thy servant a heart able to be taught, *that is, able to be enlightened by thee,* so that he can judge, *or rule,* thy people, and judge between good and evil . . . .).[217]

The protection of the rule of law includes what the constitution means in the popular mind. In the movie, *The Majestic,* the main character Peter Appleton, was told by his attorney:

> The Declaration of Independence, the Constitution, they're all just pieces of paper with signatures on them. And you know what a piece of paper with a signature is: a contract. Something that can be renegotiated at any time. Just so happens that the House un-American activities committee is renegotiating the contract this time around. Next time it will be somebody else, but it will always be somebody.

Under threat of being blacklisted at best and imprisoned at worst by Congress, Appleton rejected his attorney's view of the Constitution and defended the Bill of Rights, the Constitution, and what the rule of law means in the American society.

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this widow troubles me I will avenge her, lest by her continual coming she weary me.'" Then the LORD said, "Hear what the unjust judge said."

Luke 18:1–6 (noting the point about the judge; he was an unjust judge because the law and justice were of little regard to him, not because the widow lacked a cause of action. In fact, the judge eventually honored her valid legal right after much persistence from her).

In the New Testament, Paul famously appealed to his right to be judged by Caesar when accused of sedition. *Acts* 25. In the parable of the unforgiving servant, a servant appealed to the king regarding the harshness of a lawful act. *Matthew* 18:21–35. A servant had a large debt forgiven by the king, and then proceeded to imprison his fellow servant for a small debt. *Id.* Although the servant had the legal right to imprison his fellow servant, the King was appealed to for equity and justice in light of the mercy the king had shown to the servant and the lack of mercy the servant had shown to his fellow servant.

In discussing the role of the judge in a case, Chief Justice Hewart observed, "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." *The King v. Sussex Justices, Ex parte McCarthy,* [1923] K.B. 256 (Eng.) 259. Those who govern will be respected so long as those who are governed see the wise administration of justice. As was said of King Solomon at the beginning of his reign, "And all Israel heard of the judgment which the king had rendered; and they feared the king, for they saw that the wisdom of God *was* in him to administer justice." 1 *Kings* 3:28.

217. 1 *Kings* 3:9.

> It's the most important part of the contract every citizen has with this country. And even though these contracts - the Constitution, and the Bill of Rights - even though they're just pieces of paper with signatures on them. They're the only contracts we have that are most definitely not subject to renegotiation. Not by you, Mr. Chairman. Not by you, Mr. Clyde. Not by anyone, ever. Too many people have paid for this contract in blood![218]

The rule of law is more than power control.

The rule of law is based on the premises that the individual has a right to enjoy life and liberty and that the purpose of government is to protect that liberty. The reason that liberty needs protection is that man, by his nature,[219] is inclined to steal the fruits of that liberty from other men. These core ideas together form the foundation for the protection of the *Law.* The challenge in defining the rule of law is in the distinction between the justification for the rule of law and the implementation of the rule of law.[220] In other words, the specifics of what the law requires and the *how, when,* and *who* regarding the application of the law to control executive power under the law is a policy-centered, positivist, procedural inquiry. It is a separate inquiry from the questions of *why* and *should* regarding the control of executive power under law, which are philosophical, normative, subjective inquiries. The rule of law defines the justification of government *per se,* as well as establishes its purposes and limits.[221]

The government implements the specifics of controlling the power of individuals to harm other individuals by enforcing, among others, the criminal, tort, contract, and patent laws of a society.[222] Defining executive power under the rule of law—after individual behavior has been controlled—has tended to be more complicated. [223] The control of that power—from the

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218. *The Majestic* (2001).

219. The men of the Enlightenment and the writers of the U.S. Constitution believed in the rationality of man, but acknowledged that man was evil by nature—a view supported by history, logic and the Bible. *See supra* notes 8–13, 15; *see also Genesis* 6:5–6, 8:21; *Jeremiah* 17:9; *Mark* 7:21–23.

220. *See generally supra* note 5.

221. LOCKE, *supra* note 7.

222. *See, e.g.,* 18 U.S.C. § 1111 (2003); 35 U.S.C. § 271 (2010); TEX. BUS. & COM. CODE § 2.714 (1967); TEX. CIV. PRAC. & REM. CODE § 73.001 (1985).

223. Locke postulates that the manipulation of those in the legislature by the executive for his own interests is one additional example of lawless action that threatens the dissolution of government. He wrote:

earliest days of the ancient world to modern arguments over the power of the president to act in times of war, crisis, or peace—has been one of the unending legal and moral issues in American politics. But the presence of that unending debate makes clear that the tyranny has not yet befallen America.

What I have said here, concerning the legislative in general, holds true also concerning the supreme executor, who having a double trust put in him, both to have a part in the legislative, and the supreme execution of the law, acts against both, when he goes about to set up his own arbitrary will as the law of the society. He acts also contrary to his trust, when he either employs the force, treasure, and offices of the society, to corrupt the representatives, and gain them to his purposes; or openly pre-engages the electors, and prescribes to their choice, such, whom he has, by solicitations, threats, promises, or otherwise, won to his designs; and employs them to bring in such, who have promised before-hand what to vote, and what to enact. . . . To prepare such an assembly as this, and endeavour to set up the declared abettors of his own will, for the true representatives of the people, and the law-makers of the society, is certainly as great a breach of trust, and as perfect a declaration of a design to subvert the government, as is possible to be met with. To which, if one shall add rewards and punishments visibly employed to the same end, and all the arts of perverted law made use of, to take off and destroy all that stand in the way of such a design, and will not comply and consent to betray the liberties of their country, it will be past doubt what is doing. What power they ought to have in the society, who thus employ it contrary to the trust went along with it in its first institution, is easy to determine; and one cannot but see, that he, who has once attempted any such thing as this, cannot any longer be trusted.

