

# HARVARD JOURNAL *of* LAW & PUBLIC POLICY

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## THE PEOPLE & THE COURTS

THE TWENTY-SEVENTH ANNUAL NATIONAL FEDERALIST  
SOCIETY STUDENT SYMPOSIUM ON  
LAW AND PUBLIC POLICY — 2008

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## PREFACE

One of the foundational questions of American constitutional inquiry since the Revolution has been the proper relationship between the People and their government. The Framers arrived in Philadelphia early in the summer of 1787 with various conceptions of the ideal governmental framework. Our modern political discourse tends to describe the outcomes of the Convention with abstract nouns devoid of meaning and context: equality, liberty, and so on. But the great national debates that began that fateful summer were filled with nuance and uncertainty. Can we best hold the President accountable through popular election, legislative appointment, or some intermediary system of electors chosen by the People? What is the proper balance of accountability to the People and insulation from the passions and whims of majority factions? One of the few areas where the Framers were in general agreement was in the necessity of the independence of the federal courts. Although they disagreed on who should appoint federal judges, the Framers agreed that judges should serve in “good Behaviour.”

The People’s agreement with this principle has ebbed and flowed over time, based largely upon their satisfaction with the policy outcomes of Supreme Court decisions. Widely unpopular decisions, such as those protecting flag burning and banning school prayer, have caused calls for restricting the Court’s jurisdiction. The resulting political debates have raised questions regarding the role of judges in creating law and attempting to transform cultural norms. And perhaps more importantly, the relationship between the People and the state courts has taken myriad forms, again changing with the public’s view of judges and courts. Although law students tend to focus on the federal system, it is state courts and judges who most often affect the law applicable to our daily lives.

These issues and questions were the topic of debate at last year’s National Federalist Society Student Symposium, held at the University of Michigan Law School. Continuing our tradition of twenty-seven years, the JOURNAL is proud to publish essays developed from the speeches given at the Symposium. These thirteen essays discuss various aspects of the theme *The People and the Courts*: judicial interference with community values, the merits of selecting our judges, popular responses to unpopular decisions, whether law and economics is anti-democratic, originalism and the media, and the role of tradition and the Constitution. This conversation is ongoing, and I am confident that the essays in this Issue will contribute significantly to our conception of the proper role of judges in our Republic.

We are also honored to publish Secretary of Homeland Security Michael Chertoff's perspective on the most timely issues of national security. Much of our recent national security debate has centered on the question of whether the War on Terror is best treated as a military action or as a law enforcement action. Secretary Chertoff argues that this is a false dichotomy; we need not choose only one. Both frameworks provide essential tools, which the Bush Administration, through the Department of Homeland Security, has used to keep the nation safe since 9/11. And safer we are. But just as we could not give in to hysteria in the time after the terrible attacks, today we must not become complacent. Although we have been safe for seven years, we must continue to adapt our tools to the enemy.

Judge Edith Brown Clement presents a new perspective on religious-monument law, bringing principle back to a doctrinal line which has seemed increasingly capricious since the Supreme Court's counterintuitive split decision in *Van Orden* and *McCreary*. When a display of the Ten Commandments can be unconstitutional when in a county courthouse but not when on the grounds of a state capitol, one is left wondering whether law or whim is deciding the cases. According to Judge Clement, *Van Orden* and *McCreary* morphed the religious monument purpose test into a subjective, actor-focused inquiry, which led to the problematic outcome that the same monument could be constitutional at some times but not others. A move to a display-focused analysis would create predictability for public officials attempting to determine whether or not a proposed monument is permissible.

Professor John M. Kang presents a survey of the concept of manliness enshrined in the Constitution and American political culture. The Founders, he argues, believed that republican government rests upon certain manly virtues: honor, courage, civility, and deliberation. Despite this reality, the American constitutional order—particularly the Supreme Court—has become increasingly estranged from the values that underpin our Republic. For example, in enshrining an absolutist conception of gender equality in the VMI case, the Court forced the State of Virginia to abandon an educational system that required young men to devote themselves fully to a Code of Honor embodying these virtues. If our society further abandons manly virtue, it will be eroding the very foundation on which our republican system rests.

Our next article argues persuasively for the continued vitality of the learned intermediary doctrine in drug labeling cases. The learned intermediary doctrine holds that, because physicians are obligated to inform their patients of risks when prescribing prescription drugs, pharmaceutical manufacturers fulfill their duty to warn consumers by providing all relevant information to physicians. Victor Schwartz, Cary Silverman, Michael Hulka, and Christopher Appel demonstrate that, because increased direct-to-consumer advertising does not change the fundamental role of the prescribing doctor, there is no reason to abandon the doctrine. Additionally, FDA drug and advertisement review does nothing to alter the fundamental doctor-patient relationship, and therefore is no reason to change the law in this area.

For a quarter century *PruneYard Shopping Center v. Robins* has stood to many as a paradigmatic example of a Supreme Court gone astray. In *PruneYard*, the Supreme Court upheld a ruling of the California Supreme Court ordering the private owner of a shopping mall to allow petitioners to solicit signatures on the premises, holding that it neither infringed the owner's free speech rights nor was a government taking without just compensation. Professor Gregory Sisk argues that *PruneYard* is due for reconsideration in light of more recent free speech and takings cases that undermine its reasoning. Under these cases, the California decision created a permanent free-speech easement for which just compensation is due. Further, the Supreme Court's decision in *Rumsfeld v. FAIR* allowing the federal government to require law schools to open their campuses to military recruiters does not change the analysis, given the transitory nature of recruiter visits and the deference courts owe to Congress on military matters.

The growth of the conservative and libertarian legal movement has been one of the great successes for the political right in the last thirty years. Reining in the excesses of liberal judges—a prominent campaign call for Presidents Nixon and Reagan—would have been impossible without an army of conservative lawyers to litigate cases and serve on the bench. Steven M. Teles's book, *The Rise of the Conservative Legal Movement*, traces the history of the movement. Professor Ilya Somin writes an insightful review of the book, noting that, although the book might better be titled *The Rise of the Libertarian Legal Movement*, it is a helpful and insightful account.

I would be remiss to end this Preface without thanking all of the people whose indefatigable work has made this Issue possible. The JOURNAL staff has devoted countless hours in preparing the following essays and articles for publication. I am particularly grateful to LeElle Krompass, Daniel Thies, April Farris, and Peter Schmidt for their efforts throughout the editorial process. Will Adams and Maximillian Amster have established an exciting student writing program. Michael Perry sacrificed much of his summer to serve as National Editor of the Student Symposium, coordinating editing performed by student members of the Federalist Society throughout the country. Jennie Bradley and Christopher Catizone scoured hundreds of submissions and managed our article review process to provide us with an impressive slate of essays and articles. Finally, Deputy Editor-in-Chief Lucas Walker has been the consummate JOURNAL leader. His unflinching devotion and attention to detail have allowed the JOURNAL to maintain the level of excellence our readers have come to expect.

*Christopher M. Thomas*  
*Editor-in-Chief*

# THE FEDERALIST SOCIETY



*Presents*

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## *The People & The Courts*

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University of Michigan Law School

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*The Twenty-Seventh Annual  
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The People & The Courts*

**I.**

**JUDICIAL INTERFERENCE WITH  
COMMUNITY VALUES**

*ESSAYISTS*

RICHARD W. GARNETT  
RODERICK M. HILLS, JR.  
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# JUDICIAL REVIEW, LOCAL VALUES, AND PLURALISM

RICHARD W. GARNETT\*

## I.

"It is," the Twenty-Seventh Annual National Federalist Society Student Symposium program reports, "a basic assumption of federalism that individual communities can be different; they may have different values, and they will certainly have different laws."<sup>1</sup> This is true. Notwithstanding *American Idol*, Starbucks, *USA Today*, and chain restaurants, individual communities not only *can be* different, they *are* different. They often sit on opposite sides of what commentator David Brooks has called the "meatloaf line," which divides places with "sun-dried-tomato concoctions on restaurant menus" from those with "meatloaf platters."<sup>2</sup> Even before the 2000 election, and the explosion of "Red-versus-Blue"-themed social commen-

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\* Professor of Law, University of Notre Dame Law School. I am grateful to the Federalist Society for the invitation to participate in the Twenty-Seventh Annual National Federalist Society Student Symposium, held at the University of Michigan Law School in Ann Arbor, Michigan. Portions of these remarks are taken from, or based on, some earlier works of mine, including Richard W. Garnett, *William H. Rehnquist: A Life Lived Greatly, and Well*, 115 YALE L.J. 1847 (2006); Richard W. Garnett, *Chief Justice Rehnquist's Enduring, Democratic Constitution*, 29 HARV. J.L. & PUB. POL'Y 395 (2006); Richard W. Garnett, *Right On*, LEGAL AFF., Mar./Apr. 2005, at 34; Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841 (2001) [hereinafter Garnett, *Henry Adams's Soul*].

1. See Posting of Richard W. Garnett to PrawfsBlawg, <http://prawfsblawg.blogs.com/prawfsblawg/2008/03/the-fed-soc-sym.html> (Mar. 10, 2008, 10:13 EDT) ("The claims presented for the panel's consideration were, first, that 'it is a basic assumption of federalism that individual communities can be different'; second, that 'it is a benefit of federalism that free people can "vote with their feet" and migrate to communities that share their values'; and, third, that 'pervasive judicial review' can undermine this benefit, and this assumption, and 'destroy local identity by homogenizing community norms.'").

2. See David Brooks, *One Nation, Slightly Divisible*, ATL. MONTHLY, Dec. 2001, at 54, available at <http://www.theatlantic.com/issues/2001/12/brooks.htm>.

tary,<sup>3</sup> it should not have been controversial to note that the communities of San Francisco and Provo “have different values”—not entirely different, of course, but still different. And, if the legal enterprise involves, among other things, an effort to order our lives together in a way that reflects and promotes our understandings of human flourishing, then we should not be surprised that communities’ “different values” often translate into “different laws.”

The question presented to this panel was: Does pervasive judicial review threaten to destroy local identity by homogenizing community norms?<sup>4</sup> The short and correct, even if too quick, answer to this question is “yes.” That is, *pervasive* judicial review certainly does *threaten* local identity. It does so, in part, because judicial review can homogenize community norms, either by dragging them into conformity with national, constitutional standards or, more controversially, by subordinating them to the reviewers’ own commitments.

To say this is neither to criticize judicial review nor to celebrate excessively local identity; it is to identify neither the point at which judicial review becomes pervasive nor the point at which possibilities become threats. If we aspire to more than stating the obvious, we should reach for clarity about what are and are not the problems with and risks of judicial review, and also about what is and is not important about respecting community norms and protecting them from homogenization. We need to ask, for example, how much room the Constitution leaves for legal experiments that reflect local values.<sup>5</sup> When must legal expressions of local values give way to legal expressions of national ones? And who decides?

It is true that an important feature of our federalism is local variation in laws and values. It is also true, however, that some values have been homogenized, not by judicial review, pervasive or otherwise, but by the ratification of the Constitution,

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3. See Paul Farhi, *Elephants are Red, Donkeys are Blue*, WASH. POST, Nov. 2, 2004, at C1.

4. See Garnett, *supra* note 1.

5. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment.”).

which is the “supreme Law of the land . . . , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>6</sup> Our federalism proceeds from the premise that individual communities can be different, but it also reflects a vision of national citizenship, some fundamental moral commitments, and a common project. It is a basic assumption of federalism that local communities may have different values. But it is also a basic assumption of federalism that the national Union is committed to *some* shared values, that separate communities are bound by *some* shared laws, and that there were and are *reasons* for America’s distinct communities to come together and form, in the words of the Preamble, a “more perfect Union.”<sup>7</sup> Our various local communities and political subdivisions are not merely next to each other in space; they do not simply share a continent and currency. They are meaningfully “united.”

Of course, to gesture toward the Supremacy Clause and our nation’s name is hardly to answer the hard and interesting questions that the panel’s topic prompts. Still, even this gesture is enough to remind us that the text, history, structure, and theoretical premises of the Constitution point toward the importance of *both* diverse local “laboratories of democracy”<sup>8</sup> and a larger, national community—a Union constituted by “We the People.”<sup>9</sup> Vindicating the values and aims of this national community will sometimes require constraining, revising, or rejecting some laboratories’ experiments and some expressions in law of local majorities’ values.

Americans often talk and think about the potential conflict between judicial review and local values in terms common to the discussion of dual sovereignty. That is, we ask, “Which government’s policy choice, the federal government’s or the state’s, wins out here?” in a way that invites an answer couched in a states’ rights idiom. The Constitution’s liberty-protecting structural features should, instead, be understood more in terms of limited and enumerated powers than in terms

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6. U.S. CONST. art. VI, cl. 2.

7. U.S. CONST. pmbl.

8. See *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting).

9. U.S. CONST. pmbl.

of states' rights.<sup>10</sup> The Constitution appreciates, reflects, and incorporates pluralism and local values in a *particular way*, namely, by stating clearly that the national government and its various branches have only those powers that are "delegated to the United States by the Constitution."<sup>11</sup> And so, federal courts have the power—the "judicial Power of the United States"—to decide cases "arising under [the] Constitution."<sup>12</sup> They do *not* have the power to survey the national scene looking for local values and community norms in need of revision or homogenization, or to discover abstract rights and liberties in need of vindication.<sup>13</sup> That said, sometimes in the context of doing what it is authorized and supposed to do, a federal court will, and should, refuse to enforce a law that reflects the norms and values of a particular community. Such a refusal admittedly can appear to be a judicial interference with community values and will, in some cases, result in or aim toward the homogenizing of norms. But again, the Constitution itself makes *some* such judicial interference unavoidable because its text and structure both permit and call for it. The questions, then, are not so much *whether* federal courts may or should interfere with community values, but *when* and *how* they should do so.

Both the Constitution and sound political theory counsel deference and restraint on the part of federal judges.<sup>14</sup> It is, however, easy to imagine exasperation on the part of those scholars and commentators who insist that words like "deference," "restraint," and "activism" are not uncontested, and who warn that these terms can be, and sometimes are, misused in discussions about the Court and the Constitution.<sup>15</sup> This is true enough. The political use of "judicial activism" rhetoric is

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10. See Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1 (2003).

11. U.S. CONST. amend. X.

12. U.S. CONST. art. III, §§ 1, 2.

13. Cf. Kermit Roosevelt III & Richard W. Garnett, *Judicial Activism and Its Critics*, 155 U. PA. L. REV. PENNUMBRA 112, 126–27 (2006) ("Professor Roosevelt and I agree that, generally speaking, the job of 'weighing competing policies' is best 'left to the representative branches for reasons of democratic accountability.' I would also want to consider, though, the possibility that—putting aside concerns about competence and 'accountability'—the Court might not always be constitutionally authorized to take up the balancing task.").

14. See *id.* at 118 ("Clearly, appellate courts do and should 'defer' to lower courts and non-judicial officials all the time.").

15. See, e.g., *id.* (challenging Professor Roosevelt's definitions of deference).

often, as Professor Kermit Roosevelt and others have argued, “excessive and unhelpful.”<sup>16</sup> Even if one wants to hold on to the view that the term is not *entirely* empty of content, and even if one is not ready to conclude that judicial activism (properly understood) is a myth, one can and should agree that the term today often serves as little more than a slogan or epithet. For present purposes, though, we can bracket the challenge of making the case that judicial activism is not merely code for “decisions with which I disagree.” To say that federal judges can and should refuse to give effect to local laws and values that conflict with constitutional guarantees or that exceed constitutional limits is not to say that they should do so lightly, quickly, or too often. The Constitution commits us, as a national community, to certain values, which are reflected in and protected by certain specific provisions of that document. At the same time, an appreciation for the values associated with localism, and an appropriate humility when it comes to second-guessing political outcomes, will inspire wise judges to be cautious and to hesitate before declaring that a particular expression of local values must give way. Professor H. Jefferson Powell put it well in his Walter F. Murphy Lecture, *Constitutional Virtues*, in which he defined the virtue of “humility” as

the habit of doubting that the Constitution resolves divisive political or social issues as opposed to requiring them to be thrashed out through the processes of ordinary, revisable politics. . . . The virtue manifests itself in the continuing recognition that the Constitution is primarily a framework for political argument and decision and not a tool for the elimination of debate.<sup>17</sup>

That is a good start.

## II.

So, how do we get it right? How should the conscientious federal judge, or American citizen, go about trying to find the place where responsible exercise of the judicial power of the United States ends and unwarranted, offensive, intrusive, homogenizing overreaching begins? The task is not easy. Cer-

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16. *Id.* at 112.

17. H. Jefferson Powell, *Constitutional Virtues*, 9 GREEN BAG 2D 379, 388 (2006).

tainly, the line will not always be clear, and there is no point in pretending otherwise. Certainly, it is not enough to merely attach “activist” or “restrained” to decisions one likes or dislikes. Certainly, the effort cannot be separated from the larger project of figuring out the on-the-merits answers to questions of the Constitution’s meaning. All that said, the judicial philosophy of my former boss, the late Chief Justice William Rehnquist, is relevant and helpful here.