LOCKE, *supra* note 7, § 222 (emphasis omitted).

FEAR AND LOATHING AT ONE FIRST STREET

AN UNPRECEDENTED BOOK REVIEW[1] OF:

UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE. Josh Blackman. PublicAffairs, 2013. 352 pages. $27.99.

Reviewed by ILYA SHAPIRO*

1. If you want a conventional, fully done-before, definitely *precedented* book review that just gives you a summary of the book and enough information to decide whether you want to read it—which you should—*see infra* note 21 and accompanying text.

* Senior Fellow in Constitutional Studies, Cato Institute; Editor-in-Chief, *Cato Supreme Court Review*; signatory of ten amicus briefs for Cato in the *Health Care Cases* litigation, including four before the Supreme Court—one of which, regarding the individual mandate, was also joined by 16 other organizations and 333 state legislators.

I woke up and had no idea where I was. Tampa, Toledo, Tucson, Tulsa, Tuscaloosa—all the Sheratons look alike. The nation's unquenchable thirst for Obamacare debates, combined with my loyalty to the Starwood brand, had put me in some Kafkaesque Groundhog Day, except that I was neither a giant bug nor Bill Murray, but rather a simple constitutional lawyer—and an immigrant at that, doing a job most Americans won't: defending the Constitution. I wasn't sure whether I was arguing against the regulation of little shampoo bottles traveling in interstate commerce or ensuring that my platinum Preferred Guest account wouldn't be severed if Medicaid was expanded. As Josh Blackman noted 17,000 times (or three) in his unprecedented *Unprecedented*, I had crisscrossed the country for more than two years to debate this case—all of constitutional law in a nutshell—more than 100 times. And still I wonder sometimes whether someone had given me some bad drugs, had perhaps roofied my Bulleit Rye Old Fashioned while I turned to talk to the leggy blonde at the next barstool (this would've been before I met my wife, of course). Because all that foofaraw regarding *National Federation of Independent Business v. Sebelius*[2]—call it the *Health Care Cases*, or the big Obamacare litigation that ended up with John Roberts pulling a giraffe out of a cowboy boot[3]—had, with apologies to the late Gabriel Garcia Marquez, to be lived to be told. And indeed told to be written down, and written down to be believed, and even then might not be believed. It was a long, strange trip.[4]

I. BUY THE TICKET, TAKE THE RIDE

It all started what seems like a lifetime ago, or at least a career. Let's go back not quite to the beginning of the world, or Bismarck's welfare state, or the switch in time that saved nine but doomed the country, or even the immediate progenitors of the individual-mandate debate: the liberal dream of government-

2. 132 S. Ct. 2566 (2012).

3. *Cf.* Andrew M. Grossman, City of Arlington v. FCC*: Justice Scalia's Triumph*, 2012–2013 CATO SUP. CT. REV. 331, 331 (2013) (likening that case to "pulling a trout out of a pencil-case").

4. *See, e.g.*, Ilya Shapiro, *A Long, Strange Trip: My First Year Challenging the Constitutionality of Obamacare*, 6 FLA. INT'L L. REV. 29 (2010).

provided universal coverage, Hillarycare, the Heritage Foundation's mandate-lite—designed without legal consultation and later repudiated, but politically damaging nonetheless—Romneycare, and the primary-campaign clash between Hillary Clinton and Barack Obama. (Clinton would've included a full mandate, which Obama opposed because, "I believe the problem is not that folks are trying to avoid getting health care. The problem is they can't afford it."[5]) Instead, let's recall an important meeting at the Mayflower Hotel in November 2009. This had nothing to do with Eliot Spitzer, mind you, even if during the course of this journey he had me on his short-lived CNN show to debate broccoli mandates with Dahlia Lithwick—and ended up accusing me of wanting a *Hunger Games* world, except more cruel to children.[6] No, this meeting, which my buddy Josh[7] dubbed the "Mayflower Compact," took place during the Federalist Society's national lawyers convention in November 2009.[8] Not in the evening during the annual dinner, which is sort of like the Oscars for conservative lawyers—"Oh look, there's former Deputy Assistant Attorney General So-and-So, who's wearing Brooks Brothers and wingtips . . . and Judge Such-and-Such, in a stunning pantsuit"—but in the grand hotel concourse during business hours.

While many attendees were taking in a panel on "Bailouts and

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5. *Obama Flip-Flops on Requiring People to Buy Health Care*, POLITIFACT (July 20, 2009), http://www.politifact.com/truth-o-meter/statements/2009/jul/20/barack-obama/obama-flip-flops-requiring-people-buy-health-care [http://perma.cc/V3NT-YAFV].

6. Transcript, *Parker Spitzer*, CNN.COM (Dec. 17, 2010), http://edition.cnn.com/TRANSCRIPTS/1012/17/ps.01.html [http://perma.cc/FBD6-ZX6C].

7. How's that for a "full disclosure"? Yes, I've known Josh for a while and have even co-authored with him a number of times. *See, e.g.*, *infra* note 11; Josh Blackman & Ilya Shapiro, *Hawaii Should Walk Away from Steven Tyler Act*, USA TODAY, Feb. 16, 2013, http://www.usatoday.com/story/opinion/2013/02/15/steven-tyler-act/1923611/ [http://perma.cc/R4RU-RRV7]; Blackman & Shapiro, *Supreme Court Opens Door to More Liberty*, DETROIT NEWS, July 5, 2010, *available at* http://www.cato.org/publications/commentary/supreme-court-opens-door-more-liberty [http://perma.cc/CN2X-WV4V]; Blackman & Shapiro, *Is Justice Scalia Abandoning Originalism?*, WASH. EXAMINER, Mar. 8, 2010, http://washingtonexaminer.com/josh-blackman-and-ilya-shapiro-is-justice-scalia-abandoning-originalism/article/32701 [http://perma.cc/X6HX-8EBF]; Shapiro & Blackman, *Using Guns to Protect Liberty*, WASH. TIMES, Feb. 23, 2010, http://www.washingtontimes.com/news/2010/feb/23/using-guns-to-protect-liberty [http://perma.cc/W3GS-2EPA]. I think he's a great guy, and he apparently reciprocates because he thanks me on the first page of his acknowledgments. Also, because of my role in the litigation, I have seven entries across two lines in the book's index (for those of you who do the "Washington read"). So there, be advised of my myriad biases.

8. JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE 39–45 (2013).

Government as Insurer of Last Resort," a few "usual suspects" stepped out to catch up and strategize. It was like a college-dorm bull session, except the participants were sober, wore suits, and knew something about the subject of conversation: Todd Gaziano, head of Heritage's legal shop; Nelson Lund, a law professor at George Mason; Andrew Grossman, a law school classmate of Josh's now in private practice who's done work for both Heritage and Cato; and some other observers. (Josh and I sidled up soon after the group formed.) In the midst of speculating about constitutional defects in the pending health care bill, Todd began throwing out various hypotheticals. If the government could make you to buy health insurance as a means of regulating interstate commerce, could it force someone to buy a GM car to help out the U.S. auto industry? Could it require you to join a gym in order to reduce health care costs? (As Josh notes, this "was perhaps the first precursor to the broccoli horrible."[9])

Randy Barnett, the Georgetown law professor who would come to be known as the "intellectual godfather" of the Obamacare litigation, arrived late to the ball. When Todd asked for his views on the mandate, Randy candidly replied, "You know, I really haven't given it much thought."[10] In fact, Randy was still spending most of his time on *McDonald v. Chicago*, the case that would not only extend the right to keep and bear arms to the states but revive the Privileges or Immunities Clause.[11] But Randy ended up doing some quick thinking, and less than a month later published, with Todd and Nathaniel Stewart, a young D.C. lawyer who did most of the legwork, a Heritage Foundation report arguing that the mandate was not only "unconstitutional" but "unprecedented."[12]

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9. *Id.* at 42.

10. *Id.* at 43.

11. McDonald v. City of Chicago, 130 S. Ct. 3020, 3058–59 (2010) (Thomas, J., concurring in the judgment and thus providing the fifth vote to strike down Chicago's handgun ban, without joining the plurality's substantive-due-process analysis). *See also* Alan Gura, Ilya Shapiro & Josh Blackman, *The Tell-Tale Privileges or Immunities Clause*, 2009–2010 CATO SUP. CT. REV. 163 (2010); Blackman & Shapiro, *Keeping Pandora's Box Sealed: Privileges or Immunities, The Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States*, 8 GEO. J.L. & PUB. POL'Y 1 (2010).

12. Randy Barnett, Nathaniel Stewart & Todd F. Gaziano, *Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional*, HERITAGE FOUND. LEGAL MEMORANDUM NO. 49, Dec. 9, 2009, *available at* http://www.heritage.org/research/reports/2009/12/why-the-personal-mandate-to-buy-health-insurance-is-unprecedented-and-unconstitutional [http://perma.cc/BHB8-U73P].

While Josh would end up joking about the "Randy Barnett 'Unprecedented' Individual Mandate Drinking Game," the use of the word "unprecedented" became not just a staple of Randy's commentary and scholarship, but a key part of the strategy behind the legal challenge.[13] Not because any government action that's unprecedented is automatically unconstitutional, but because if the government had the awesome power to make people buy things and didn't use it during a time of crisis—in the Great Depression to gin up economic demand, say, or war bonds during the Civil War or World War Two—there has to be a strong *presumption* of unconstitutionality. As broad as federal regulatory authority had grown, from the 1942 wheat case of *Wickard v. Filburn*[14] to the 2005 weed case of *Gonzales v. Raich*,[15] (which Randy argued), that power has never been used to compel commerce—or any activity—as opposed to regulating or prohibiting it. As we now know, the Supreme Court agreed, and in much clearer terms than any of the lower-court opinions that favored the challengers.