As the confirmation hearings for Chief Justice Roberts and Justice Alito reminded us, tracking down nominees’ judicial philosophies is tiring, tricky work.<sup>18</sup> Senate staffers, pundits, journalists, and bloggers scour an ever-expanding range of sources, including college research papers, job applications, appellate briefs and opinions, and even thank-you notes<sup>19</sup> looking for clues (or smoking guns). As it happens, though, Chief Justice (then Justice) Rehnquist provided a reflective and revealing sketch of his philosophy just a few years after joining the Court in a short essay called *The Notion of a Living Constitution*.<sup>20</sup> This notion, often associated with Justice William Brennan,<sup>21</sup> was, in Chief Justice Rehnquist’s view, to be resisted—but not out of pious reverence for the Founders’ insight into the

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18. See, e.g., Mike Allen & R. Jeffrey Smith, *Judges Should Have ‘Limited’ Role, Roberts Says: Statement to Panel Cites Need for Restraint on Bench; Prior Documents Question ‘Right to Privacy,’* WASH. POST, Aug. 3, 2005, at A5 (“Roberts echoed the views of President Bush in describing his judicial philosophy. Roberts said that he views the role of judges as ‘limited’ and that they ‘do not have a commission to solve society’s problems, as they see them, but simply to decide cases before them according to the rule of law.’”); Senator Charles Schumer, Remarks of the Nomination of Samuel Alito to the Supreme Court (Oct. 31, 2005), available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/31/AR2005103100707.html> (“A preliminary review of his record raises real questions about Judge Alito’s judicial philosophy and his commitment to civil rights, workers’ rights, women’s rights, and the rights of average Americans which the courts have always looked out for.”).

19. See Charles Babington, *Miers Hit on Letters and the Law*, WASH. POST, Oct. 15, 2005, at A7.

20. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976), reprinted in 29 HARV. J.L. & PUB. POL’Y 401, 410 (2006).

21. See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 816 (1983) (Brennan, J., dissenting) (“[T]he Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers.”); William J. Brennan, Jr., *Construing the Constitution*, 19 U.C. DAVIS L. REV. 2, 7 (1985) (“[T]he genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.”).



moral, economic, and social challenges facing late-twentieth-century society.<sup>22</sup> Nor did his critique purport to be the product of a tight deduction from premises relating to the very nature of a written constitution. He was not, to use Professor Sunstein's term, a "fundamentalist,"<sup>23</sup> or even a thoroughgoing, principled originalist. He did not fail to observe and absorb the obvious fact that ours is a very different world from the Framers'.

Chief Justice Rehnquist's aim in critiquing the notion of a living Constitution, and in so doing, appearing to assume the unenviable "necrophil[ia]" position of playing partisan for a "dead" Constitution,<sup>24</sup> was to insist and ensure that "We the People," the "ultimate source of authority in this Nation,"<sup>25</sup> acting through our politically accountable representatives, retain the right to serve (or not) as the agents of and vehicles for constitutional change. What animates the essay is not so much a misplaced attachment to *stasis*, or a slavish adherence to ideological formulae, but a clear-eyed appreciation for the tension that can exist between the "antidemocratic and antimajoritarian facets" of judicial review and the "political theory basic to democratic society."<sup>26</sup>

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22. See, e.g., Rehnquist, *supra* note 20, at 699 ("It seems to me that it is almost impossible . . . to conclude that [the Founders] intended the Constitution itself to suggest answers to the manifold problems that they knew would confront succeeding generations."); cf. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 717 (1977) (Rehnquist, J., dissenting) ("Those who valiantly but vainly defended the heights of Bunker Hill in 1775 made it possible that men such as James Madison might later sit in the first Congress and draft the Bill of Rights to the Constitution. The post-Civil War Congresses which drafted the Civil War Amendments to the Constitution could not have accomplished their task without the blood of brave men on both sides which was shed at Shiloh, Gettysburg, and Cold Harbor. If those responsible for these Amendments, by feats of valor or efforts of draftsmanship, could have lived to know that their efforts had enshrined in the Constitution the right of commercial vendors of contraceptives to peddle them to unmarried minors through such means as window displays and vending machines located in the men's room of truck stops, notwithstanding the considered judgment of the New York Legislature to the contrary, it is not difficult to imagine their reaction.").

23. CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 119–20 (2005) (discussing Chief Justice Rehnquist's "fundamentalist" views regarding the right to marry).

24. Rehnquist, *supra* note 20, at 693 ("At first blush it seems certain that a *living* Constitution is better than what must be its counterpart, a *dead* Constitution.").

25. *Id.* at 696.

26. *Id.* at 705. For a recent, powerful exploration of this tension, see Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346 (2006).

And so, Chief Justice Rehnquist contended, it is one thing to note that the Constitution is, in many places, "not a specifically worded document"; it is one thing to concede that "[t]here is . . . wide room for honest difference of opinion over the meaning of general phrases in the Constitution."<sup>27</sup> It is another, however, to authorize "nonelected members of the federal judiciary"—functioning as "the voice and conscience of contemporary society" and "as the measure of the modern conception of human dignity"<sup>28</sup>—to serve as a "council of revision"<sup>29</sup> armed "with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country."<sup>30</sup>

Chief Justice Rehnquist's big-picture view of the Constitution, the government that it constitutes, and the task of federal judges that it authorizes can be well and efficiently captured through two short quotations from his opinions. First, from his opinion for the Court in *United States v. Lopez*:

The Constitution creates a Federal Government of enumerated powers. As James Madison wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties. Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."<sup>31</sup>

Second, is this passage from his dissent in *Texas v. Johnson*:

The Court's role as the final expositor of the Constitution is well established, but its role as a Platonic guardian admonishing those responsible to public opinion as if they were

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27. Rehnquist, *supra* note 20, at 697.

28. *Id.* at 695.

29. *Id.* at 698.

30. *Id.*; cf. *Trimble v. Gordon*, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting) ("[T]his Court seems to regard the Equal Protection Clause as a cat-o'-nine-tails to be kept in the judicial closet as a threat to legislatures which may, in the view of the judiciary, get out of hand and pass 'arbitrary,' 'illogical,' or 'unreasonable' laws.").

31. 514 U.S. 549, 552 (1995) (citations omitted).

truant schoolchildren has no similar place in our system of government.<sup>32</sup>

These two passages go a long way in presenting the vision or, at least, the disposition that plausibly can be said to have animated Chief Justice Rehnquist's work and career on the Court, and that could also be of some use, even comfort, to federal judges wrestling with the questions presented by this Symposium.

Chief Justice Rehnquist was a federalist, in the Madisonian sense, and, within limits, a conservative majoritarian. He believed that "We the People," through our Constitution, had authorized our federal courts, legislators, and administrators to do many things, but not everything. The nation's powers are vast where they exist, but they are also divided, separated, "few and defined."<sup>33</sup> As a result, the national government may not pursue every good idea, smart policy, or worthy end, nor are local governments forbidden to enact all foolish or immoral ones. The point of this arrangement is not so much to hamstring good government as to "ensure the protection of our fundamental liberties"<sup>34</sup> by dividing, enumerating, and structuring powers. The Constitution's freedom-facilitating structural features, Chief Justice Rehnquist believed, should not be left entirely to the care of those branches that might not have, or might not perceive clearly, an interest in their health. The structure of government, as he emphasized in *Lopez*, matters to the well-being and flourishing of persons, and it is appropriate for courts of law to enforce the boundaries inherent or involved in those structural features.<sup>35</sup>

The *Texas v. Johnson* dissent underscores a companion commitment to judicial modesty with respect to moral controversies and debatable policies.<sup>36</sup> True, many regard Chief Justice Rehnquist's "Platonic guardian" line,<sup>37</sup> along with similar calls for judicial modesty, restraint, and deference, as little more than a disingenuous cover for his own conservative brand of activism. But this charge is misplaced. It is neither arrogant nor

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32. 491 U.S. 397, 435 (1989) (Rehnquist, C.J., dissenting).

33. THE FEDERALIST NO. 45, at 137 (James Madison) (Roy P. Fairfield ed., 1981).

34. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (internal quotation marks omitted).

35. *Lopez*, 514 U.S. at 552.

36. See 491 U.S. at 430-31 (Rehnquist, C.J., dissenting).

37. *Id.* at 435.

illegitimate for a judge to enforce the Constitution's structural features, nor is it disingenuous for such a judge to believe that federal courts should only rarely employ judicial review as an "end run around popular government."<sup>38</sup> Running through Chief Justice Rehnquist's opinions in cases involving a broad spectrum of policy questions is not opportunistic conservative activism but reasonably consistent fidelity to the idea that our Constitution leaves many important, difficult, and even divisive decisions to the People or, for our purposes, to local communities. It is possible and reasonable to distinguish between votes to invalidate the policy choices of state legislatures as inconsistent with the Constitution's substantive individual-rights provisions, on the one hand, and votes to invalidate regulatory measures enacted by Congress as outside Congress's enumerated powers, on the other. It is one thing to invalidate federal laws for reasons having to do with the distribution of power; it is another to strike down local laws as misuses of power.

To be sure, the Constitution has countermajoritarian features. It effectively removes certain questions (such as "Should we criminalize seditious libel?"<sup>39</sup> or "Should Congress select the Russian Orthodox Archbishop of New York?"<sup>40</sup>) from the political arena. At the same time, it is a document that reflects strong commitments to popular sovereignty and that relies at least as much on constitutional structure and institutional design as on judicial review to constrain majorities' resolutions of challenging moral questions.<sup>41</sup>

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38. Rehnquist, *supra* note 20, at 706; see *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997) (observing that "[t]hroughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.").

39. See U.S. CONST. amend. I; *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) (discussing the unconstitutionality of criminalizing seditious libel).

40. See U.S. CONST. amend. I; cf. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952) (striking down New York law purporting to transfer control of Russian Orthodox churches from the governing hierarchy of the Russian Orthodox Church to the governing authorities of the Russian Church in America).

41. It is incorrect to conclude, as Professor Chemerinsky does, that Chief Justice Rehnquist's willingness and ability to enforce the Constitution's structural features represents a departure from, or is in tension with, his "majoritarianism." See Erwin Chemerinsky, *Understanding the Rehnquist Court*, 47 ST. LOUIS U. L.J. 659, 662-63 (2003).

## III.

This panel's focus has been on the homogenizing threat that judicial review can pose to local communities' distinctive values and legal experiments. We have been considering the worry that when federal judges second-guess local-values-reflecting policies, it can be difficult to hold the line between enforcing the Constitution's trumping commitments—*our* shared commitments—and imposing their own preferences. This worry is not frivolous, but there is no easy way to soothe it.

Although judicial review of local legislation *does* threaten to undermine local identity by homogenizing community norms, such review is both helpful and necessary to the task of protecting the institutions, groups, associations, and communities that generate, nurture, test, express, and advocate for those norms. In a case like *Romer v. Evans*,<sup>42</sup> for example, the Supreme Court's exercise of judicial review can be seen as homogenizing local norms by subordinating their expression in local ordinances to the requirements of the Equal Protection Clause.<sup>43</sup> In a decision like *Boy Scouts of America v. Dale*,<sup>44</sup> on the other hand, the Court's invalidation of a law reflecting local values can perhaps be seen as protecting the existence and independence of competing and diverse sources of meaning.<sup>45</sup> Put simply, to the extent that one cares about values-pluralism, judicial review can be a friend as well as a foe.

As it happens, this point also finds support in the work and views of Chief Justice Rehnquist. As Professor John McGinnis has explored in some detail,<sup>46</sup> a powerful and pervasive theme in the Rehnquist Court's decisions is recognition and even celebration of the place and function of mediating institutions in civil society.<sup>47</sup> The landscape that is created, regulated, and reflected by the Constitution includes more than a federal gov-

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42. 517 U.S. 620 (1996).

43. U.S. CONST. amend. XIV, § 1.

44. 530 U.S. 640 (2000).

45. See generally Garnett, *Henry Adams's Soul*, *supra* note \*.

46. See generally John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002).

47. See, e.g., *Boy Scouts*, 530 U.S. at 648 (noting that the freedom of association is "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority" (internal quotation marks omitted) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984))).

ernment and states, and more than persons and governments. The structural features of that charter both preserve and clear out the space of civil society in which associations and mediating institutions work to safeguard political liberty and constrain political authority. Associations, therefore, serve a number of critical purposes:

[A]ssociations have a structural, as well as a vehicular, purpose. They hold back the bulk of government and are the "critical buffers between the individual and the power of the State." They are "laboratories of innovation" that clear out the civic space needed to "sustain the expression of the rich pluralism of American life." Associations are not only conduits for expression, they are the scaffolding around which civil society is constructed, in which personal freedoms are exercised, in which loyalties are formed and transmitted, and in which individuals flourish.<sup>48</sup>

The same judicial review that we might fear could impose unwelcome moral uniformity is, it turns out, sometimes necessary to preserve the freedoms of associations upon which a healthy moral conversation depends.

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48. Garnett, *Henry Adams's Soul*, *supra* note \*, at 1853–54.

# COUNTING STATES

RODERICK M. HILLS, JR.\*

The United States Supreme Court frequently bases federal constitutional doctrine on state law,<sup>1</sup> often doing so by counting states' laws in a variety of doctrinal contexts to determine the legislative consensus among the States. For instance, state counting is used to determine the "evolving standards of decency" that define the meaning of "cruel and unusual punishment" under the Eighth and Fourteenth Amendments,<sup>2</sup> to determine whether some method of conducting jury trials is consistent with the Sixth and Fourteenth Amendments,<sup>3</sup> and to decide whether a state practice is consistent with traditions of ordered liberty implied by substantive due process.<sup>4</sup> But across this doctrinal variety, state counting involves two common elements: judicial use of state law to inform the content of federal constitutional doctrine, and judicial evaluation of states' laws collectively rather than singly to determine a state "consensus." When counting states, the Court treats the States as one large decision-making body whose members reach a single consensus.

The oddity of treating the States as a single collective decision maker has not been lost on scholars. At least one has argued that such use of state law actually undermines the purposes of federalism, which she identifies as permitting states to express the diverse preferences of their respective residents.<sup>5</sup> This criticism of state counting is mistaken. To understand why and how state counting might be valuable, it is important first

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\* William T. Comfort III Professor of Law, New York University School of Law.

1. For a survey of the practice, see generally Note, *State Law as "Other Law": Our Fifty Sovereigns in the Federal Constitutional Canon*, 120 HARV. L. REV. 1670 (2007).

2. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

3. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 160–62 (1968).

4. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 570–71 (2003); *id.* at 593 n.3 (Scalia, J., dissenting).

5. See Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1091–93, 1106 (2006).

to draw a distinction between two different ways in which the Court could be counting states. First, the Court could be using the state legislatures' consensus as a *source* of national law. Alternatively, the Court could be using the state legislatures' consensus as a *limit* on national law. In the first case, the Court would count the States' laws to determine the States' consensus position on an issue and then enforce that position against outlier states. In the second case, the Court would determine the States' consensus to place an outside limit on the judiciary's enforcement of its own view of the constitutional norm. In effect, the second version of state counting uses the States' consensus as a sort of collective veto over judicial review, not as an independent source of federal constitutional norms.

This Essay argues that the Supreme Court counts states largely for the second purpose of limiting judicial power. Seen as a mechanism of judicial self-limitation, the Court's practice of counting states is not inconsistent with federalism but is rather a natural extension of the federal principles already in the Constitution. Moreover, understanding state counting as a mechanism of judicial self-limitation helps explain why the Court tends to be casual about the details of how it counts states. One might justly complain that state counting does little to protect the novel policymaking experiments of outlier states from judicial review, but such protection is probably impossible absent restrictions on judicial review so severe that they would permit "experiments" such as Jim Crow that few would want to accept.

## I. WHY STATE COUNTING DOES NOT PROVIDE A SOURCE OF FEDERAL LAW

The assertion that the Court's state-counting decisions might best be viewed as using state "consensus" to provide limits on, rather than sources of, federal law needs some defense, because it is in tension with the Court's own account of how it uses state law in at least some doctrinal contexts. The Court's Eighth Amendment opinions, for instance, assert that state consensus actually supplies the content of the rule that the Court enforces against the States.<sup>6</sup> According to the Court, "The clearest and

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6. See, e.g., *Enmund v. Florida*, 458 U.S. 782, 792-93 (1982); *Coker v. Georgia*, 433 U.S. 584, 595-96 (1977).



most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."<sup>7</sup> Laws that depart from the "consensus" established by these legislatures are deemed to be so "unusual" that they violate the Eighth Amendment's ban on cruel and unusual punishment.<sup>8</sup> On this account, the Court enforces the States' mainstream position on the Eighth Amendment against outlying states.<sup>9</sup>

For four reasons, however, it is difficult to take this judicial description of the Court's Eighth Amendment state counting at face value. First, suppressing outlying states as an end in itself is not a coherent constitutional goal in a federal regime. The whole point of federalism is based on the premise that there is no harm in legal diversity as such. If a single state passed a statute, for instance, punishing a certain crime by ordering the offender to undergo intensive therapy and perform community service, it would not be sensible to strike down the law as "cruel and unusual" just because no other state had enacted such a reform. In a federal regime, merely being unusual (ab-sent cruelty) is a virtue, not a vice.

Second, the Court itself acknowledges that state laws constitute "relevant" but not decisive evidence concerning the national standard of decency that it enforces.<sup>10</sup> The challenged punishment must violate not only "objective evidence" of American values as reflected by state practice but also the Court's "own judgment" of the punishment's constitutionality.<sup>11</sup> The Court does not, in short, suppress outliers from a state consensus unless those outliers offend the Court's own view of the constitutional norm.

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7. *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).

8. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 314–16 (2002) (noting that the execution of mentally retarded offenders had "become truly unusual" among the States, such that it "is fair to say that a national consensus has developed against it").

9. By enforcing the States' mainstream position against outlier states, the Court acts in a manner similar to a theory of judicial review described by Professor Michael Klarman. See Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 6 (1996) (describing the Court's typical role as suppressing outlier states that depart from national norms).

10. See *Atkins*, 536 U.S. at 312–13 (describing the Court's sequence of analysis as first, reviewing the stance of state legislatures, and second, "consider[ing] reasons for agreeing or disagreeing with their judgment").

11. See *id.* (gathering "objective evidence" from state legislatures, but ultimately relying on the Court's "own judgment" of capital punishment of the mentally retarded (quoting *Penry*, 492 U.S. at 331)).

Third, it is hard to take seriously the Court's assertions that it is enforcing the States' own consensus on norms of decency when the Court itself makes no effort to determine whether the "consensus" states' legislation was enacted for the *purpose* of establishing any national norm of decency. Yet some such effort is essential to distinguish state decisions based on administrative convenience or local policy from those intended to express an opinion on *Trop's* evolving standard of decency. That a state legislator rejects a punishment, after all, might have nothing to do with the legislator's assessment that the punishment is cruel. The legislator might instead simply believe that the punishment is administratively costly, leads to excessive litigation, or is an ineffective deterrent. Moreover, the legislator might have no desire to set national standards in voting for a particular policy—she might be a federalism-loving policy maker who believes that other states ought to be permitted to go their own way on the issue. For the Court to use such a vote as evidence of a consensus against outlying states' policies is to distort the meaning of the legislator's vote. State laws, therefore, cannot be evidence of some national consensus on the cruelty of a punishment until one has some reason to believe that the laws in question were enacted for the purpose of setting such a standard. Yet the Court largely ignores the reasons underlying state legislatures' decisions, preferring to tally state legislation according to various controversial measures<sup>12</sup> without offering any account of why state legislatures have chosen particular policies.<sup>13</sup> Such judicial dragooning of state legislatures

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12. See Jacobi, *supra* note 5, at 1123–49.

13. In *Kennedy v. Louisiana*, for instance, the Court seemed to presume that the "consensus" states failed to impose capital punishment for aggravated child rape because they had each made independent determinations that such a penalty was inconsistent with some important legal norm. 128 S. Ct. 2641, 2651–53 (2008). The obvious alternative explanation was that state legislatures wanted to avoid the threat that *Coker*, which had declared that rape of adults could not be a capital offense, might apply to child rape as well. See *id.* at 2653. The Court rejected this theory by observing that "there is no clear indication that state legislatures have misinterpreted *Coker* to hold that the death penalty for child rape is unconstitutional." *Id.* at 2656. But this statement adopts a presumption about the purposes of state inaction on child rape that *Kennedy* never bothers to justify or even explain. *Kennedy* declares that "[i]n the absence of evidence from those States where legislation has been proposed but not enacted we refuse to speculate about the motivations and concerns of particular state legislators." *Id.* at 2655. Although this statement superficially sounds like a textualist policy for construing state law, there were no state texts for *Kennedy* to construe; the Court was attributing a policy-setting purpose to state *inaction*—the failure to enact child rape laws—rather than state statutes. To presume that a state legislature wanted to constitutional-

into an involuntary constitutional convention—attributing to legislators' votes some constitutional significance of which they were unaware and might, indeed, vociferously reject—is truly an odd way to define national constitutional doctrine.

Fourth, the Court bases a national “consensus” on the laws of far too few states for state counting to be regarded as a convincing source of a national constitutional norm. In *Atkins v. Virginia*,<sup>14</sup> for instance, the Court found a consensus establishing an “objective” norm against the execution of mentally retarded criminals based on thirty states that either prohibited the death penalty altogether or prohibited execution of mentally retarded individuals.<sup>15</sup> But these thirty “consensus” states represent only 50.9% of the nation's population.<sup>16</sup> The remaining twenty states, which are inhabited by the other half of the population, permitted juries to make individual assessments of the relevance of mental retardation. It defies common sense to believe that the legal norms followed in 60% of the states representing roughly half the nation's population are somehow “objective evidence” that the norms followed by the rest of the country (that is, in 40% of the states representing the other half of the nation's population) violate “national standards.” Suggesting that a punishment accepted by essentially half of the nation's population is “unusual” strains plain English usage.

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ize a decency-based objection to a punishment merely because it failed to enact the law is not only bizarre as a matter of political science but is also inconsistent with the Court's longstanding cautions about inferring specific policies from a legislature's rejection of a particular proposal. See, e.g., *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169–70 (2001).

14. 536 U.S. 304 (2002).

15. See *Kennedy*, 128 S. Ct. at 2651, 2653 (“When *Atkins* was decided . . . 30 States, including 12 noncapital jurisdictions, prohibited the death penalty for mentally retarded offenders; 20 permitted it.”); *Roper v. Simmons*, 543 U.S. 551, app. B at 581 (2005) (listing twelve states without the death penalty: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin); *Atkins*, 536 U.S. at 313–15 (listing eighteen states that, at the time, permitted capital punishment generally but prohibited the execution of mentally retarded offenders: Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Maryland, Missouri, Nebraska, New Mexico, New York, North Carolina, South Dakota, Tennessee, and Washington).

16. See U.S. Census Bureau, *Annual Estimates of the Population for the United States, Regions, States, and Puerto Rico: April 1, 2000 to July 1, 2007* (Dec. 27, 2007), <http://www.census.gov/popest/states/tables/NST-EST2007-01.xls> (spreadsheet showing the 2007 estimated population in the thirty “consensus” states as 153,441,285, which represents 50.9% of the 2007 estimated national population of 301,621,157).

For these four reasons, it seems implausible to regard state counting as supplying the *content* of federal law.

## II. STATE COUNTING AS A *LIMIT* ON THE SUPREME COURT'S CONSTITUTIONAL JURISPRUDENCE

It is more helpful and coherent to think of state laws as forming a *limit* on the Court's independent interpretation. The state counting method in *Gregg v. Georgia* supports this theory.<sup>17</sup> In *Gregg*, the Court counted states to show that the public did not have a revulsion to capital punishment,<sup>18</sup> thus remedying the debacle it had created four years earlier in *Furman v. Georgia* when the Court used its *own* norm against capital punishment to strike down the practice.<sup>19</sup>

Counting states, in other words, is intended to function as a constraint on the judiciary, not on outlier states. In practice, when the Court's own assessment of a punishment's cruelty is rejected by a majority of the States, the Court refuses to enforce its own values.<sup>20</sup>

17. 428 U.S. 153 (1976).

18. See *id.* at 175–76, 179–81 (plurality opinion) (“[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.” (alteration in original) (quoting *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting))).

19. See *id.*; *Furman*, 408 U.S. at 239–40 (per curiam).

20. See, e.g., *Baze v. Rees*, 128 S. Ct. 1520, 1526–27 (2008) (plurality opinion) (upholding the three-drug protocol for lethal injections used by at least thirty states). Chief Justice Roberts, author of the plurality opinion in *Baze*, noted:

[I]t is difficult to regard a practice as “objectively intolerable” when it is in fact widely tolerated. Thirty-six States that sanction capital punishment have adopted lethal injection as the preferred method of execution. The Federal Government uses lethal injection as well. . . . No State uses or has ever used the alternative one-drug protocol belatedly urged by petitioners.

*Id.* at 1532. The plurality acknowledged that “[t]his consensus is probative but not conclusive with respect to that aspect of the alternatives proposed by petitioners,” *id.* at 1532–33, but also observed that “[t]hroughout our history, whenever a method of execution has been challenged in this Court as cruel and unusual, the Court has rejected the challenge,” *id.* at 1538. Instead of relying on the Court to reform such methods, the plurality implied that evolving social norms themselves would push the legislatures toward humane methods of execution: Despite the absence of judicial intervention, “[o]ur society has nonetheless steadily moved to more humane methods of carrying out capital punishment. The firing squad, hanging, the electric chair, and the gas chamber have each in turn given way to more humane methods, culminating in today’s consensus on lethal injection.” *Id.*

But when the Court's assessment is not inconsistent with any consensus among the States, the Court feels free to charge ahead.<sup>21</sup>

This judiciary-limiting character of state law explains why the Court does not require a more robust showing of state consensus. If the only purpose of the state counting exercise is to demonstrate the negative point that no clear consensus exists among the States that is inconsistent with the Court's point of view, then it is sufficient for the Court to show that its holding has not been *rejected* by a majority of the States. The Court need not show that the judicial position has actually been endorsed by a majority of the States because the States' consensus is not intended to supply the content of the federal norm. State counting merely provides assurance against a national popular backlash against the Court. Put differently, where there is no consensus one way or the other, the Court uses the indecision of the States as an opening for the Court to impose its own values on the nation.

Likewise, once one understands that state counting functions in practice as a purely negative, judiciary-limiting device, the Court's notorious casualness in how it tallies states becomes less mystifying. If the only point of the tally is to ensure that the Court's position has not been *rejected* by a majority of states, it is unnecessary to determine *why* the States have not rejected the judicial position. It suffices that, for whatever reason, most states have not adopted a position inconsistent with the Court's view. That these state legislatures might not perceive themselves as fixing a national standard of decency is immaterial, because the Court is not relying on them to define such a constitutional standard—it is relying on them only to demonstrate that it is not trampling on any well-defined majority opinion.

The use of state laws as a limit on judicial power is not confined to the Eighth Amendment context. In substantive due process cases, for instance, the Court surveys state laws to determine whether some challenged state action has the support of most other states. Consider the Court's practice of state counting in *Washington v. Glucksberg*,<sup>22</sup> *Troxel v. Granville*,<sup>23</sup> and *Lawrence v.*

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21. See, e.g., *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2646, 2652 (2008) (declaring capital punishment for child rape unconstitutional in part because "44 States have not made child rape a capital offense").

22. 521 U.S. 702 (1997).

23. 530 U.S. 57 (2000).

Texas.<sup>24</sup> *Glucksberg* upheld Washington's ban on physician-assisted suicide after observing that the vast majority of states followed a similar ban.<sup>25</sup> In *Troxel*, the plurality admonished the state court judge for not giving special weight to the custodial parents' decision regarding grandparent visits, observing that a number of states required such deference.<sup>26</sup> The plurality struck down Washington's statute as applied to Tommie Granville, but at the same time assured the rest of the States, after surveying their respective visitation statutes, that the Court's holding would leave their statutes unaffected.<sup>27</sup> Finally, *Lawrence* reversed earlier precedent that had upheld state laws banning sodomy, in part because many states had been reversing their sodomy statutes, leaving only a handful that still retained such laws.<sup>28</sup>

The Court's reliance on state law to limit its own power is plausibly attributed to the Burger Court's painful experience with two controversial decisions that contradicted the laws of a majority of states. In the Eighth Amendment context, that controversial decision was *Furman*.<sup>29</sup> In the context of substantive due process, that experience emerged, of course, from *Roe v. Wade*.<sup>30</sup> After these decisions, the Court looked for a doctrinal device to ensure that it would not again reach conclusions inconsistent with majority opinion. Counting state laws and refusing to enforce constitutional doctrines inconsistent with a majority of those laws serves this Court-restraining function.

### III. STATE COUNTING AND "COOL FEDERALISM"

There are certain parallels between this Court-restraining function of state counting in due process cases and what Profes-

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24. 539 U.S. 558 (2003).

25. See *Glucksberg*, 521 U.S. at 705–06, 710–11 & n.8.

26. See *Troxel*, 530 U.S. at 71–72 (plurality opinion).

27. See *id.* at 60, 73 & n.\*.

28. See *Lawrence*, 539 U.S. at 570–71, 578.

29. *Furman v. Georgia*, 408 U.S. 238 (1972); see Stanley H. Friedelbaum, *Advances and Departures in the Criminal Law of the States: A Selective Critique*, 69 ALB. L. REV. 489, 518 (2006).

30. 410 U.S. 113 (1973); see Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 53 (2000).

sor Larry Sager calls "cool federalism."<sup>31</sup> Professor Sager describes cool federalism as the practice of allowing "maverick" states to "invent" new governmental norms that are then gradually "propagated" to other states and are eventually "consolidated" as federal norms by Congress or the federal courts once they have won sufficiently widespread support among the States.<sup>32</sup> The period of state experimentation, according to Professor Sager, provides information to national decision makers about how the "maverick" norms will operate on the ground, allowing them to decide whether to nationalize the norms after they have proven themselves to be sound policies.<sup>33</sup>

To the extent that the Court tallies states to assure itself that its decision will not offend a national majority, one could regard due process state counting as a way to glean information about public opinion from maverick state experiments. In effect, the States become the Court's pollsters. Counting states helps the Court ensure that it will not experience *de novo* the widespread popular backlash it has incurred in the past for getting ahead of public opinion. But it is important to note the thinness of the information the Court obtains from state counting: The Court simply assures itself that the public is sufficiently divided on a controversial issue that the Court can weigh in without risking a popular backlash so great that it would have to reverse itself later. Such state counting, in other words, yields very little information about the actual merits of the position that the Court decides to endorse. Moreover, state counting as a device for restraining courts does very little to foster maverick states' experiments because a bare majority of state legislatures has the power to stop the Court from imposing a uniform constitutional rule on the nation. Novel state policies that arguably impinge on the federal judiciary's theories of lib-

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31. Lawrence G. Sager, *Cool Federalism and the Life-Cycle of Moral Progress*, 46 WM. & MARY L. REV. 1385, 1386 (2005).

32. See *id.* at 1386–88. Professor Sager distinguishes this norm-testing view of federalism from "hot federalism." *Id.* at 1385. Hot federalism is intended to enable political subdivisions (states) with relatively homogeneous groups to enter a federal structure with other groups from different regions and with different religions or cultures, while preserving a more or less permanent division of policymaking among the different groups as well as between the different groups and the federal authority. See *id.*

33. See *id.* at 1396–98.

erty or equality—like covenant marriage<sup>34</sup>—would need an additional and more robust restraint on judicial review.

#### IV. JUSTICE HARLAN'S TRADITION-BASED THEORY OF SUBSTANTIVE DUE PROCESS

One such restraint on judicial review is the tradition-based theory of due process pressed by Justice Harlan (with which state counting is sometimes mistakenly conflated). According to Justice Harlan's theory, due process may be invoked only against state laws that contradict the vast majority of other states' laws *and* violate deeply-rooted social norms.<sup>35</sup> Justice Harlan elaborated on this tradition-based theory of judicial review in his dissent in *Poe v. Ullman* when he called for a theory of substantive due process that preserved a "balance . . . between . . . liberty and the demands of organized society" based on "what history teaches are the traditions from which it developed as well as the traditions from which it broke."<sup>36</sup> Because this "tradition is a living thing,"<sup>37</sup> Justice Harlan was willing to enforce liberties not recognized by the Fourteenth Amendment's framers as part of the original understanding of "life, liberty, [and] property."<sup>38</sup> But unlike the practice of state counting, Justice Harlan's tradition-based theory requires that a judicially protected liberty have longstanding support in past political practice and widespread social custom—that the liberty take "its place in relation to what went before and further [cut] a channel for what is to come."<sup>39</sup>

Thus, Justice Harlan's tradition-based theory of liberty is a far more drastic restriction on judicial power than merely counting states to make sure that the Court's decision does not

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34. Arizona, Arkansas, and Louisiana remain the only states to have enacted statutes authorizing "covenant marriages," which are, essentially, marriages with a two-year waiting period before a divorce may become effective. ARIZ. REV. STAT. §§ 25-901 to -906 (2007); ARK. CODE §§ 9-11-801 to -811 (2008); LA. REV. STAT. §§ 9:272 to 9:276, 9:307 (2008); see Cecil VanDevender, Note, *How Self-Restriction Laws Can Influence Societal Norms and Address Problems of Bounded Rationality*, 96 GEO. L.J. 1775, 1791 (2008).

35. See *Poe v. Ullman*, 367 U.S. 497, 541-46, 554-55 (1961) (Harlan, J., dissenting).

36. *Id.* at 542.

37. *Id.*

38. U.S. CONST. amend XIV, § 1. For example, Justice Harlan was willing to recognize that the Constitution protected the right of married couples to use contraceptives. See *Ullman*, 367 U.S. at 539, 540-41 (Harlan, J., dissenting).

39. *Ullman*, 376 U.S. at 544 (alteration in original) (internal quotation marks omitted) (quoting *Irvine v. California*, 347 U.S. 128, 147 (1954) (Frankfurter, J., dissenting)).



contradict a majority of the states' laws. Indeed, the tradition-based theory requires some showing that the state law being challenged contradicts liberties not merely honored in a majority of states but throughout the nation. Justice Harlan condemned Connecticut's Comstock Act, for instance, because it "punish[ed] married people for the private use of their marital intimacy" and thereby encroached on "what, by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of 'liberty,' the privacy of the home in its most basic sense."<sup>40</sup>

Unlike mere state counting, the tradition-based theory of judicial review gives outlier states plenty of time to experiment with restrictive legislation that falls short of offending dominant social norms throughout the country. Indeed, Justice Harlan expressly defended his tradition-based conception of liberty precisely to protect experiments currently popular in only a handful of states, noting that "it is all wrong, in my view, for the Court to adopt the political doctrines popularly accepted at a particular moment of our history and to declare all others to be irrational and invidious, barring them from the range of choice by reasonably minded people acting through the political process."<sup>41</sup>

The Court has been divided on the issue of whether it will use tradition or state counting to restrict its substantive due process jurisprudence. *Lawrence's* emphasis that "our laws and traditions in the past half century are of most relevance here"<sup>42</sup> suggests a turn away from tradition and toward state counting. Against this view, however, the *Lawrence* majority also noted that laws penalizing same-sex intercourse had fallen into desuetude, being virtually unenforced by public prosecution.<sup>43</sup> *Lawrence* seems caught between two methods of self-restraint—

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40. *Id.* at 548. Connecticut's law was uniquely restrictive because it restricted the distribution as well as the use of contraceptives for the purpose of preventing pregnancy. *See id.* at 554–55. On the distinctive nature of the Connecticut Comstock Act and for a detailed historical account of the "struggle" to overturn or repeal it, see DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 79–130 (1994). By the time *Ullman* was decided, the statute had lapsed into desuetude and was enforced only against those distributors who advocated for and instructed in the use of contraceptives—like the birth control clinic in *Griswold v. Connecticut*. *See Griswold v. Connecticut*, 381 U.S. 479, 505–06 (1965) (White, J., concurring); *Ullman*, 367 U.S. at 554 (Harlan, J., dissenting).

41. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 686 (1966) (Harlan, J., dissenting).

42. *Lawrence v. Texas*, 539 U.S. 558, 571–72 (2003).

43. *See id.* at 572–73.

a tradition-based theory in which the Court strikes down only those laws that seem to have lapsed into disuse because they offend widespread norms limiting governmental interference with private relationships, and a state counting theory in which the Court enforces its own libertarian theories restrained by the need to respect practices prevalent in a majority of states.<sup>44</sup>

### CONCLUSION

State counting is more an assurance that a judicial opinion is consistent with the national majority's current preferences than a protection of outlier states' experimentation. If one assumes that the only function of federalism is to protect outlying states' experiments, then state counting will not seem to be consistent with the spirit of federalism.<sup>45</sup> But American federalism has more justification than protection of regulatory diversity. Since the Anti-Federalists' attack on the proposed U.S. Constitution as a device for serving the interests of mercantile elites, supporters of state power have argued that state governments—whose officials are generally elected from small electoral districts—are more responsive to voters, more egalitarian, and less dominated by cultural and financial elites than the federal government.<sup>46</sup> Uniting the States as a single force to counterbalance the federal government, therefore, is a venerable theme in American federalism. The Court's device of counting states is essentially a judicially crafted version of this populist idea.

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44. For a commentary noting an analogous ambiguity in *Lawrence* between "desuetude" and "autonomy" readings, see Cass R. Sunstein, *Liberty After Lawrence*, 65 OHIO ST. L.J. 1059, 1061–63 (2004).

45. Tonja Jacobi seems to make this assumption in her attack on Eighth Amendment state counting. See Jacobi, *supra* note 5, at 1091–92.

46. On Anti-Federalist ideology, see, for example, JACKSON TURNER MAIN, *THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION, 1781–1788*, at 130–31 (1961), and see generally Saul Cornell, *Aristocracy Assailed: The Ideology of Backcountry Anti-Federalism*, 76 J. AM. HIST. 1148 (1990). On later Jacksonian reiterations of the same theme, see, for example, JOHN ASHWORTH, 'AGRARIANS' & 'ARISTOCRATS': PARTY POLITICAL IDEOLOGY IN THE UNITED STATES, 1837–1846, at 36–37 (1983).

# VOTING WITH YOUR FEET IS NO SUBSTITUTE FOR CONSTITUTIONAL RIGHTS

DOUGLAS LAYCOCK\*

## I. THE DOWNSIDE OF VOTING WITH YOUR FEET

The organizers of this Symposium<sup>1</sup> gave each panel a brief summary of the panel's intended topic. I want to take a part of that summary as the subject of my commentary: "It is a benefit of Federalism that people can vote with their feet and migrate to communities that share their values as well as enable their liberty. But does pervasive judicial review threaten to destroy local identity by homogenizing community norms?"<sup>2</sup> There follows some more in that vein, some illustrative examples, and finally the provocative question whether the Constitution really requires a separation of God and football.<sup>3</sup> I will return to God and football, but I principally want to address this idea of voting with your feet. The idea is common in the federalism literature,<sup>4</sup> but it has always troubled me.<sup>5</sup>

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\* Yale Kamisar Collegiate Professor of Law, University of Michigan Law School, and Alice McKean Young Regents Chair in Law Emeritus, The University of Texas at Austin.

1. Program for Twenty-Seventh Annual National Federalist Society Student Symposium, Panel: Judicial Interference with Community Values (Mar. 7, 2008) (on file with Author).

2. *Id.*; see also *The Fed Soc Symposium and "voting with your feet,"* Posting of Rick Garnett to Prawfsblawg, <http://prawfsblawg.blogs.com/prawfsblawg/2008/03/the-fed-soc-sym.html> (Mar. 10, 2008, 10:13 EDT) ("The claims presented for the panel's consideration were, first, that 'it is a basic assumption of federalism that individual communities can be different'; second, that 'it is a benefit of federalism that free people can "vote with their feet" and migrate to communities that share their values'; and, third, that 'pervasive judicial review' can undermine this benefit, and this assumption, and 'destroy local identity by homogenizing community norms.'").

3. See Program, *supra* note 1; see also *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (holding that school-sponsored prayer before high school football games violates the Establishment Clause).

4. See, e.g., Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 157-58 (2001) (arguing that state laws banning

The idea especially troubles me when voting with your feet is offered as an argument for less vigorous enforcement of constitutional rights.<sup>6</sup> At least some of the commentators who have written articles praising the right to vote with your feet have also shared my view that this right is insufficient to protect other constitutional rights. Thus, Richard Epstein argues that federalism is indispensable because it protects the right to vote with your feet, but that the protection is not enough. "[T]he institution of federalism, without the rigorous enforcement of substantive individual rights, will not be equal to the formidable task before it."<sup>7</sup>

There are times when voting with your feet is an acceptable second-best solution, and it is a good thing that we are always free to leave a jurisdiction if we have to.<sup>8</sup> But voting with your

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discrimination on the basis of sexual orientation illustrate "many of the classic arguments for federalism: people have been able to accommodate their own preferences by voting with their feet, and the states with more progressive rules have served as laboratories for assessing the benefits and costs of extending antidiscrimination laws in this way" (footnote omitted)); Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS., Winter 1992, at 147, 150 ("Federalism works best where it is possible to vote with your feet."); see also Seth F. Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 72 (2001) ("[W]here states adopt different positions on issues of irreducible moral disagreement, the variety of local political regimes gives citizens a choice of the rules they live under that would be unavailable in a centralized system."); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1344-45 (2004) ("When information problems are taken into account, voting with your feet in a relatively decentralized federal system may lead to greater majoritarian control of government than ballot box voting in a more centralized system.").

5. Cf. Douglas Laycock, *Federalism as a Structural Threat to Liberty*, 22 HARV. J.L. & PUB. POL'Y 67, 80-82 (1998) ("But in an era of big government without vigorous enforcement of constitutional rights, federalism becomes a serious structural threat to liberty. . . . It is often said that local government is closer to the people and thus more politically responsive. This may be true for those who have easy access to policy makers or who can threaten to move their factory to another jurisdiction. It is sometimes true when an issue captures public attention and arouses a large segment of the populace. But it is rarely true for minority religions or small religious organizations. The only bodies that can protect constitutional liberty against each of the multiple sources of regulation are at the federal level.").

6. See *id.* at 82 ("[Y]ou cannot have limited government and a weak judiciary. The judicial power to enforce constitutional liberty is one of the essential checks on the rest of government." (footnote omitted)).

7. Epstein, *supra* note 4, at 150; cf. Kreimer, *supra* note 4, at 72. Kreimer argues for the benefits of voting with your feet, but also notes that "'only' crossing a border is often no mean hurdle. To the citizen who is unwilling or unable to abandon her current residence, the availability of a freer life in the next state is cold comfort." *Id.*

8. Some commentators have long argued that federal legislation is making this right illusory. Because federally imposed standards have tended to homogenize

feet is often a last resort in response to illegitimate treatment. The task is to distinguish those cases in which a person leaves the jurisdiction in response to illegitimate pressures from those cases in which a person leaves the jurisdiction in response to legitimate policy disagreements. That question reduces to a debate over which rights to constitutionalize and over the appropriate scope of each constitutional right. We have great debates about those questions. Americans disagree about which rights to interpret narrowly and which to interpret broadly. But we will do best if we debate these questions on their merits. Unless one takes Professor Lino Graglia's view that enforcing constitutional rights through judicial review is a bad idea,<sup>9</sup> the debate over the appropriate scope of rights cannot be resolved by references to voting with your feet.

"Voting with your feet" is a sugarcoated way to describe what happens when dissenters are driven out of the community. Runaway slaves were voting with their feet.<sup>10</sup> Darfurians fleeing to Chad are voting with their feet.<sup>11</sup> Ethnic cleansing is a way of encouraging people to vote with their feet. I assume that the people who wrote our panel description did not have in mind any of these examples. But the difference between these examples and what our organizers were likely thinking about does not turn on the definition of voting with your feet. The relevant differences are in the rights being violated and in the

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the States, they argue, a dissatisfied citizen who moves does not improve his situation. See Douglas W. Kmiec & Eric L. Diamond, *New Federalism is Not Enough: The Privatization of Non-Public Goods*, 7 HARV. J.L. & PUB. POL'Y 321, 350 (1984) ("A strong federal presence tends to cartelize the 'market for government' leading to homogeneity among potential competitors. As state and local taxpayers have their tax/service options reduced they remain unable to vote with their feet."). Moreover, the right to leave a jurisdiction was repealed by federal law at least once. See Baker & Young, *supra* note 4, at 121–24 (discussing how the Fugitive Slave Clause eliminated the right of exit for slaves in the antebellum South).

9. See, e.g., Lino A. Graglia, *Judicial Review: Wrong in Principle, A Disaster in Practice*, 21 MISS. C. L. REV. 243 (2002).

10. See, e.g., R.J.M. Blackett, "Freemen to the Rescue!": Resistance to the Fugitive Slave Law of 1850, in *PASSAGES TO FREEDOM: THE UNDERGROUND RAILROAD IN HISTORY AND MEMORY* 133, 133 (David W. Blight ed., 2004) (discussing how large numbers of fugitive slaves were successfully integrated into northern communities of free blacks).

11. See, e.g., Jérôme Tubiano, *Darfur: A Conflict for Land?*, in *WAR IN DARFUR: AND THE SEARCH FOR PEACE* 68, 69 (Alex de Waal ed., 2007) (estimating 200,000 Darfurian refugees in Chad); Dawit Toga, *The African Union Mediation and the Abuja Peace Talks*, in *WAR IN DARFUR, supra*, at 214, 214–15 (estimating "[o]ver 100,000" Darfurian refugees in Chad).

magnitude of the deprivations that led people to vote with their feet. To distinguish between acceptable and unacceptable pressure to vote with your feet, we have to consider specific rights and the range of possible deprivations.

Federalism is a prominent feature of our Constitution.<sup>12</sup> Federalism means that there will be differences from state to state.<sup>13</sup> Within states, we rely heavily on local government, and that reliance means that there will be differences from town to town or between rural and urban areas.<sup>14</sup>

But countervailing ideas are also prominent in our Constitution. We teach our children that we are "one Nation . . . indivisible,"<sup>15</sup> and the idea of indivisibility also appears in the Supreme Court's interpretation of the Constitution.<sup>16</sup> An American is free to go anywhere in this country as a visitor or as a new permanent resident.<sup>17</sup> More immediately to the point, a person born in the United States is a citizen of the state where he resides.<sup>18</sup> And he may reside in any state he chooses. When I moved from Texas to Michigan, Michigan could not reject me. Potential employers had a choice; no one had to hire me. But the state did not have a choice. Michigan had to accept me as a citizen, and it could not discriminate against me because I was new to the state.<sup>19</sup>

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12. See, e.g., Douglas Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEX. L. REV. 343, 364 (1981) (book review) (collecting constitutional provisions that assume or protect the continued existence of states as governing entities).

13. See, e.g., Richard W. Garnett, *Judicial Review, Local Values, and Pluralism*, 32 HARV. J.L. & PUB. POL'Y 7, 7 (2008) ("Notwithstanding *American Idol*, Starbucks, *USA Today*, and chain restaurants, individual communities not only *can be* different, they *are* different.").

14. See *id.*

15. See 4 U.S.C. § 4 (2000) (the Pledge of Allegiance).

16. See *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868) ("The Constitution, in all its provisions, looks to an indestructible union of indestructible states."); see also *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) ("Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.").

17. See *Zobel v. Williams*, 457 U.S. 55, 76–77 (1982) (O'Connor, J., concurring) ("It is difficult to imagine a right more essential to the Nation as a whole than the right to establish residence in a new State."); *Aptheker v. Sec'y of State*, 378 U.S. 500, 517 (1964) ("[F]reedom of travel is a constitutional liberty closely related to the rights of free speech and association . . ."); see also *Zobel*, 457 U.S. at 67 (Brennan, J., concurring) (noting the "unquestioned historic recognition of the principle of free interstate migration, and . . . its role in the development of the Nation").

18. See U.S. CONST. amend XIV, § 1.

19. See *Saenz v. Roe*, 526 U.S. 489 (1999) (holding it unconstitutional to limit new residents to the level of welfare benefits that would have been payable in the state

Even before I established residence in Michigan, when I was just visiting and exploring opportunities, Michigan could not discriminate against me. During my visits, Michigan owed me all the privileges and immunities of a citizen of Michigan.<sup>20</sup> That guarantee is more nuanced than it appears and requires some interpretation, but it is nevertheless a sweeping guarantee of interstate equality.<sup>21</sup>

Once in Michigan, I obviously cannot insist that the state do everything to my liking, so that I will feel no pressure to leave. I have no more rights than any other citizen in Michigan, which is why on most issues, we vote.<sup>22</sup> On some issues, we create and enforce individual rights,<sup>23</sup> and the argument is about which issues should be the subject of individual rights and which issues should be left up to votes.<sup>24</sup>

The individual rights that we have created are important, and some of their applications are controversial, but they are not especially numerous.<sup>25</sup> It is absurd to suggest that judicial review

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from which they came); *Zobel*, 457 U.S. at 55 (holding it unconstitutional to pay citizen dividends from state's oil revenue in proportion to the number of years each citizen had resided in the state); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (holding it unconstitutional to make new residents wait one year before becoming eligible for welfare benefits). These are not the decisions of thin liberal majorities clinging to old precedents. With respect to the results, these decisions were rendered by votes of 7-2, 8-1, and 6-3 respectively.

20. See U.S. CONST. art. IV, § 2, cl. 1.

21. See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 261-73 (1992).

22. See MICH. CONST. art. II (providing for the manner of elections); MICH. CONST. art. IV (vesting the legislative power and specifying the organization and basic operation of the legislative branch); MICH. CONST. art. XII (specifying the methods of amending or revising the Michigan Constitution, with each method culminating in a vote of the people).

23. See U.S. CONST. art. I, §§ 9-10; amends. I-IX, XIII-XV, XIX, XXIV, XXVI (protecting individual rights); MICH. CONST. art. I (protecting individual rights).

24. For example, see the recent political debate and litigation over affirmative action in Michigan. See MICH. CONST. art. I, § 26 (banning affirmative action by constitutional amendment); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding affirmative action policies at the University of Michigan Law School against claim that they violated the Federal Constitution); *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775 (6th Cir. 2007) (denying motions to intervene in continuing litigation over federal constitutionality of state's ban on affirmative action); *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237 (6th Cir. 2006) (vacating preliminary injunction that would have delayed enforcement of state's ban on affirmative action).

25. See provisions cited *supra* note 23.

is as pervasive as the panel description implied.<sup>26</sup> Every state has thousands of statutes; even small towns have hundreds. Most of these statutes have never been challenged, and most of them would be upheld without serious argument if they were. Vast areas of social, economic, and regulatory policy are left to the political process with little or no serious judicial review.

Individual rights are concentrated in a few areas that tend to be unusually important to individuals—speech, religion, fair procedure, equality of treatment, and the core of property ownership.<sup>27</sup> These rights give each individual an essential, if limited, sphere of autonomous control over his life. Most of these rights are also important to the functioning of a democratic government.<sup>28</sup> Ownership of guns,<sup>29</sup> to take a currently controversial example, fits in at least the first of these categories; it is undoubtedly a right that is intensely important to many Americans, however abhorrent it may be to many other Americans. With respect to these individual rights, the Constitution carries the strategy of decentralization beyond federalism. It decentralizes choice beyond states or localities and down to individuals.

By protecting individuals with respect to the things that they are likely to feel most strongly about, we reduce the occasions on which they have to vote with their feet. That is a good thing. Voting with your feet is expensive.<sup>30</sup> People move in this country for many reasons—for education, for jobs, for family, for climate—and they should not have these choices limited simply because some towns are hostile or discriminatory towards their religion, political views, race, speech, sexual orientation, or lack of citizenship. There are many reasons why people choose a place of residence, and it can be costly, both to indi-

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26. See *supra* note 2 and accompanying text.

27. See provisions cited *supra* note 23.

28. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73–183 (1981) (arguing for a “representation-reinforcing” theory of constitutional rights).

29. See U.S. CONST. amend. II.

30. See Epstein, *supra* note 4, at 154–58 (arguing that the inability to remove immobile assets within a jurisdiction imposes significant costs on voting with one’s feet); Kreimer, *supra* note 4, at 72 (“For the citizen who lacks access to information, funds, or transportation, the legal possibility of liberty in a neighboring state may provide no succor.”); Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings after Kelo*, 15 SUP. CT. ECON. REV. 183, 222 (2007) (“‘Voting with your feet’ does not protect anything you can’t take with you when you flee.”).



viduals and to society, to subordinate all those reasons to the question whether some jurisdiction will respect the basic rights that people care about most. Requiring people to move to preserve their basic rights can separate families. It can require people to leave jobs. It is an obstacle to trade. Forcing people to choose their residence on grounds of political acceptability is bad for the economy, if nothing else.

But this is what is implicitly required when the option to vote with your feet is offered as a reason not to enforce constitutional rights. The argument is that we do not have to enforce rights judicially, because if people think a right that is really important to them is being violated, they can just leave. The argument assumes that people can, or should, focus on just one reason for choosing a place of residence and subordinate all other reasons to that one reason. It is that argument that I reject.