II. TOO WEIRD TO LIVE, TOO RARE TO DIE

On December 9, 2009, Heritage hosted the first public event examining the constitutionality of Obamacare, in conjunction with the release of the Barnett-Gaziano-Stewart paper. (Perhaps all this was a sort of penance for the role that Stuart Butler played two decades earlier, against the advice of Cato's Ed Crane, in conjuring the individual mandate's ancestor. The think tank would go on to file its first-ever amicus brief to address the awkwardness; the lawyers threw the policy scholars under the bus.) Senator Orrin Hatch, who would take the lead on bringing constitutional points of order during the congressional debate, spoke there. Then Randy debated an unlikely opponent: UCLA law professor Eugene Volokh. A leading legal scholar whose views tended to skew libertarian, Eugene was nonetheless skeptical of the constitutional case

13. Josh Blackman, *Take a Shot for Liberty—The Randy Barnett 'Unprecedented' Individual Mandate Drinking Game*, JOSH BLACKMAN'S BLOG (Aug. 2, 2010), http://joshblackman.com/blog/2010/08/02/take-a-shot-for-liberty-the-randy-barnett-unprecedented-individual-mandate-drinking-game [http://perma.cc/HK54-V9CK]. To Josh's discredit, he apparently failed to insist that his publisher include "unprecedented" as a term in the book's index.

14. 317 U.S. 111 (1942).

15. 545 U.S. 1 (2005).

against Obamacare. Curiously, his remarks at this event would constitute the whole of his contribution to the *Health Care Cases* debate—even as Randy and four other "co-conspirators" at the eponymous *Volokh Conspiracy* blogged up a storm.[16]

Of course, Senator Ensign's point of order, which would be joined by all present Republican senators, would be overruled. The health care legislation passed the Senate 60–40 on a strict party-line vote in the wee hours of December 24 (which Josh notes was the first time the Senate had met on Christmas Eve since 1895).[17] But the Senate's version differed from what the House had passed the previous month—meaning the bills would have to be "conferenced" and voted on again—and the Democrats lost their filibuster-proof majority on January 19 when Republican Scott Brown incredibly won a special election for what had been Ted Kennedy's seat. (I was in Boston the seventy-two hours leading up to that election, providing legal assistance in my personal capacity—I saw none of the city except the Park Plaza hotel, where the "legal war room" was located and the victory was celebrated—and that night we thought we had stopped Obamacare in its tracks.) Speaker Nancy Pelosi had toyed with the idea of "deeming" the Senate bill passed by only voting on the Reconciliation Act, but this "demon pass" maneuver was determined to be one shenanigan too far. Instead, the House Democrats decided to pass not just the Senate bill, which they considered to be flawed, but also an amendment, the Health Care and Education Reconciliation Act, which they controversially got through the Senate in a "reconciliation" process that wasn't subject to filibuster. President Obama signed the bills on March 23 and 30, respectively.[18]

And that's how we got the Patient Protection and Affordable Care Act—and what an Orwellian name, given that patients are more vulnerable and health care costs have increased![19] Even its

16. RANDY E. BARNETT ET AL., A CONSPIRACY AGAINST OBAMACARE: THE VOLOKH CONSPIRACY AND THE HEALTH CARE CASE (Trevor Burrus ed., 2013). That isn't to say that Eugene purposely decided to stay away from Obamacare or contemporary controversies altogether. He is front-and-center on the "contraceptives mandate" cases that the Supreme Court has taken up this term, which are much more in his First Amendment wheelhouse than any of the *NFIB v. Sebelius* litigation was. *See* EUGENE VOLOKH, SEBELIUS V. HOBBY LOBBY: CORPORATE RIGHTS AND RELIGIOUS LIBERTIES (2014).

17. BLACKMAN, *supra* note 9, at 57–58.

18. Josh livens up his chapter on this period with subheadings such as "Master of the House" and "One Day More." *Id.* at 69, 71. What miserable punnery.

19. *See, e.g.*, Jim Angle, *Survey Shows Obamacare Sending Premiums Rising at Fastest Clip in Decades*, FOXNEWS.COM (Apr. 14, 2014), http://www.foxnews.com/politics/

acronym was unwieldy, however, so the legislation quickly became known as "Obamacare." I don't know who coined that term—it emerged sporadically during the 2008 campaign before there was any legislation of which to speak—but I use it because that's the colloquial name and it's much easier to say than "PPACA," "Affordable Care Act," or anything else. While thought in some quarters to be pejorative, I've never understood how that can be. Is "Bush tax cuts" pejorative? Is "Reaganomics" (as opposed to "trickle-down economics") pejorative? Even the leading academic supporters of Obamacare's constitutionality, such as Yale law professors Akhil Amar and Jack Balkin (who both make *Unprecedented* appearances) use the phrase, and Obama himself eventually endorsed it.[20] The one semi-accurate criticism I've heard is that the law was mostly written by Congress, not the executive branch. But that just means it would be better to call it Pelosi-Reid-care, which is presumably no more or less pejorative. In any event, that ship has long sailed.

III. THERE'S NOTHING LIKE A JOB WELL DONE

Now hold up. This is a book review and you've come here to read about my buddy Josh's book. Maybe a handful of you even want to read my particular take on the book. Some of you might even be amused by this tale I'm telling—or at least tolerate it because it's something different than what you typically see in a law review, aside perhaps from *The Green Bag: The Entertaining Journal of Law* (peace be upon its bobbleheads)—but still want to find some sort of summary of *Unprecedented* or reason to read it rather than some other book on your Amazon wishlist. I get it. We're all busy, and who has time to read all those worthy tomes we hear about from email lists and magazines and talking heads and your political-junkie uncle when you asked for his riff on pajama-boy's request that we talk about health care over the holidays?