Enforceable federal rights take basic questions of fair treatment out of the decision about where to live so that people can act on all of their many other reasons for deciding where to live. Federal constitutional rights protect individuals from pressure to move in search of fair treatment. Constitutional rights enforceable everywhere are essential to the right to travel and to live throughout the country<sup>31</sup> and are therefore essential to national unity. Abolitionists and Republicans could not safely travel in the South in the 1850s.<sup>32</sup> They could vote with their feet and stay out of the South,<sup>33</sup> and most of them did, but that was not a good thing.

Constitutional rights, including the controversial ones, are equally essential to mobility today. Professor Alan Brownstein, who is an observant Jew teaching at the University of California at Davis School of Law, has said that the school prayer decisions made it possible for families like his to leave the Jewish community in Brooklyn and move anywhere they wanted, in-

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31. For the right to travel or to change one's residence, see sources cited *supra* notes 17–20.

32. See MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 31 (1986) (describing inability of Republicans to conduct meetings or spread their views in the South); RUSSEL B. NYE, *FETTERED FREEDOM: CIVIL RIGHTS AND THE SLAVERY CONTROVERSY 1830–1860*, at 174–93 (1963) (describing mob violence and vigilance committees directed at anyone who, while in the South, opposed slavery).

33. See CURTIS, *supra* note 32, at 31 (noting Abraham Lincoln's concession that Republicans could not speak in the South).

cluding to relatively small and relatively rural communities like Davis.<sup>34</sup> And the examples could be multiplied. A generation of African-Americans left the South before the civil rights movement in search of equal treatment in the North and West.<sup>35</sup> It is good that they were free to do that, but they should never have had to do that.

The vote-with-your-feet ideology undermines national unity in another way as well: It encourages Americans to separate themselves physically along ideological lines. All the conservative Republicans go here; all the really, really conservative Republicans go over there; all the Democrats go somewhere else; and all the really, really, liberal Democrats go yet elsewhere. That is the logic of voting with your feet, and the more that happens, the more politically segregated we become. Carried to its logical conclusion, voting with your feet sorts people into separate states that have little in common, thus renewing the risk of separation. It is good that most states are not really red or blue, but various shades of purple.<sup>36</sup>

Our politics feels polarized today. We talk about red states and blue states, but it could be a lot worse, and at times in our history it has been a lot worse. In Utah, the reddest of the red states, Democrat John Kerry received twenty-six percent of the vote without campaigning.<sup>37</sup> In Massachusetts, the bluest of blue states, Republican George W. Bush received roughly thirty-seven percent, also without campaigning.<sup>38</sup> In thirty-two of the fifty states, the loser received more than forty percent of the votes in the 2004 election,<sup>39</sup> and in all these states, most of the voters who supported the loser were contentedly living

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34. He does not appear to have said this in print, but it made a permanent impression on me when he said it very eloquently at a conference.

35. See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 100-02* (2004) (describing the "Great Migration" of Southern blacks beginning at the time of World War I).

36. Professor Robert Vanderbei at Princeton has produced a great set of maps that graphically illustrate the nation's persistent political purpleness. See Robert J. Vanderbei, *The Changing Colors of America (1960-2004)*, <http://www.princeton.edu/~rvdb/JAVA/election2004> (last visited July 29, 2008).

37. See FEC, *FEDERAL ELECTIONS 2004: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE, AND THE U.S. HOUSE OF REPRESENTATIVES 38* (2005), <http://www.fec.gov/pubrec/fe2004/federaelections2004.pdf>.

38. See *id.* at 32.

39. See *id.* at 27-39. The details but not the pattern differed in 2008; the losing major-party candidate in every state had substantial minority support. See *Election Results 2008*, <http://elections.nytimes.com/2008/results/president/map.html>.

with their neighbors who supported the winner. This is a very different time from 1860 when Lincoln got no votes—zero, literally—in ten of the eleven states that would secede after he was elected,<sup>40</sup> and trivial numbers of votes in the eleventh.<sup>41</sup>

## II. SOME EXAMPLES

Consider some specific examples. In particular, what about separating prayer and football? In the Supreme Court, I represented the parents who objected to prayer at high school football games in Texas.<sup>42</sup> The case involved two forms of religious zeal: evangelical Christianity and Texas high school football.<sup>43</sup> The plaintiffs were a Catholic family and a Mormon family,<sup>44</sup> both fed up with the school's frequent imposition of Protestant evangelicalism.

It is widely agreed that religious liberty entails at least a prohibition of mandatory church attendance. The state could not pass a law that says everyone must attend a weekly worship service on pain of criminal penalty, let alone a particular service chosen by a local majority.<sup>45</sup> Yet in towns where every

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40. Elting Morison, *Election of 1860*, in 2 HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS 1789–1968, at 1097, 1152 (Arthur M. Schlesinger, Jr. ed., 1971). In the four slave states that did not secede, Lincoln received a cumulative 5.8 percent of the vote. See *id.* In most of the seceding states, Lincoln did not appear on the ballot. See MELVIN L. HAYES, MR. LINCOLN RUNS FOR PRESIDENT 213 (1960).

41. Lincoln received about 1900 votes in Virginia; reported figures vary from 1877 to 1929 votes. About 94% of these votes came from the counties that later became West Virginia; about 92% came from counties bordering Ohio or Pennsylvania; about 73% came from Brooke, Hancock, Mason, and Ohio counties, the four counties in the northern panhandle, just west of Pittsburgh and closer to Detroit than to Richmond. These numbers were calculated from slightly different county-by-county returns in two sources: W. DEAN BURNHAM, PRESIDENTIAL BALLOTS 1836–1892, at 816–43, 852–64, 948–52 (1955); MICHAEL J. DUBIN, UNITED STATES PRESIDENTIAL ELECTIONS 1788–1860, at 184–86 & 188 n.12 (2002). Burnham credits Lincoln with 125 votes in what is now Virginia; Dubin says 100. These were the only votes that Lincoln got anywhere in the seceding South. For further analysis of the sectionalized nature of this election, see BURNHAM, *supra*, at 71–87.

42. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 293–95 (2000).

43. See generally H.G. BISSINGER, FRIDAY NIGHT LIGHTS: A TOWN, A TEAM, AND A DREAM (2000) (illustrating the social significance of Texas high school football with a case study of one team).

44. See *Santa Fe*, 530 U.S. at 294.

45. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 52 (2004) (Thomas, J., concurring in the judgment) (noting that “[t]ypically, attendance at the state church was required” in the “traditional ‘establishments of religion’ to which the

governmental event begins with a prayer, we get a limited version of that. The time commitment is much shorter, and the penalty for not attending is generally smaller, but people are in effect forced to attend someone else's religious observance as a price of participating in public business.<sup>46</sup> To avoid the short prayer service, they have to skip the event or arrive late and leave early, often drawing attention to their religious dissent in the process. The penalty for not attending the prayer is forfeiture of one's equal right to participate in a secular public event. As the Supreme Court said in its most succinct explanation of the problem with government-sponsored prayer, "the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice."<sup>47</sup>

Reasonable people can disagree with that principle, and in fact the Court has not applied it to the full limit of its logic.<sup>48</sup> We can argue about whether religious dissenters should just accept the imposition of religious observance at secular events, whether they should view it as *de minimis*, whether the community interest outweighs the individual interest, or whether the dissenters should have constitutional protection. But however you weigh the conflicting interests, you cannot make a serious argument that simply disregards the individual's side of the balance. The sense of violation of individual conscience in these cases can be very strong for some believers of minority faiths and for some nonbelievers. Whatever we do in these cases, we need to think them through on their own facts. We should not flippantly say that the community can do what it wants, and if the dissenters do not like it, they can vote with their feet.

It is also the case that a majority's strong desire to impose its religion is often associated with other kinds of intolerance. Take Santa Fe, Texas, where the football-prayer case arose. In the event that principally motivated one of the plaintiff families to sue, a teacher passed out fliers in his class for a Baptist revival meeting. One of his students asked if non-Baptists could attend.

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Establishment Clause is addressed" (quoting *Lee v. Weisman*, 505 U.S. 577, 640-41 (1992) (Scalia, J., dissenting))).

46. See *Santa Fe*, 530 U.S. at 311-12.

47. *Lee*, 505 U.S. at 596.

48. Cf. *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding practice of opening daily meetings of legislature with prayer).

The teacher asked the student what her religion was; after she said she was Mormon, the teacher spent the next ten minutes denouncing Mormonism as an evil cult.<sup>49</sup> Bibles were distributed every year in the Santa Fe schools, and there was uncontradicted evidence of verbal harassment of students who declined to accept Bibles or who objected to prayers and religious observances in school.<sup>50</sup> One parent—not one of the plaintiffs—began home-schooling her youngest daughter to avoid persistent verbal and physical harassment over issues of religion in the public school.<sup>51</sup> Withdrawing from public school to home school is, on a local scale, a form of voting with your feet.

The trial judge permitted the *Santa Fe* plaintiffs to litigate anonymously and felt obliged to threaten “contempt sanctions” and “criminal liability” to deter continuing investigations to learn their identity and to deter “intimidation or harassment.”<sup>52</sup> The judge closed the courtroom for the testimony of the minor plaintiffs because of “the possibility of social ostracization and violence because of militant religious attitudes.”<sup>53</sup>

Santa Fe has had other such incidents over the years. As an opinion piece in the *Houston Chronicle* summarized:

What’s striking is the diversity. Not in the city of Santa Fe’s population . . . but in the variety of its prejudice. For three decades Santa Fe has made national headlines for spasms of bigotry, racism and religious exclusion and persecution involving a truly impressive range of minorities.

In 1981, the KKK chose Santa Fe as the site for its Valentine’s Day anti-Asian rally; the crowd of 150 reportedly included small children draped in white robes. In the 1990s, Mormon and Catholic students complained of harassment in the town’s public schools. And in 2000, Santa Fe school officials in the overwhelmingly Protestant city went to the U.S. Supreme Court to defend public prayer before football games.

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49. See *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 810 (5th Cir. 1999), *aff’d*, 530 U.S. 290 (2000).

50. See Brief for Respondents at 2, *Santa Fe*, 530 U.S. 290 (No. 99-62) (citing Transcript of Hearing at 98-99, 197, 208-09 (July 25, 1996)).

51. See *id.* (citing Transcript of Hearing, *supra* note 50, at 82-83).

52. *Santa Fe*, 530 U.S. at 294 & n.1.

53. Brief for Respondents, *supra* note 50, at 2 (quoting an Order of the district court, docket entry 39 (July 22, 1996)).

That was also the year that Santa Fe's lone Jewish student, Phillip Nevelow, alleged that classmates had bullied him and threatened to hang him. School authorities called his complaints overblown; Nevelow's parents contended the mistreatment flowed naturally from the current of bigotry coursing through the debate and litigation over public prayer.

Last week Santa Fe erupted again. Four boys from 13 to 16 were charged with painting swastikas and burning a cross at the house of a black woman, Margaret Lewis, and her two grandchildren.<sup>54</sup>

A similar column in the *Fort Worth Star-Telegram* mentioned the Jewish student, the anti-Mormon tirade, and two other incidents. In 2000, an African-American man who asked how to file a complaint was arrested for walking on the wrong side of the street.<sup>55</sup> In 1997, following a junior high basketball game, the visiting team's African-American players were subjected to racial slurs, and a school police officer from the visiting team was beaten up.<sup>56</sup> Of course, there were residents of Santa Fe who resisted such incidents and tried to help the victims, but they were not able to change the pattern of continued intolerance.<sup>57</sup>

The family of the Jewish student mentioned in both stories ultimately chose to vote with their feet. Their son was repeatedly bullied, harassed with anti-Semitic jibes and epithets, threatened with hanging, and physically assaulted.<sup>58</sup> The school variously claimed that it did not know about the problems, that it had already addressed them, that the reason the victim got an "F" on an essay describing these problems was that he had not followed the rules for the assignment, and that the victim initiated at least one of the incidents.<sup>59</sup> Four students were eventually arrested on charges of assault or terrorist

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54. Editorial, *What's with Santa Fe? This Small Town in Galveston County Is Sullied by Another Outburst of Hate*, HOUS. CHRON., May 1, 2005, at 2.

55. See Bud Kennedy, *Santa Fe Yet to Display Standard for Tolerance*, FORT WORTH STAR-TELEGRAM, June 3, 2000, at Metro 1.

56. See *id.*

57. See Editorial, *supra* note 54, at 2.

58. See Deborah Tedford, *Santa Fe ISD Officials Say Jewish Boy Never Told of Threats*, HOUS. CHRON., Oct. 26, 2000, at A29; Kevin Moran, *Teen Charged in Attack on Jewish Boy*, HOUS. CHRON., July 4, 2000, at A27.

59. Tedford, *supra* note 58.

threats,<sup>60</sup> and the school eventually settled with the Nevelows for \$325,000.<sup>61</sup> The family gave up on hoping for a solution and moved to Galveston.<sup>62</sup> All these problems in one town may be an extreme example and not entirely representative, but the differences are matters of degree. Each of these problems is connected to a worldview that tells people to conform or leave. Vote with your feet.

Some towns routinely impose religion on others at public events. Other towns treat religion like pornography, not to be seen in public. At the other end of the political and theological spectrum from *Santa Fe* is a case dragging on in New York City, *Bronx Household of Faith v. New York City Board of Education*.<sup>63</sup> That litigation is now in its fifteenth year. It has been to the Second Circuit four times;<sup>64</sup> the parties are again awaiting an oral argument date as I write this in 2008.<sup>65</sup> There have been three Supreme Court decisions on point—one of them unanimous, another eight to one—all going against the school board's position.<sup>66</sup> The school board is still litigating, claiming that those Supreme Court cases are somehow all distinguishable.<sup>67</sup>

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60. See Bud Kennedy, *Prayers Do Young Jew Little Good*, FORT WORTH STAR-TELEGRAM, June 20, 2000, at Metro 1 (three charged with terroristic threats); Moran, *supra* note 58 (one charged with assault).

61. See Kevin Moran, *Papers Show Santa Fe ISD Paid \$325,000 to Settle Suit*, HOUS. CHRON., Mar. 22, 2002, at A34.

62. I know this from discussions at the time with the family's attorney, Anthony Griffin of Galveston. It can also be inferred from press coverage. Compare *id.* ("The family lives in Galveston."), with Kennedy, *supra* note 60 (reporting that victim's parents had lived in Santa Fe for fifteen years). It would appear that Jewish adults and Jewish small children could safely live in Santa Fe, but that Jewish middle school and high school students could not. See *id.*

63. 492 F.3d 89, 92–95 (2d Cir. 2007) (reviewing the background of the conflict, which began in 1994).

64. See *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89 (2d Cir. 2007); *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342 (2d Cir. 2003); *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 127 F.3d 207 (2d Cir. 1997). The fourth is a pending appeal in *Bronx Household of Faith v. Board of Education*, No. 07-5291 (2d Cir.).

65. E-mail from Jordan Lorence, Counsel for Plaintiff, to Douglas Laycock (July 29, 2008) (on file with Author).

66. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (5-4 when elementary school children are at issue); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (unanimous when adults on the weekend are at issue); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (8-1 when high school students are at issue). Justice Breyer concurred in part in *Good News Club*, making it 6-3 for reversal, but he held out the possibility that the school might yet win on remand. See *Good News Club*, 533 U.S. at 128–30 (Breyer, J., concurring in part). So for pur-

The issue in *Bronx Household* is that the school board rents its facilities to community groups on weekends.<sup>68</sup> The Bronx Household of Faith is a church group that wants to rent one of these school facilities over the weekend, but the school has refused the group's request because the school prohibits religious worship anywhere on its premises, even among consenting adults on weekends.<sup>69</sup> Keeping religious speech out of school buildings is a community value to which the New York Board of Education is very committed, but that value is fundamentally at odds with more basic American values. The school board is discriminating on the basis of something that is a core constitutional right. It is suppressing freedom of speech: it is making viewpoint distinctions within speech.<sup>70</sup> The Bronx Household of Faith and its members should not have to move to Alabama or Texas to find a place where they can exercise their right to speak about religion in a public forum. They should not have to vote with their feet. I am glad we have a constitutional right to free speech, and sooner or later, it will be honored even in New York.

The examples I know best involve religious liberty. Of course, there are many other civil liberties examples on both the Left and the Right. Americans tend to applaud the protection of rights they value for themselves and to see judicial interference in the protection of rights they do not especially value or would prefer to violate. The people who think judges violated community values with respect to football prayer and that there should be *less* judicial review of government-sponsored religious ceremonies probably overlap substantially with the people who think that *Kelo v. City of New London*<sup>71</sup> ignored community values with respect to property ownership and that there

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poses of assessing the school's argument in *Bronx Household of Faith*, *Good News Club* is better characterized as a 5-4 decision.

67. See *Bronx Household*, 492 F.3d at 92-95 (summarizing arguments of each side after *Good News Club*).

68. See *id.* at 92.

69. See *id.* at 94 (quoting the most recent revision of the school's rule restricting religious speech).

70. See *Good News Club*, 533 U.S. at 107-12 (holding, and reviewing other cases holding, that discrimination against religious speech is impermissible viewpoint discrimination).

71. 545 U.S. 469 (2005) (holding that taking of private property is for public use even when city consolidates parcels and transfers them to private developer pursuant to a redevelopment plan).



should be *more* judicial review of how some communities exercise eminent domain power.<sup>72</sup>

The recent Second Amendment case<sup>73</sup> is another example in which both individual and community values differ sharply. At least one town in America requires all heads of households to own a gun;<sup>74</sup> another wants to ban all handguns and require any other guns to be rendered unusable while in the city.<sup>75</sup> There is a certain appeal to saying that each town should be able to decide for itself, but the cost of such local autonomy would be that some jurisdictions would reach extreme solutions and that some Americans—those who feel strongly about their right to own a gun (or about their presumed right to refrain from owning one)—would effectively be barred from living in those jurisdictions. They could vote with their feet, but they could not exercise the right of American citizens to live anywhere in the country while also exercising their claimed right to decide for themselves whether to own a gun.