Well okay, if that's what you're looking for, I can do that. But

2014/04/14/survey-shows-obamacare-sending-premiums-rising-at-fastest-clip-in-decades/ [http://perma.cc/9R9R-Z9DG].

20. *See, e.g., Transcript and Audio: First Obama-Romney Debate*, NAT'L PUB. RADIO (Oct. 3, 2012), http://www.npr.org/2012/10/03/162258551/transcript-first-obama-romney-presidential-debate; Tom Howell Jr., *Obama to Charles Barkley: I'm Cool with the Term 'Obamacare,'* WASH. TIMES, Feb. 17, 2014, http://www.washingtontimes.com/news/2014/feb/17/obama-to-charles-barkley-im-cool-term-obamacare [http://perma.cc/MXW6-ZXEM].

only on condition that you promise to still read *Unprecedented.* Here's what I would (and did) write if this were a conventional book review:

> In 2012, the U.S. Supreme Court became the center of the political world. In a dramatic and unexpected 5–4 decision, Chief Justice John Roberts voted to save the Affordable Care Act, commonly known as Obamacare. Josh Blackman's magisterial *Unprecedented* tells the inside story of how this constitutional challenge raced across all three branches of government and narrowly avoided a collision between the Supreme Court and President Obama.
>
> The book offers unrivaled inside access to the key decision makers in Washington, based on interviews with over 100 of the people who lived this journey—including the academics who began the challenge, the lawyers who litigated the case at all levels, and the Obama administration attorneys who defended the law. It reads like a political thriller, providing the definitive account of how the Supreme Court almost struck down the president's "unprecedented" law. It also explains what this decision means for the future of the Constitution, the limits on federal power, and the Supreme Court.
>
> *Unprecedented* is not a legal book, in the sense that it's not a "treatise" by which to teach law students about health care law or even the jurisprudence surrounding the Commerce Clause, Congress's constitutional power to regulate interstate commerce. There's plenty of doctrinal explanation, to be sure, tracing the development of modern federal authority to regulate the economy. But fundamentally this book is a story about a lawsuit and how a group of legal activists, intellectuals, and practitioners conceived and executed a stunning attack on the Obama administration's signature legislative achievement.
>
> As with Thurgood Marshall and the legal heroes of the civil rights era, Georgetown professor Randy Barnett (who wrote the book's foreword) and other scholars developed theories that snowballed into judicial victories that could not be ignored by the national media and political classes. What had appeared at first to be "off the wall" libertarian thought experiments moved "on the wall" as they were picked up by the attorneys general of Virginia and Florida and operationalized by leading appellate advocates like Paul Clement and Michael Carvin. On the other side, Neal Katyal and then Don Verrilli pressed the government's defense, ultimately losing their central arguments but salvaging Obamacare.
>
> At this point I should mention that I was no neutral observer of this tale. The Cato Institute, the libertarian think tank where I hang my hat, played a central role in supporting the

> Obamacare challenge. . . . I definitely had a dog in this fight!
>
> And yet I too was gobsmacked as I sat in the courtroom the morning of June 28, 2012, and heard the chief justice hand the government a bottom-line victory while not expanding federal regulatory authority. What had I (and everyone else) missed? The possibility that the case would be decided based on something other than competing legal theories. That is, eight justices decided *NFIB v. Sebelius* on the law—four finding that the Constitution limits federal power, four that constitutional structure must yield to "Congress' capacity to meet the new problems arising constantly in our ever-developing modern economy"—and one had other concerns on his mind.
>
> We won't know for some time, if ever, what exactly caused John Roberts to do what he did. *Unprecedented* doesn't provide that answer—sorry to disappoint you—but it does give us a great sense of the personal, political, and other atmospheric factors swirling around the Supreme Court justices as they considered this case.
>
> Josh Blackman . . . has done a tremendous job in compiling, synthesizing, and explaining all that we can possibly know about this subject. *NFIB v. Sebelius* is truly the case of a generation—and *Unprecedented* is the definitive book on that case.[21]

Got that?

IV. NOT A GOOD TOWN FOR PSYCHEDELIC DRUGS

Now it's time to ratchet up the story, to add some grist to the litigation mill, some spice to the mulled wine of legal strategery. The same day that President Obama signed his hallmark bill into law—within minutes of the ceremony—the attorneys general of Florida and Virginia electronically raced to the courthouse to file lawsuits. Florida was joined by 12 other states (and eventually 13 more), while Virginia's Ken Cuccinelli went alone. (Oklahoma would later file its own suit, bringing the total number of states arrayed against the federal government to an unprecedented 28, all represented by Republican attorneys general or governors—except that Louisiana's AG Buddy Caldwell was a Democrat who switched parties in February 2011.) Judge Henry Hudson of the federal district court in Richmond was the first to rule, denying

21. Ilya Shapiro, *FDL Book Salon Welcomes Josh Blackman,* Unprecedented: The Constitutional Challenge to Obamacare, FDL BOOK SALON (Oct. 6, 2013), http://fdlbooksalon.com/2013/10/06/fdl-book-salon-welcomes-josh-blackman [http://perma.cc/4LQZ-QSSS].

the government's motion to dismiss. "Your argument is officially not frivolous," Jack Balkin wrote to Randy Barnett.[22] Not to be outdone, Judge Roger Vinson of the federal district court in Pensacola became the first to grant summary judgment to the plaintiffs, throwing out the entire law.

After that it was Katy (or Kathleen Sebelius) bar the door, with rulings coming in steady drips in the plethora of lawsuits that had been filed across the nation. Other than a couple of the government lawyers, Randy Barnett and I were the only people in America to attend all of the appellate arguments. In Richmond, we had fine steaks at Morton's. In Cincinnati, we visited Salmon P. Chase's grave and took turns fielding media calls on the drive back to the airport. In Atlanta, we waited in line for the courthouse in 94-degree heat, for which I had prepared by wearing my lightest seersucker suit (and was photographed in it by AARP magazine).[23] And in D.C.—an anticlimax, given that for me this "trip" involved walking five blocks and that cert petitions were already being filed in the 26-states case—well, the gallery felt like a class reunion of sorts. We joked that we should've made "Obamacare Tour 2010–2012" t-shirts.

Josh had me doing so many shots after the Eleventh Circuit struck down the individual mandate—but left the rest of the law standing, the fourth different way in which lower courts siding with challengers resolved the question of how much of the rest of Obamacare survived—that I wasn't sure which side I was supporting. And indeed, the cert posture in the Florida-originated case alone was hard to follow: the private plaintiffs (NFIB and two individuals) had split from the states on appeal, and each, along with the government had asked the high court to review a different part of the case. The Supreme Court ended up granting all these cert petitions and ordering unprecedented separate briefing and argument on four issues: whether the challenge was barred in the first place by a Reconstruction-era law called the Anti-Injunction Act (which prohibits lawsuits against taxes before they're assessed); whether the federal power had power to require people to buy health insurance; to what extent was the individual mandate "severable" from the rest of the law; and whether the government could condition all federal

22. BLACKMAN, *supra* note 9, at 88.
23. Presumably, tan seersucker is marginally cooler than blue seersucker.

Medicaid funds on state acceptance of (and payment for) an expanded Medicaid program. The Court also appointed two special counsel to argue positions on the AIA and severability, respectively, that neither side took. More than 150 amicus briefs were filed in total—Cato was the only group to file on all four issues, so clearly we're the best "friend of the court"—resulting in the most billable hours spent on one case since the O.J. Simpson trial. The Court scheduled six-and-a-half hours of oral argument over three days[24]—incredible but not quite unprecedented, though in the modern era the only parallel is with obscure cases like *Brown v. Board of Education* and *Roe v. Wade.*

On March 26, 2012, almost exactly two years since the law's enactment, *Constitution v. Obamacare* arrived at the Supreme Court. "After two years of litigation, political wrangling, and punditry from the ivory tower to the beltway to the Tea Party," Josh explains, "the case had finally reached its crescendo before the nine justices."[25] Although the first day was devoted solely to that dry AIA issue—even if no lower court had ruled that the ancient statute barred suit—the scene at One First Street was a circus like no other. Camera crews, activists, tourists, and commercial opportunists all mingled on and across from the Supreme Court plaza. While some hearty souls camped out every night to score coveted seats to the sold-out show, others paid line-standers; the rate had apparently gone up to $50/hour and more. When I walked in on each of those cold mornings—thanks to interns from Cato and the *Daily Caller* (whose "Supreme Court correspondent" I was that week) who camped out all three nights[26]—I felt like I was walking into history.

V. NO SYMPATHY FOR THE DEVIL

For a law nerd and Supreme Court junkie like myself, who treats oral argument like free theater—by cosmic coincidence, I live halfway between my office and the marble palace—attending the Obamacare hearings was zambofrious.[27] The *Unprecedented*

24. Dino Grandoni, *Six Hours of Oral Arguments Over Obamacare Are the Longest in 45 Years*, THE WIRE, Mar. 26, 2012, http://www.thewire.com/national/2012/03/6-hours-oral-arguments-over-obamacare-are-longest-45-years/50331/ [http://perma.cc/79ZN-B9EJ].

25. BLACKMAN, *supra* note 9, at 174.

26. Immeasurable thanks go to Kathleen Hunker and eight other interns (three per night) whose names have been lost to the mists of time. I hope that yeoman duty has given them great stories to tell friends, employers, and potential paramours.

27. *See bemusedly* Ilya Shapiro, *Fear and Loathing in the District of Columbia,*

book, however, is a different kind of treat: It really is the case that Josh Blackman has written what will surely be considered the definitive account of a once-in-a-lifetime case, the constitutional challenge to Obamacare. Not the definitive academic treatment on the Supreme Court's ruling, let alone its implications for health care policy, but the inside story on a legal and political tug-of-war that embroiled all three branches of government. The book, which the *Wall Street Journal* called "excellent,"[28] offers unrivaled access to the key decision makers based on interviews with over 100 people who lived the case.

As of this writing, nearly two years have passed since Chief Justice John Roberts made Obamacare's individual mandate a tax. I was in the courtroom that fateful June day—the day after my 35th birthday—and my emotions quickly cycled through shock, denial, anger, and later depression, before settling into the "bargaining" stage of the Kübler-Ross model of grieving, where I remain to this day.

To be sure, the decision was a constitutional win in at least four ways:

(1) It's now clear that the government can't compel activity in order to regulate it;

(2) Legislation that's "necessary" may still be unconstitutional if it isn't "proper";

(3) The narrow tax power ruling allows the government only to levy small taxes on non-purchases, but Congress won't ever use this power because it can achieve the same economic goal by offering (politically easier) tax credits; and

(4) For the first time, the Court—by a 7–2 vote!—found that the federal government can't coerce the states by attaching too many strings onto federal funding.