The rhetoric and reality of voting with your feet also arise with respect to taxes and regulation, contexts that are important in their own right but that raise a different set of issues beyond the scope of this short Essay. Economic and regulatory treatment is generally in the realm of legitimate policy disagreements rather than arguable constitutional rights.

Competing for business with generally applicable choices about tax and regulation is an inherent feature of federalism or national sovereignty or any other system with separate jurisdic-

72. Compare Douglas W. Kmiec, *The Human Nature of Freedom and Identity—We Hold More Than Random Thoughts*, 29 HARV. J.L. & PUB. POL'Y 33, 45 (2005) (condemning “the unfortunate *Kelo* result” for “disregard[ing] the original meaning of the Public Use Clause[,] . . . ignor[ing] the words of the Fifth Amendment[,] and approv[ing] a regrettable result in favor of faction”) with Douglas W. Kmiec, *Young Mr. Rehnquist’s Theory of Moral Rights—Mostly Observed*, 58 STAN. L. REV. 1827, 1865–66 (2006) (praising Chief Justice Rehnquist’s dissent in *Santa Fe* as seeking “to vindicate freedom of worship and speech, two negative liberties of profound importance to individuals that impose minimal burdens on the public”).

73. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (holding that the Second Amendment guarantees, against the United States and its instrumentalities, an individual right to own firearms traditionally owned by individuals, subject to traditional forms of regulation, and more specifically, that District of Columbia’s ban on possession of handguns is unconstitutional).

74. See Doug Payne, *Police Chief: Kennesaw on Right Path with Gun Law*, ATLANTA J.-CONST., July 13, 1995, at J1; *Follow-Up on the News: Where Residents Must Own a Gun*, N.Y. TIMES, July 31, 1988, at 138.

75. See *Heller*, 128 S. Ct. at 2788 (summarizing the gun laws of Washington, D.C.).

tions. Forcing people to vote with their feet in this context can raise issues of harsh treatment and injustice at the extremes, but in this context, the most important issues involve pressures on government more than pressures on individuals. Voting with your feet in response to economic regulation certainly produces rent seeking and probably has reverse redistributive consequences. Larger businesses are probably more able to move than small businesses—more able to afford the capital costs of the move and less dependent on local name recognition—and larger businesses are much more able to extract government subsidies in exchange for moving to a new location or in exchange for threatening to move and then deciding to stay put. Competition to attract businesses becomes a source of steady pressure against regulation and against taxes and for individualized subsidies.

Reducing regulation and taxes may be a good idea or a bad idea, depending on which side of the political spectrum you are on and, less ideologically, depending on how far the political pendulum has swung in one direction or the other. But subsidies to rent-seeking individual businesses are generally a bad thing no matter what your politics. One negative effect of competition between jurisdictions is to empower businesses to extort such subsidies. Congress could presumably ban such individualized subsidies pursuant to its power to regulate interstate commerce.<sup>76</sup> But such legislation is not on anyone's political radar and appears to be completely impossible politically. These applications of voting with your feet are important in their own right, but they are distinct from the judicial review issues that are the focus here.

### CONCLUSION

Judicially enforceable individual rights serve a purpose. I know that hardly anyone in the Federalist Society really disagrees with that basic proposition, but the vote-with-your-feet rhetoric tends to imply disagreement with it. The question is not whether communities should always win and dissenters should vote with their feet and leave for friendlier communities. The question is what should be the scope of each of our constitutional rights.

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76. See, e.g., *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 555–57 (1984) (holding that state governmental functions are not immune from federal regulation of interstate commerce).

# NORM CHANGE OR JUDICIAL DECREE? THE COURTS, THE PUBLIC, AND WELFARE REFORM

AMY L. WAX\*

The topic for this panel—the relationship between community values and judicial decision making—calls to mind Supreme Court cases on high-profile issues that have provoked strong criticism from the public. Decisions regarding church-state relations,<sup>1</sup> abortion,<sup>2</sup> free speech,<sup>3</sup> government regulation of property rights,<sup>4</sup> and affirmative action<sup>5</sup> are recent examples. This Essay addresses another example of tension between judicial decrees and popular attitudes. From the 1960s through the 1980s, key Supreme Court decisions addressing the administration of public welfare programs were at odds with the dominant values of much of the nation. For a number of reasons, that conflict has now largely been resolved. Therein lies a revealing story.

In 1996, after decades of experimental and pilot programs, Congress enacted a massive overhaul of the federal poverty-relief scheme. As part of a comprehensive welfare reform package sponsored by the Clinton Administration, the core federal cash-aid program, Aid for Families with Dependent Children (AFDC), was repealed and replaced with a work-based assistance program, Temporary Assistance for Needy Families

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\* Robert Mundheim Professor of Law, University of Pennsylvania Law School.

1. *See, e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 5 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 102 (2001).

2. *See, e.g.*, *Gonzales v. Carhart*, 127 S. Ct. 1610, 1639 (2007); *Stenberg v. Carhart*, 530 U.S. 914, 922 (2000); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992); *Roe v. Wade*, 410 U.S. 113, 154 (1973).

3. *See, e.g.*, *Davis v. FEC*, 128 S. Ct. 2759, 2775 (2008); *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 70 (2006).

4. *See, e.g.*, *Kelo v. City of New London*, 545 U.S. 469, 489–90 (2005).

5. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2746 (2007); *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003).

(TANF).<sup>6</sup> These changes coincided with a significant decline in the role of the courts in shaping policy in the welfare area. Although the federal courts considered a range of important challenges to laws and regulations governing poverty relief and economic redistribution between the 1960s and the mid-1980s, they have been relatively uninvolved since that period and have not played a major role in sorting out issues arising from the welfare reform legislation. Moreover, despite widespread attention to growing economic and social inequality,<sup>7</sup> there is no evidence of a significant push to reenlist courts in efforts to address these problems. A visit to informational and advocacy websites on poverty issues bears out this abandonment of judicial avenues.<sup>8</sup> All told, there is little reason to believe that courts will significantly shape the law and policy of poor relief in the near future.

This picture represents a significant change. In the 1960s and 1970s, welfare-rights advocates were eager to use the courts to advance their agenda. Their main priorities at that time included establishing economic rights and invalidating restrictive conditions on entitlement to welfare benefits.<sup>9</sup> Poverty law courses began to appear in law school curricula around the country, and instructors became handmaidens of the activist welfare project.<sup>10</sup> The goal was to teach students how to litigate on behalf of the poor by arguing for expanded access to public assistance. On the theory that existing benefit conditions enshrined the race and class prejudices of a benighted majority, liberalizing

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6. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 8 & 42 U.S.C.).

7. See, e.g., Michael Kazin & Julian E. Zelizer, *A New Social Contract*, WASH. POST, June 22, 2008, at B7; Alexander Stille, *Grounded by an Income Gap*, N.Y. TIMES, Dec. 15, 2001, at A17. See generally ARLOC SHERMAN & AVIVA ARON-DINE, CTR. ON BUDGET & POLICY PRIORITIES, NEW CBO DATA SHOW INCOME INEQUALITY CONTINUES TO WIDEN: AFTER-TAX-INCOME FOR TOP 1 PERCENT ROSE BY \$146,000 IN 2004 (2007), <http://www.cbpp.org/1-23-07inc.htm>; Amy L. Wax, *Engines of Inequality: Class, Race, and Family Structure*, 41 FAM. L.Q. 567, 588 (2007).

8. See, e.g., Public Agenda Issue Guide: Poverty and Welfare, <http://www.publicagenda.org/citizen/issueguides/poverty-and-welfare/sources-and-resources> (last visited Aug. 10, 2008).

9. See R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS 83-84 (1994).

10. See Amy L. Wax, *Musical Chairs and Tall Buildings: Teaching Poverty Law in the 21st Century*, 34 FORDHAM URB. L.J. 1363, 1364 (2007).

poverty relief was regarded as an important rights-expanding project in keeping with a broader civil rights agenda.<sup>11</sup> As discussed more fully below, the results were decidedly mixed, with activists scoring some key victories while failing to achieve their broader goal of securely establishing positive economic rights.

Law students today are only dimly aware of the landmark decisions in the welfare area that received widespread attention at the time they were decided. Because issues surrounding public assistance do not currently preoccupy the courts, these earlier decisions are viewed as historical relics with little ongoing significance. That view is overly simplistic. Although the controversies surrounding the Supreme Court's welfare-rights decisions have largely abated, the trajectory of the courts' involvement in these issues sheds important light on the interplay between community norms and judicial decrees.

The courts' declining role in shaping the direction of social welfare law and policy is best understood as the culmination of a decades-long tug-of-war between community values—as expressed through legislative restrictions on poor relief programs—and the Supreme Court's vision of the proper ambit for those values in setting poor relief policies. The role of the courts has now abated because of two signal developments in the social and legal landscape. First, recent revisions in the basic New Deal scheme for federal poverty programs have largely corrected one source of popular discontent in the administration of welfare programs—the unfairness and perverse incentives flowing from the failure to require recipients to work. To the extent that these revisions have been challenged at all, the courts have largely upheld the imposition of strict work requirements. Second, sexual mores have shifted dramatically. They are now far more in sync with the decades-old (and originally unpopular) decisions invalidating benefits restrictions tied to unconventional sexual conduct and nontraditional families. Although the government has not given up on trying to support—and revive—the traditional nuclear family, it has largely abandoned the direct use of welfare law and policy to regulate, punish, or reward private reproductive behavior.

Recounting this story requires some historical background. The New Deal ushered in an important sea change in our coun-

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11. *See id.*

try's approach toward the poor. Until the 1930s, poverty relief was principally a local charge.<sup>12</sup> Modest antipoverty programs, such as aid for widowed mothers, were funded and administered largely at the state or municipal level.<sup>13</sup> As part of a comprehensive series of New Deal reforms that included both social insurance and direct subsidies, Congress established the Aid to Dependent Children Program, which eventually became Aid for Families with Dependent Children (AFDC). Congress designed the program, which the states administered, to support families with children left destitute by the death or abandonment of a parent (usually the father). The stated goal was to relieve mothers in those families of the need to work, thus leaving them free to care for their children.<sup>14</sup>

Although AFDC was initially a small and uncontroversial program, its popularity declined as the number of recipients grew and the beneficiary population changed. At first, recipients were mostly widows and divorcees.<sup>15</sup> After 1960, a burgeoning population of never-married single mothers and their out-of-wedlock children replaced those earlier recipients.<sup>16</sup> Although nonwhites rarely received benefits during the first decades of the program, the number of black single mothers on welfare expanded and became a significant part of the welfare population.<sup>17</sup> Community outreach programs spearheaded by welfare-rights advocates helped swell the rolls. These developments engendered concerns that AFDC encouraged dependency, undermined the traditional family, and fueled the growth of an

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12. For a discussion on the transition from state provision of welfare to federal provision, see Leo E. Strine, Jr., *Human Freedom and Two Friedmen: Musings on the Implications of Globalization for the Effective Regulation of Corporate Behaviour*, 58 U. TORONTO L.J. 241, 247–48 (2008).

13. See MELNICK, *supra* note 9, at 65; FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 46–48 (2d ed. 1993).

14. See JEFF GROGER & LYNN A. KAROLY, *WELFARE REFORM: EFFECTS OF A DECADE OF CHANGE* 10–11 (2005).

15. See Susan W. Blank & Barbara B. Blum, *A Brief History of Work Expectations for Welfare Mothers*, 7 THE FUTURE OF CHILDREN 28, 29–30 (1997); June Carbone, *Age Matters: Class, Family Formation, and Inequality*, 48 SANTA CLARA L. REV. 901, 936–37 (2008).

16. For a more statistically detailed discussion of this transition, see Carbone, *supra* note 15, at 936–37.

17. See, e.g., A. Mechele Dickerson, *Bankruptcy Reform: Does the End Justify the Means?*, 75 AM. BANKR. L.J. 243, 248 (2001).

urban, black, underclass culture.<sup>18</sup> Dissatisfaction with a growing, idle welfare population became a salient political issue, fueling the rise of the Republican Party in the 1970s and beyond.<sup>19</sup>

Throughout this period, the AFDC program was intermittently revised to introduce limited training and work requirements, but insufficient funding and the absence of political will prevented these innovations from being implemented effectively.<sup>20</sup> For most single mothers with children, especially in urban areas, welfare benefits were easily obtained and appeared to continue indefinitely. For more and more recipients, welfare did indeed become "a way of life."<sup>21</sup>

The groundswell of popular concern grew slowly from the 1970s through the 1990s, finally culminating in decisive political action. The 1996 welfare reform legislation, TANF, introduced three key changes in the federal scheme of poverty relief. First, it significantly expanded states' discretion in doling out benefits, allowing greater ambit for innovative programs, conditions, and restrictions. Second, it imposed substantial work requirements for adults—including single mothers—as a condition of receiving aid. Third, it established a strict five-year limit on benefits for most recipient families.<sup>22</sup>

What role have the courts played in these historical developments? Assessing the courts' contribution to the current state of welfare law and policy requires some understanding of the core principles that govern the politics of poverty relief in this country. As Martin Gilens has documented, public opinion on the optimal design of public welfare programs has long em-

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18. See Theodore H. White, *Summing Up*, N.Y. TIMES, Apr. 25, 1982, § 6 (Magazine), at 32. For a recounting of early 1970s welfare reform efforts, see Robert B. Carleson, *Real welfare reform: More responsibility to the states*, WASH. TIMES, Apr. 18, 2005, at A19.

19. See E.J. DIONNE, JR., WHY AMERICANS HATE POLITICS 93–94 (1991).

20. See Joel F. Handler, *The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457, 489–94 (1988).

21. For a well-known critique of welfare as "a way of life," see Gov. William J. Clinton, I Still Believe in a Place Called Hope, Acceptance Speech at the Democratic National Convention (July 16, 1992), in L.A. TIMES, July 17, 1992, at 10.

22. See Amy L. Wax, *A Reciprocal Welfare Program*, 8 VA. J. SOC. POL'Y & L. 477, 487 (2001). Although TANF made cash relief harder to obtain, it left relatively untouched other aspects of the safety net for poor families. TANF benefits continued to be supplemented by a range of federal programs and transfers, including food stamps, housing subsidies, the Earned Income Tax Credit, and Medicaid.

braced the distinction between the deserving and undeserving poor.<sup>23</sup> These categories roughly track the so-called luck egalitarian divide between those who suffer deprivation through bad luck or forces outside their control and those whose poverty can be traced in large part to their own imprudent choices.<sup>24</sup> Although voters are generally skeptical of government-sponsored handouts, they are willing to help people down on their luck. That is, they support assisting people who are victims of misfortune, but are reluctant to bail out those perceived as behaving irresponsibly. In defining who is irresponsible and who is merely unlucky, voters have consistently embraced something of an ethos of conditional reciprocity for public welfare. They robustly endorse fundamental norms of self-reliance, and believe that able-bodied persons should strive to minimize their economic dependency.<sup>25</sup>

Historically, the distinction between bad luck and bad choices influenced transfer policies in two important ways. First, welfare rules were structured to take account of beneficiaries' behavior—including their sexual conduct—as it affected their economic need and dependency. At the time of AFDC's enactment, sexual relations out of wedlock were viewed with disapproval. The public was well aware that such relationships often produced children and mothers who were destined to become dependent on public assistance. Women who had sexual relations and gave birth to children outside of marriage, without the customary support of the male provider, were viewed as acting irresponsibly. Likewise, men's choices to engage in extramarital liaisons, while failing to marry or to provide support for resulting children, engendered public resentment. During the initial decades after AFDC's enactment, mothers were not expected to work, but men were expected to support their fami-

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23. See MARTIN GILENS, *WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY* 92–93 (1999).

24. See Amy L. Wax, *Something for Nothing: Liberal Justice and Welfare Work Requirements*, 52 EMORY L.J. 1, 20–29 (2003). For more on luck egalitarianism, see Daniel Markovits, *Luck Egalitarianism and Political Solidarity*, 9 THEORETICAL INQUIRIES L. 271 (2008).

25. For a defense of this view, see Amy L. Wax, *Social Welfare, Human Dignity, and the Puzzle of What We Owe Each Other*, 27 HARV. J.L. & PUB. POL'Y 121 (2003) [hereinafter Wax, *Social Welfare*], and Amy L. Wax, *The Political Psychology of Redistribution: Implications for Welfare Reform*, in *WELFARE REFORM AND POLITICAL THEORY* 200–22 (Lawrence M. Mead & Christopher Beem eds., 2005).



lies. This scheme gave rise to concern with men's idleness, failure to engage in gainful employment, and refusal to take on the breadwinner role. In more recent decades, as women entered the labor force in increasing numbers, these concerns were gradually extended to women as well.<sup>26</sup>

The voting majority's embrace of traditional norms of self-sufficiency, family obligation, sexual restraint, and responsible personal conduct contrasted sharply with the agenda of welfare-rights advocates in the 1960s and 1970s. That agenda received support from elements of elite opinion and from legal scholars concerned with poverty. Then, as today, welfare advocates were unrelentingly hostile to the deserving-undeserving distinction, with special animosity reserved for welfare restrictions based on individual sexual conduct and reproductive choices.<sup>27</sup> On this point, activists drew strength from liberal political theorists' contemporaneous attack on the very concept of desert.<sup>28</sup> On this view, individual conduct is not and should not be morally or legally relevant to the provision of public aid—or to desert more generally—at least in matters surrounding economic life.<sup>29</sup> But even if some people deserve their fate, the poor almost always do not. The poor are rarely undeserving, because they are trapped by social and economic conditions. Thus, the notion that society's disadvantaged could and should do more to support themselves is misguided and delusory.<sup>30</sup> As victims of a structurally unjust system, the poor should not be deprived of governmental aid by the imposition of stringent or

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26. See discussion *infra*.