Still, by letting Obamacare survive in such a dubious manner—I've called it a "unicorn tax," a creature of no known constitutional provenance that will never be seen again—Roberts undermined the trust people have that courts are impartial arbiters rather than political actors.[29] I never thought I could feel

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DOUBLETHINK ONLINE (July 24, 2005), http://americasfuture.org/fear-and-loathing-in-the-district-of-columbia/ [http://perma.cc/VD8Y-WRH4] (coining this completely made-up word but not defining it).

28. George Melloan, *Book Review: 'Unprecedented' by Josh Blackman & 'The Last Line of Defense' by Ken Cuccinelli*, WALL ST. J., Sept. 11, 2013, *available at* http://stream.wsj.com/story/latest-headlines/SS-2-63399/SS-2-324676/.

29. For my fuller doctrinal analysis of the strengths and weaknesses of *NFIB v.*

so hollow (still!) after having Court majorities offer such ringing endorsements of Ilya's (either one) theories on constitutional law.[30]

What bothers me isn't that Roberts changed his vote—it's not over till the slip-opinion printer hums—but instead that his tax section is laughably implausible. Roberts's opinion "construing" the mandate as a tax is unconvincing, to say the least—even the liberal justices weren't so enthusiastic about it, though they were happy to go along with any ratification of federal power—but it's now apparent that he was simply grasping at any way to uphold Obamacare while not expanding federal power. He succeeded in squaring that circle, but we're left with a suspect ruling based on a rewritten piece of legislation no Congress would ever have passed.

The sad thing is that the chief didn't have to do what he did to preserve the Court's popular legitimacy (or any such "atmospheric" consideration). For one thing, Obamacare has always been unpopular—particularly its individual mandate, which even a majority of Democrats in a national poll thought was unconstitutional on the eve of the ruling.[31] For another, he only damaged his own reputation by making this move after warnings from pundits and politicians that striking down the law would be conservative "judicial activism."[32]

Most importantly, the whole reason we care about the Court's independence is so it can make the tough legal calls without regards to politics.[33] Had Roberts voted to strike down Obamacare, it would have been just the sort of thing for which the Court needs all that accrued respect. Instead, we have a strategic decision dressed up in legal robes.

Sebelius, see Ilya Shapiro, *Like Eastwood Talking to a Chair: The Good, the Bad, and the Ugly of the Obamacare Ruling*, 17 TEX. REV. L. & POL. 1 (2012). Evidently the editors of this august publication liked that essay enough to have invited me back. What you see in this repeat appearance shouldn't be taken as proof of my not wanting to get invited back a third time. *See also* Randy E. Barnett, *No Small Feat: Who Won the Health Care Case (and Why Did So Many Law Professors Miss the Boat)*, 65 FLA. L. REV. 1331 (2013).

30. *See generally* JOSH BLACKMAN'S BLOG, http://joshblackman.com/blog/category/ilyas [http://perma.cc/F7B2-DX3D] (collecting incidents of "Ilya confusion").

31. Frank Newport et al., *Gallup Editors: Americans' Views on the Healthcare Law*, GALLUP (June 22, 2012), http://www.gallup.com/poll/155300/gallup-editors-americans-views-healthcare-law.aspx [http://perma.cc/9Q88-PVRN].

32. *Obama: Court Striking Down Obamacare Would Be Judicial Activism*, REALCLEARPOLITICS (Apr. 2, 2012), http://www.realclearpolitics.com/video/2012/04/02/obama_supreme_court_striking_down_obamacare_would_be_judicial_activism.html [http://perma.cc/38EB-BZZH].

33. *See most obviously* THE FEDERALIST NO. 78 (Alexander Hamilton).

I'm reminded of the Oscar-winning 1966 film *A Man for All Seasons*, in which an ambitious young lawyer named Richard Rich perjures himself so that the Crown can secure Sir Thomas More's conviction for treason. (More was the 16th-century Lord Chancellor of England who refused to sign a letter asking Pope Clement VII to annul King Henry VIII's marriage to Catherine of Aragon. He resigned rather than taking an oath that declared the king to be the head of the Church of England.) Rich is promoted to Attorney General of Wales as a reward. Upon learning of Rich's connivance, More plaintively asks, "Why Richard, it profits a man nothing to give his soul for the whole world . . . but for Wales?"

So it is with John Roberts, who, like his namesake Justice Owen Roberts, changed his vote on Obamacare in service to political will. (That's actually unfair to Owen Roberts because his so-called "switch in time that saved nine," which provided the decisive vote to uphold the New Deal after years of reversals, came before FDR announced his Court-packing scheme). There are many theories on why he did this—I don't think it's because Jeffrey Rosen wrote an op-ed,[34] or even because President Obama and Senator Pat Leahy (D-VT) made speeches—but they mainly boil down to the idea of wanting to preserve the Supreme Court's reputation as an institution that doesn't get involved in highly charged political disputes during a presidential election year.

Now, let's set aside the issue of whether Roberts's split-the-baby opinion actually helps the Court's institutional integrity—polls show a decline in approval for the Court from what was already a near-historic low[35]—and consider *why* this sort of reputation-preservation matters and whether it's worth torturing the law to accomplish it. The way I see it, the federal judiciary is our system of government's premier counter-majoritarian institution, holding the political branches' feet to the constitutional fire. Courts are supposed to decide the law and let the political chips fall where they may. Implicit in the Constitution's careful separation of powers—and made

34. Rosen is now head of the National Constitution Center, for which I seem to be serving as the "house libertarian"—not to be confused with the Shabbos goy—of late.