27. See Jonathan L. Hafetz, "A Man's Home Is His Castle?": Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries, 8 WM. & MARY J. WOMEN & L. 175, 221–24 (2002) (discussing the use of sexual norms to distinguish the "deserving" from the "undeserving"); Richard Hardack, *Bad Faith: Race, Religion and the Reformation of Welfare Law*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 539, 616 (2006) (arguing that "deserving poor," for purposes of AFDC, meant in practice "the sexually ascetic, monogamous, frugal, tidy, and white" (citation and internal quotation marks omitted)); see also Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 810–16 (2007) (arguing that the deserving-undeserving distinction is race and class based).

28. But see Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965) (arguing that the concept of desert entitles the poor to public assistance).

29. See Samuel Scheffler, *Justice and Desert in Liberal Theory*, 88 CAL. L. REV. 965, 985–86 (2000).

30. See Amy L. Wax, *The failure of welfare reform*, L.A. TIMES, Oct. 22, 2006, at M3 [hereinafter Wax, *The failure of welfare reform*]. See generally Wax, *supra* note 24.

conduct-related conditions. To the extent that popular attitudes reject this view, they are unsophisticated at best and bigoted at worst.

What role did the courts play in mediating between these contrasting views of the proper scope of public largesse? In the 1960s and 1970s, during the heyday of the welfare-rights movement, the courts regularly ruled on challenges to official attempts to shape benefit eligibility requirements to respect traditional mores of sexual and financial responsibility. Although the Supreme Court was largely sympathetic to these challenges, the landscape is somewhat mixed. In rejecting some conditional benefits restrictions, the Supreme Court issued a few key opinions that placed it distinctly at odds with dominant notions of deservingness. In other cases, however, it upheld restrictions consonant with popular views.

The most controversial cases concerned restrictions placed on eligibility for AFDC benefits. Under the terms of the federal statute governing these benefits, states were to make cash aid available to families with an "absent parent," with no express exclusion for single, unmarried mothers. But the dominant norms of the time made many states reluctant to pay benefits to unmarried mothers cohabiting with men who took no responsibility for them or their children. Not only were the women (and men) involved in such relationships considered undeserving, but eligibility for single mothers under these circumstances was viewed as unfair and corrosive of public morals.<sup>31</sup> Such benefits undermined marriage by "subsidizing" illicit relationships and flouting accepted conventions of family self-sufficiency. Concern was also directed at the potential horizontal inequity between welfare beneficiaries and conventional families, who were ineligible for benefits under the terms of the program. Aid programs without conduct restrictions were seen as putting poor married couples at a disadvantage compared to single mothers.

A number of states responded to these concerns by developing rules designed to deny benefits to cohabiting single moth-

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31. See Jill Duerr Berrick, *From Mother's Duty to Personal Responsibility: The Evolution of AFDC*, 7 HASTINGS WOMEN'S L.J. 257, 260-61 (1996); Amy Mulzer, *The Doorkeeper and the Grand Inquisitor: The Central Role of Verification Procedures in Means-Tested Welfare Programs*, 36 COLUM. HUM. RTS. L. REV. 663, 667-69 (2005).

ers. A 1968 case, *King v. Smith*,<sup>32</sup> challenged Alabama's use of its administrative discretion under the AFDC program to exclude families consisting of unmarried mothers who were living with or maintaining sexual relationships with men. Under the Alabama rule, any man engaged in a relationship with an eligible mother was deemed a "substitute father" under the statute, thus defeating the statutory requirement of an "absent parent."<sup>33</sup> Alabama maintained that the "substitute father" interpretation was necessary to discourage illicit relationships and illegitimate births and to put couples involved in informal sexual relationships on a par with married couple families.<sup>34</sup>

Likewise, in *Lewis v. Martin*,<sup>35</sup> California sought to exclude unmarried cohabiting women from the AFDC program by deeming available, for purposes of calculating benefits eligibility, the earnings of any unrelated adult male present in a single mother's home. This regulation, which designated the single woman's male partner a "man assuming the role of a spouse" or "MARS" under the pertinent regulations, effectively assigned him financial responsibility for the woman's family unit for purposes of welfare entitlement.<sup>36</sup> Again, this regulation was intended to discourage illicit conduct and out-of-wedlock births and to establish horizontal equity with poor married couple families who were ineligible to receive benefits under AFDC.

In both cases, the restrictions imposed by the states meant that some children of cohabiting or sexually active single mothers were deprived of benefits regardless of whether the mothers' male partners were actually their fathers, actually contributed to their support, or were legally required to do so. In both cases, the Supreme Court struck down the state regulations. In *King v. Smith*, the Court ruled that the Alabama substitute-father rule was inconsistent with the federal statute creating the AFDC program.<sup>37</sup> Relying on what it identified as the core purpose of the AFDC statute—to support needy children—the Court noted that the mothers' sexual conduct had no bearing on the

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32. 392 U.S. 309 (1968).

33. For a discussion on "substitute parent" state laws, see WINIFRED BELL, AID TO DEPENDENT CHILDREN 76-92 (1965).

34. See *King*, 392 U.S. at 318.

35. 397 U.S. 552 (1970).

36. See *id.* at 554.

37. *King*, 392 U.S. at 326-27.

existence of the children's need.<sup>38</sup> Therefore, conditioning benefits on the mothers' behavior was inconsistent with the statute's objective. Enforcing public morality or satisfying the state's sense of fairness to intact families and married fathers could not be allowed to interfere with this goal.<sup>39</sup> In the same vein, the Court in *Lewis v. Martin* ruled that California was not allowed to assume that a man's income was available to support a mother and her children unless state law obligated that man to provide support.<sup>40</sup> In California, a male who was neither married to a woman nor the legally established father of her children had no such obligation. Therefore, the income of a man who did not meet these conditions could not be assumed available under the federal statute for purposes of determining eligibility for aid.<sup>41</sup>

In a similar case decided shortly after, *United States Department of Agriculture v. Moreno*,<sup>42</sup> the Supreme Court considered a challenge to Congress's decision to amend federal law to disqualify households consisting of unrelated individuals from eligibility for food stamps. Although the legislative record suggested that this provision was motivated by Congress's disapproval of and reluctance to subsidize "hippie communes," the government did not rely on this rationale in defending the provision at issue.<sup>43</sup> Rather, the government argued that the measure was necessary to minimize fraudulent claims for food stamps.<sup>44</sup> Striking down the amendment as constitutionally impermissible, the Court in *Moreno* characterized the restriction on household composition as irrational and arbitrary in light of the core purpose of the food stamp program, which was to ensure an adequate supply of food for individuals unable to af-

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38. See *id.* at 320.

39. See *id.* at 325 ("In sum, Congress has determined that immorality and illegitimacy should be dealt with through rehabilitative measures rather than measures that punish dependent children, and that protection of such children is the paramount goal of AFDC.").

40. See *Lewis*, 397 U.S. at 556-57 ("[T]he regulations explicitly negate the idea that in determining a child's needs, a stepfather . . . or a[n] [adult male person assuming the role of spouse to the mother although not legally married to her] may be presumed to be providing support.").

41. See *id.* at 559-60.

42. 413 U.S. 528 (1973).

43. See *id.* at 537-38.

44. See *id.* at 535.

ford proper nutrition.<sup>45</sup> Disregarding Congress's stated concern with the unconventional sexual arrangements in some households, the Court characterized Congress's goal of excluding hippie communes as motivated by pure animus or the bare desire to harm an unpopular group.<sup>46</sup> The Court ruled that this desire did not advance a valid public purpose, especially in light of the food stamp program's avowed aim of feeding the hungry.<sup>47</sup>

These three cases stand in contrast to others, decided within the same period, in which the Supreme Court upheld conditions on benefits designed to reinforce—or at least to avoid undermining—widely held expectations of self-sufficiency and sexual conduct. In *Dandridge v. Williams*,<sup>48</sup> for example, welfare recipients challenged Maryland's decision not to pay higher AFDC benefits to families with more than a designated number of children. The State sought to justify the benefits ceiling as a means to maximize the number of families supported with limited resources. The State also pointed to the goals of fairness to non-beneficiary working families, who did not automatically get a raise upon the birth of each child. It also sought to encourage employment by ensuring that single-mother families on welfare did not possess more resources than low-income working families. The Supreme Court upheld the Maryland benefits schedule, accepting the State's justifications for the cap as consistent with the objectives of the AFDC program and grounded in the realities of family life.<sup>49</sup>

Similarly, the Supreme Court in *Califano v. Boles*,<sup>50</sup> upheld a regulation under the Social Security program that distinguished between married and unmarried mothers of insured wage earners' children. Under the terms of the Social Security

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45. *See id.* at 538.

46. *See id.* at 534.

47. *See id.* at 535–36.

48. 397 U.S. 471 (1970).

49. The Court acknowledged Maryland's "legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor." It further explained that "[b]y combining a limit on the recipient's grant with permission to retain money earned, without reduction in the amount of the grant, Maryland provides an incentive to seek gainful employment. And by keying the maximum family AFDC grants to the minimum wage a steadily employed head of a household receives, the State maintains some semblance of an equitable balance between families on welfare and those supported by an employed breadwinner." *Id.* at 486.

50. 443 U.S. 282 (1979).

Act, dependent relatives of deceased qualifying wage earners are entitled to survivors' benefits, including a special allotment for the widowed mothers of workers' minor children. In *Boles*, the Court considered the claim that restricting these so-called "mothers' insurance benefits" to widows and divorced wives, while denying payments to unmarried mothers of the wage earner's biological children, was an unconstitutional violation of the equal protection component of the Fifth Amendment.<sup>51</sup> In rejecting that claim, the Court reasoned that the statutory distinction was based on the reasonable general assumption that a wage earner's widow or former wife was more likely than an unmarried consort to have been dependent on the wage earner during his lifetime and to suffer economic dislocation upon his death.<sup>52</sup> The Court also denied that the rule unlawfully discriminated against children born out of wedlock, noting that those children were entitled to separate benefits under specified conditions.<sup>53</sup> Although relying principally on the validity of legislative generalizations about the economic significance of marriage, the Court's decision in *Boles* had the effect of reinforcing conventional expectations and norms regarding sexual behavior and family. By preserving the priority of marriage over extramarital liaisons through ensuring more favorable treatment to a wage earner's lawfully wedded wife (and her children) than to his girlfriend (and her children), the provision rewarded and encouraged marital relationships.

The rules and restrictions at issue in these cases reflect traditional notions regarding sexuality, family relations, and economic obligation. In each case, public officials responsible for creating and administering public welfare programs were loathe to offer financial support—which could be viewed as a form of public subsidy—for behavior that ran afoul of customary expectations. The rules were also designed to achieve fairness toward those who, to paraphrase President Clinton's more recent formulation, "work hard and play by the rules."<sup>54</sup> On this view, programs to help the poor must be structured to ensure that welfare recipients are no better off than other low-income persons who man-

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51. See *id.* at 295–96.

52. See *id.* at 289.

53. See *id.* at 294–95.

54. The President's Radio Address, 31 WEEKLY COMP. PRES. DOC. 31, 32 (Jan. 7, 1995).

age, by virtue of their own effort and restraint, to avoid dependency. Individuals who are working, getting married, and paying taxes to support others deserve more favorable treatment than those on the public dole.<sup>55</sup>

Thus, what seemed to incense the architects of the “substitute father” and “man in the house” rules at issue in cases like *King v. Smith* and *Lewis v. Martin* was the prospect of single mothers on welfare enjoying no-strings-attached sexual relationships with men who bore no responsibility for the women’s children and were heedless of the fate of any children they might conceive. Meanwhile, living right next door were hard-working married couples with no greater advantages or skills who, nonetheless, were not receiving aid. The decision of those neighbors to marry, and the steps the men in those families took to support their wives and children, rendered most of these families ineligible for welfare benefits under the terms of AFDC, which was designed primarily to assist children with “absent parents.” In formulating the restrictions at issue, the states were clearly acknowledging the deserving neighbors of welfare recipients and seeking to mute or eliminate the perversity of denying aid to traditional families while supplying cash to people who disregarded conventional moral expectations and strictures. Not only were such efforts viewed as serving principles of fairness, but they were also seen as reducing the temptation to fall into dependency.

In turning back the effort to minimize the perversity of AFDC, the Court’s primary motive seems to have been avoiding harm to poor dependent children; that is, it tried to refrain from visiting the sins of the parents upon the sons. The Supreme Court had relied on this principle in a series of contemporaneous decisions repudiating longstanding state rules that put illegitimate children at a disadvantage relative to children born in wedlock.<sup>56</sup> Applying this principle in the Court’s decisions on welfare, however, produced perverse results. By enshrining

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55. The principle that best captures this idea is that of avoiding perversity in the design of public welfare programs. See ALBERT O. HIRSCHMAN, *THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY* 27–42 (1991) (suggesting that conservative opposition to welfare programs is often grounded in a concern with such programs’ perverse effects, including creating undesirable incentives and rewarding antisocial behavior).

56. See, e.g., *Levy v. Louisiana*, 391 U.S. 68, 70–72 (1968). In the welfare context, see *N.J. Welfare Rights Org. v. Cahill*, 411 U.S. 619, 621 (1973).

programmatic indifference to conventions of responsible conduct, the rulings undermined states' efforts to preserve equity in the treatment of welfare recipients and working families.

In the wake of these decisions, Congress and the States got the message: Heavy-handed attempts to use conditions on public benefits to enforce dominant norms surrounding family life, sexuality, and economic dependency were off-limits. The States were now constrained in their attempts to incorporate conduct-based rules reflecting popular conceptions of deserving and undeserving behavior. After *King v. Smith*, *Lewis v. Martin*, and *United States Department of Agriculture v. Moreno*, political actors at the state and federal level were forced to back away from official efforts to "legislate morality" through conditions on public welfare.<sup>57</sup>

The fallout from the Court's decisions, however, was not lost on the voters. The abandonment of the twin goals of non-perversity, which were to preserve the favored position for those who respected conventional mores and to eliminate incentives for bad behavior, was politically ill-timed. Taxpayers resented the liberalization of welfare disbursements, and their ire was fueled by simultaneous explosions in crime, welfare dependency, and extramarital childbearing.<sup>58</sup> These developments had important political consequences. The growing unpopularity of the AFDC program worked to the advantage of the Republican Party and contributed to the success of Republican Presidential candidates Richard Nixon and Ronald Reagan, who made taming the excesses of the welfare system a priority.<sup>59</sup> The backlash was heard in Bill Clinton's promise to "end welfare as we know it," which helped get him elected and produced the significant reforms enacted during his Administration.<sup>60</sup>

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57. But see J.L. Mashaw, *Welfare Reform and Local Administration of Aid to Families with Dependent Children in Virginia*, 57 VA. L. REV. 818 (1971) (documenting continued informal efforts to distinguish between deserving and undeserving recipients of AFDC, and to maintain equity between working and welfare families, by administrators of welfare programs in various counties in Virginia).

58. See Susan Chira, *War Over Role of American Fathers*, N.Y. TIMES, June 19, 1994, at A22; Steven A. Holmes, *Out-of-Wedlock Births Up Since '83, Report Indicates*, N.Y. TIMES, July 20, 1994, at A1.

59. See ALONZO L. HAMBY, *LIBERALISM AND ITS CHALLENGERS: FROM F.D.R. TO BUSH* 319-29, 359 (2d ed. 1992).

60. See Francis X. Clines, *Clinton Signs Bill Cutting Welfare; States in New Role*, N.Y. TIMES, Aug. 23, 1996, at A1.



Nonetheless, the Court's influence on the trajectory of welfare law and policy and on the politics surrounding welfare reform should not be overstated. The pro-welfare decisions detailed above, although receiving widespread attention and undeniably shaping the course of poor relief, are only part of the story. Other developments, both in the courts and in society as a whole, have influenced the evolution of government benefits programs and attitudes towards the disadvantaged more generally. First, as already discussed, the Supreme Court's antipathy towards state-initiated measures designed to temper the perverse incentives and morally unconventional features of welfare programs began to ease. The Court in *Dandridge v. Williams* allowed the state to cap benefits in deference to conventional concerns about the unfairness of escalated payments to welfare recipients that were unavailable to working families. Similarly, the Court in *Califano v. Boles* refused to require the Social Security program to put a man's mistress on a par with his wife. By effectively deferring to prevailing norms, these outcomes helped temper political discontent.

Second, even during the heyday of welfare rights, the courts did not go nearly as far as they could have. Nor did they embrace the core agenda of welfare activists. Judges consistently refused to recognize a fundamental right to economic support and repeatedly asserted that the legislative decision to grant government largesse is a discretionary one.<sup>61</sup> In *San Antonio Independent School District v. Rodriguez*,<sup>62</sup> for example, the Supreme Court decisively turned back an attempt to declare the poor a constitutionally suspect class, which would have triggered strict scrutiny for legislative distinctions based on economic status.<sup>63</sup> The Court's refusal to recognize positive rights to economic support, or to view the poor as a special protected class, preserved some degree of leeway for Congress and the States to structure benefits to achieve desirable social goals.

In the wake of these rulings, the lower courts have selectively permitted attempts to tailor aid programs to create work incen-

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61. For a discussion and historical overview, see CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 149–71 (2004).

62. 411 U.S. 1, 6 (1973).