35. *Supreme Court*, GALLUP, http://www.gallup.com/poll/4732/supreme-court.aspx [http://perma.cc/G2GZ-UHEW] (last visited May 24, 2014).

explicit in the foundational case of *Marbury v. Madison*[36]—is the idea of judicial review. Under this concept, federal courts have an obligation to review government actions that are claimed to exceed enumerated federal powers or violate protected rights—and to strike down those that do.

That's why it's so important that courts be free from political pressure. Particularly with regard to major controversies that polarize the nation, courts—and especially the Supreme Court—need to apply dispassionate and independent legal reasoning so that their often unpopular opinions are followed and respected, rather than engendering resistance and revolution.

The *Health Care Cases* presented nothing if not one such singular moment. People across the country anxiously awaited a ruling and would have accepted (if bitterly) a 5–4 decision on Commerce Clause grounds. Upholding the mandate, and with it the rest of Obamacare, on that ground would have been wrong—and unpopular—and would have removed any remaining limits on federal power. Striking it down would similarly have provoked a heated response, albeit only from a declining minority of Americans (but a majority of legal and media elites). In either event, the Court's decision would have "simply" been a very high-profile legal ruling, just the sort of thing for which the Court needs all that accrued institutional gravitas.

What we have instead, however, is a political decision dressed up in legal robes, judicially enacting a law Congress did not pass, all to "save" the Court to live to fight another day. But what is that other day? I just don't understand what Roberts is saving the Court for if not the sort of big, tough case that Obamacare exemplified. In refraining from making that hard balls-and-strikes call he discussed at his confirmation hearings, John Roberts sold out the law for less than Wales—thereby showing why we don't want our judges making political calculations.

VI. My Heart Feels Like an Alligator

Josh generally agrees with my analysis of the case outcome, though he's more sanguine about the consequences for the legal system—buying the idea that John Roberts "saved Obamacare so

36. 5 U.S. 137 (1803).

he could fight another day"[37]—if not the country. He says that this whole imbroglio is "a lesson for any future president—don't try to change the nation when 49 percent of Congress [and a clear majority of the public, he could've added] opposes it."[38] Moreover, Barack Obama and his congressional allies have deliberately put the country through a public policy trauma whose end is not yet in sight. The president was reelected *despite* Obamacare—and because the Republican nominee was perhaps the worst possible candidate for this particular election (though Mitt Romney was the only A-lister who ran)—not because of it. I do share Josh's fervent hope, however, that "the constitutional clash from 2009 to 2012 remains *unprecedented* and is never repeated."[39] It's not healthy for a constitutional system when the government can't define a limit to its power and doesn't think it necessary to do so because the underlying policy is just too important. As Josh writes in his introduction, Obamacare "is now the supreme law of the land. However, the battle over Obamacare, health care reform in America, and competing visions of our Constitution is far from over."[40]

A more interesting part of the narrative that Josh spins—and certainly a new insight even for those of us who were immersed in the litigation—concerns the ebb and flow of the government's strategy in defending the individual mandate. Solicitor General Don Verrilli was pilloried for his performance during oral argument, having literally choked on his opening words during the individual mandate argument, but ultimately secured a win for his client. The less charitable interpretation is that the government won *regardless* of the arguments it put forward, but it's incontrovertible that Verrilli spent more briefing pages on the taxing power than had acting solicitor general Neal Katyal in the lower courts. Moreover, while Katyal had a close connection to the left-wing professoriate that got things so wrong regarding the *Health Care Cases*,[41] Verrilli had long been a practitioner and thus departed from the losing academic-influenced arguments that had previously driven the government's case.

37. BLACKMAN, *supra* note 9, at 279.
38. *Id.* at 284.
39. *Id.* at 302.
40. *Id.* at xxv.
41. *See, e.g.*, David A. Hyman, *Why Did Law Professors Misunderestimate the Lawsuits Against PPACA?*, ILL. L. REV. (forthcoming 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2224364 [http://perma.cc/4J33-8BMR].

In any event, I'm still not over *NFIB v. Sebelius*—and still haunted by a woman who paced the Supreme Court plaza the week of oral argument, chanting, "follow the law, just follow the law" (whatever that meant)—but Josh Blackman has provided me with some *Unprecedented* therapy.[42] Four years after the law was enacted and nearly two years after the Supreme Court ruling—with untold damage to the American economy and health care system—as Obamacare's smoldering remains litter the intersection of hope and change, I wonder: Was it all a dream?

42. By now you probably agree with me that South Texas College of Law professor Josh Blackman—legal public-intellectual super-tasker by day, legal public-intellectual super-tasker by night—is awesome. Not only is he a colleague of the very cool Charles W. "Rocky" Rhodes (one of three people who have ever published an unsolicited article in the *Cato Supreme Court Review*), but he founded and runs FantasySCOTUS.net, the Internet's premier Supreme Court fantasy league. He also posts an average of 87.3 blog entries per day. Most importantly, Josh was recently named one of *Forbes* magazine's Top 30 Under 30 for law and public policy.


TEXAS REVIEW OF
LAW & POLITICS