63. *See id.* (reversing a lower court's ruling that the Texas school finance system was unconstitutional).

tives, preserve fiscal integrity, shore up intact families, encourage law-abiding behavior, and serve other popular goals. Under TANF, for example, the courts have recently upheld restrictions on benefits based on past conduct, criminality, and immigration status. These restrictions include provisions barring persons convicted of certain drug-related felonies from receiving aid under the federal food stamp or TANF programs.<sup>64</sup> Courts have also allowed states to cap the amount of welfare payments to single mothers who continue to bear children out of wedlock.<sup>65</sup> Finally, judges have given Congress, the States, and welfare agencies broad leeway to structure programs to advance the core goal of encouraging work. Few legal challenges to work requirements under TANF have been undertaken, and none of importance has succeeded.<sup>66</sup>

There is no question that the Supreme Court's refusal to allow states and administrators to "legislate morality" seriously restricted the political options for dealing with what was perceived in some quarters as the socially destructive excesses of poverty relief programs. Nonetheless, this account of the relationship between the courts and the community on matters related to public welfare is seriously incomplete. This is because the morality that voters—and their representatives—are interested in legislating has evolved radically over time. When the most important welfare cases were decided, most people embraced fairly conservative values on sexuality, family structure, and dependency. When poverty relief and social insurance programs were forged in mid-century, most mothers were not in the workforce.<sup>67</sup> Women were, however, expected to control their sexuality in ways that would minimize their own and

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64. See 21 U.S.C. § 862(a), (d); *Turner v. Glickman*, 207 F.3d 419 (7th Cir. 2000) (finding Section 862(a) to be "rationally related to legitimate government interests in deterring drug use and reducing welfare fraud").

65. See, e.g., *C.K. v. Shalala*, 883 F. Supp. 991, 997 (D.N.J. 1995), *aff'd sub nom.*, *C.K. v. N.J. Dep't of Health & Human Servs.*, 92 F.3d 171, 195 (3d Cir. 1996).

66. For a review of some of the issues involved in work requirements imposed on recipients of benefits under TANF, see Matthew Diller, *Working Without a Job: The Social Messages of the New Workfare*, 9 STAN. L. & POL'Y REV. 19, 23–25 (1998), reprinted in *FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER* 151, 152–54 (Nancy E. Dowd & Michelle S. Jacobs eds., 2003).

67. See Martin H. Malin, *Unemployment Compensation in a Time of Increasing Work-Family Conflicts*, 29 U. MICH. J.L. REFORM 131, 133 (1995–96).

their children's dependency.<sup>68</sup> Specifically, they were expected to avoid conduct that posed the risk of their becoming economically dependent single mothers. Although male sexuality was not so rigidly regulated, men's behavior was also subject to strict social norms. Fathering children out of wedlock, or abandoning mothers and children, elicited extreme disapproval.

The 1960s sexual revolution and the rise of feminism fueled a softening in these attitudes and a shift in expectations regarding work, sexuality, and family structure. These norm changes have decisively influenced public views on welfare and have shaped the course of welfare reform. The critical development relevant to this Essay is that the liberationist values of the 1960s took hold in the mainstream. In the decades since the 1960s, unconventional families—including single-parent families—have become more prevalent and socially acceptable, and extramarital sexual activity is now commonplace.<sup>69</sup> Persons deviating from conventional norms are no longer uniformly viewed as undeserving of public assistance. In addition, a central tenet of the sexual revolution has been a reluctance to judge others' choices in areas related to sexuality and family structure. This shift in mainstream morality has undermined the public's willingness to use law and policy to hold people to traditional standards of sexual conduct.

In sum, the past forty years have witnessed a pronounced sea change in the expectations for personal behaviors that bear on dependency. These developments, however, have not caused the public to abandon the distinction between the deserving and undeserving poor. Rather, they have resulted in a reassessment of who falls within those categories. To be sure, there remains uncertainty and ambivalence on issues of sexual conduct relevant to public aid programs. Is having a child out of wedlock a choice for which mothers (and fathers) should be held responsible, or is it something that women do not really control? Is a woman's decision to marry or have a child one on which the government should have no opinion and take no position, or should the government be able to take those decisions into account, especially when spending taxpayers' money? There is

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68. For a discussion of early efforts to prevent recipients from becoming economically dependent on AFDC, see Berrick, *supra* note 31, at 260–62.

69. See Malin, *supra* note 67, at 133 ("The percentage of families headed by single parents more than doubled from 1970, reaching twenty-seven percent in 1993.").

now less unanimity on these questions, with views running the gamut. Nonetheless, the number of people taking a hard line is unquestionably in decline. The upshot is that public opinion is now more closely in sync with the reasoning and outcomes of cases like *King v. Smith*, *Lewis v. Martin*, and *United States Department of Agriculture v. Moreno*.

Attitudes have also decisively changed on the question of work, with the voting public less tolerant of single mothers' economic dependency and more willing than in past decades to hold poor women responsible for their own support. Although some still embrace men's traditional duties to marry and provide for their children, there is less consensus on this point, with the result that much of the burden of supporting extramarital children has effectively been transferred to the mothers themselves.<sup>70</sup> One key impetus for this change is that a growing number of women have joined the workforce.<sup>71</sup> Proponents of work requirements point out that mothers across the board now work. They ask why poor women should be different. Even if many are unable to achieve complete economic independence, they can at least contribute reasonable efforts toward their own support.<sup>72</sup> What Noah Zatz has termed the "class parity" argument—the position that mothers on welfare, like other women in the post-feminist world, should no longer automatically expect to stay home and be supported by others—has gained a decisive influence in the welfare policy world.<sup>73</sup>

The dramatic social developments just discussed prompt a question: If the Supreme Court had never decided cases like *King*, *Lewis*, and *Moreno*, would public assistance programs have taken a different turn? Were these judicial decisions instrumental in shaping the course of public welfare? Alternatively, did they affect the behavioral choices of welfare recipients? Although it is impossible to give a definitive answer, the situation suggests that these decisions were a modest influence.

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70. For a discussion of the increased emphasis on personal responsibility, see Berrick, *supra* note 31, at 272–74.

71. See Malin, *supra* note 67, at 133 (women in the work force increased by 200% between 1950 and 1990).

72. For a more detailed discussion of the issue of self-sufficiency, see Amy L. Wax, *A Reciprocal Welfare Program*, 8 VA. J. SOC. POL'Y & L. 477 (2001); Wax, *Social Welfare*, *supra* note 25; see also Noah Zatz, *Revisiting the Class Parity Analysis of Welfare Work Requirements* (unpublished manuscript, on file with Author).

73. See Zatz, *supra* note 72.

The post-60s juggernaut was rolling, the family was weakening, and the expectation of economic independence for women was growing stronger. The courts did not foment these trends, and they probably could not have stopped them. On this view, the key welfare decisions were probably of minor importance. They were an anticipation of things to come and, at most, hastened the arrival of new social patterns. Broader cultural trends were at least as significant as the decisions themselves.

Indeed, recent changes in sexuality and family structure have been so powerful that efforts to slow or reverse these trends have proven unsuccessful. It has now been twelve years since the enactment of the TANF program. Although the key elements of TANF are stringent work requirements and time limits for receiving cash benefits, the preamble to the welfare reform statute reveals that the drafters were more concerned with the disintegration of the family than with economic dependency.<sup>74</sup> Proponents of reform thought that work requirements, by making welfare less attractive, would create strong incentives for women to marry.<sup>75</sup> The hope was that a surge in marriage among poor women would generate a revival of the traditional family. This hope was never realized. Although reform has been successful in promoting employment among poor single mothers, it has not achieved the stated goal of reversing the decades-long decline in the nuclear family for this group.<sup>76</sup> For the least skilled and educated segment of the population, the family continues to deteriorate apace. Extramarital childbearing is ever more common and marriage increasingly rare, with single-parent families now the norm for low-income women.<sup>77</sup> The failure of welfare reform to slow these trends reveals that family structure changes have now taken on a life of their own. These developments have thus far resisted manipulation through legal or policy instruments.

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74. See Wax, *The failure of welfare reform*, *supra* note 30.

75. See Wax, *supra* note 7, at 588 (explaining that these hopes were unrealized because work support programs continued effectively to subsidize all types of families).

76. See Philip K. Robins, *Economic and Social Security and Substandard Working Conditions: The New World of Welfare*, 56 INDUS. & LAB. REL. REV. 735, 735 (2003) (reviewing *THE NEW WORLD OF WELFARE* (Rebecca Blank & Ron Haskins, eds. 2001)).

77. For a more extensive discussion of this issue, see Wax, *supra* note 7, at 574–75. See also Amy L. Wax, *Too Few Good Men*, 134 POL'Y REV. 69 (2006).

The question of whether AFDC accelerated the decades-long disintegration of the family is highly controversial.<sup>78</sup> We will never really know whether judicially imposed leniency, as mandated in cases like *King v. Smith* and *Lewis v. Martin*, contributed significantly to the nuclear family's decline, or whether poor families would be more cohesive today if those cases had come out differently. But whether or not the courts had much to do with weakening families in recent decades, the evidence suggests that government programs and policies cannot do much to strengthen them.<sup>79</sup> The deterioration of the family continues apace among the less advantaged members of our society. Most likely, nothing short of a cultural revolution—akin to the one this country experienced in the 1960s—will reverse this trend.

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78. See CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950–1980*, at 124–34 (1984).

79. For a more extensive discussion of this issue, see Wax, *supra* note 7, at 587–88.

*The Twenty-Seventh Annual  
National Federalist Society Student Symposium:  
The People & The Courts*

**II.**

**THE MERITS OF SELECTING  
OUR JUDGES**

*ESSAYISTS*

THOMAS R. PHILLIPS  
CLIFFORD W. TAYLOR





# THE MERITS OF MERIT SELECTION

THOMAS R. PHILLIPS\*

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\* Partner, Baker Botts LLP; Chief Justice, Supreme Court of Texas, 1988–2004; B.A., 1971, Baylor University; J.D., 1974, Harvard Law School. Remarks originally delivered to the Twenty-Seventh Annual National Federalist Society Student Symposium, held at the University of Michigan Law School in Ann Arbor, Michigan.

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America has almost as many different ways of selecting state judges as it has states.<sup>1</sup> Over the past two centuries, most states have coalesced around fairly uniform requirements, term lengths, and election dates for executive and legislative officials.<sup>2</sup> But no “consensus” method of choosing judges has developed; indeed, each decade of the last century has brought more disparity between the States, not less.<sup>3</sup>

In many states, the debate rages as fiercely as ever over whether judges should be “appointed” or “elected,” identified by party affiliation or prohibited from any partisan activity, subject to a contested race for re-election or merely an up-or-down “retention” referendum, bound by the same ethical and electoral rules as other public officials, or treated as wholly distinct from the political branches. Even at the federal level, proposals for fixed judicial terms are periodically suggested, espe-

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1. See AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2008), <http://www.ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf> (surveying judicial selection methods).

2. See, e.g., Project Vote Smart, General Information About the Governors' Offices, <http://www.votesmart.org/pdf/govtable.pdf> (last visited Dec. 14, 2008) (demonstrating almost uniform four-year terms for state governors with a majority of states imposing a limit of two consecutive terms). The one modern change to popular-branch elections has been the adoption in recent decades of term limits for legislators and executive officials in many states. Interestingly enough, only in Nevada was there a serious proposal to extend this reform to the judiciary: In the 1996 general election, voters imposed term limits on state and local officials, but by a separate vote declined to impose them on the judiciary. NEV. ASS'N OF COUNTIES, TERM LIMITS AND NEVADA: A BRIEF HISTORY OF TERM LIMITS AND THEIR APPROACHING IMPACT TO GOVERNMENT IN NEVADA 12, available at [http://www.nvnaco.org/pdf\\_files/termlimits.pdf](http://www.nvnaco.org/pdf_files/termlimits.pdf).

3. See *infra* Part I.B. and accompanying text.

cially for the Supreme Court,<sup>4</sup> and popular election of the federal judiciary has been mooted on occasion since Jefferson.<sup>5</sup>

Because an equal and independent judiciary was not merely the great original contribution of American government, but also has been that aspect of our system most frequently emulated around the world,<sup>6</sup> one would think that in America, if anywhere, a consensus on how to choose judges would have emerged. Why has it not?

One possibility is that, although the American people and the American States all support an overarching commitment to an equal and independent judiciary, they disagree on what that commitment really means. No doubt, because of the power judges hold to change public policy through both constitutional and common-law rulings, their actions have periodically provoked marked controversy. In current parlance, this debate centers around whether justice is best served when courts seek a "just" result regardless of literal text or controlling precedent, or when judges merely apply the law as they find it, regardless of their personal preferences or their intuition regarding contemporary popular sentiment. For example, in the final national television debate between John McCain and Barack Obama during the 2008 presidential campaign, Senator McCain pledged to appoint judges with "a history of strict adherence to the Constitution" and "not legislating from the bench," while then-Senator Obama responded that "the most important thing in any judge is their capacity to provide fairness and justice to the American people." By way of example, he explained that "the kind of judge I want" is "that if a woman is out there . . . trying to support her family, and is being treated unfairly, then the court has to stand up, if nobody else will."<sup>7</sup>

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4. See Paul D. Carrington & Roger C. Cramton, *The Supreme Court Renewal Act: A Return to Basic Principles*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 467 (Roger C. Cramton & Paul D. Carrington eds., 2006).

5. See Letter from Thomas Jefferson to Samuel Kercheval (June 12, 1816) ("It has been thought that the people are not competent electors of judges *learned in the law*. But I do not know that this is true . . ."), available at <http://www.teachingamericanhistory.org/library/index.asp?document=459>.

6. See William Rehnquist, U.S. Chief Justice, Remarks at American University's Washington College of Law (Apr. 9, 1996), available at <http://www.law.cornell.edu/supct/justices/rehnau96.htm>.

7. Comm'n on Presidential Debates, Debate Transcript: The Third McCain-Obama Presidential Debate (Oct. 15, 2008), available at <http://www.debates.org/pages/trans2008d.html>.

Indeed, the debate over the proper nature of the judicial process, which might be little more than an arcane professional schism in some countries, is an integral part of public political discourse in America. A 2008 poll showed a remarkable degree of agreement between the respective candidates and their supporters on judicial philosophy. According to a Rasmussen Poll released September 5, 2008, "[w]hile 82% of voters who support McCain believe the justices should rule on what is in the Constitution, just 29% of Barack Obama's supporters agree."<sup>8</sup> Conversely, "[j]ust 11% of McCain supporters say judges should rule based on the judge's sense of fairness, while nearly half (49%) of Obama's supporters agree."<sup>9</sup> Indeed, one of the principal reasons for creating the Federalist Society a generation ago was to elevate and sharpen this debate among the American bar, particularly among the advocates of judicial restraint.<sup>10</sup> And versions of this debate occur every year in state judicial elections and confirmation battles, particularly for seats on state supreme courts.

But, as important as this issue is, in the past scholars have not been able to detect any correlation between a particular selection system and a particular judicial philosophy. No doubt, a snapshot of a particular time or place might reveal instances where "most appointed judges are liberal" or "elected judges are activist," but these isolated observations have not, taken as a whole, produced a consistent pattern.<sup>11</sup>

Nonetheless, a distinct pattern may now be emerging. Some recent studies suggest that contested elections produce judges with less institutional independence and more result-oriented jurispru-

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8. Rasmussen Reports, Supreme Court Update (Sept. 5, 2008) (on file with the Harvard Journal of Law & Public Policy).

9. *Id.*

10. See The Federalist Society for Law and Public Policy Studies, About Us, <http://www.fed-soc.org/aboutus/> (last visited Oct. 5, 2008) (stating that "The Federalist Society . . . is founded on the principle[] . . . that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.").

11. See Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 43-45 (1994) (citing Victor E. Flango & Craig R. Ducat, *What Difference Does Method of Judicial Selection Make? Selection Procedures in State Courts of Last Resort*, 5 JUST. SYS. J. 25, 33-35 (1979)) (discussing various studies' failures to link methods of selection with judicial voting or decision making); Jerome O'Callaghan, *Another Test for the Merit Plan*, 14 JUST. SYS. J. 477, 484 (1991); see also Jason J. Czarnecki, *A Call for Change: Improving Judicial Selection Methods*, 89 MARQ. L. REV. 169, 173-74 nn.24 & 25 (2005) (collecting studies).

dence.<sup>12</sup> Recent developments in the conduct of judicial elections might produce more pronounced differences in judicial behavior based on the way judges obtain and retain their benches.

## I. TRANSITIONS IN JUDICIAL SELECTION METHODS

The wide disparity in judicial selection systems can be explained largely by history. The type of system a state has depends largely on the date it adopted that system. Each successive wave of judicial selection methods has arisen in response to popular clamour for more professional, less political judges.

### A. *From Appointment to Election*

In the original states, judges were chosen in one of two ways: by the executive—appointment either by the governor himself or the governor's council—or by the legislature.<sup>13</sup> None of the original states seriously considered popular judicial elections, although isolated jurisdictions did experiment with elective judges at some levels.<sup>14</sup>

Between 1846 and the outbreak of the Civil War, however, more than two-thirds of the states moved to an elective judiciary at all levels of courts.<sup>15</sup> What caused such a rapid change? There are at least three reasonable explanations.

12. See David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 287–88 (2008) (discussing research finding that elective judges favor in-state litigants, are more likely to rule in ways that are consistent with public opinion, and become more punitive in criminal cases as reelection approaches). Pozen also argues that “elected state supreme courts are associated with lower overall rates of litigation than appointed ones (the theory being that appointed judges’ greater political independence generates more uncertainty about litigation outcomes).” *Id.* at 288–89 (citing F. Andrew Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges*, 28 J. LEGAL STUD. 205, 232 (1999)).

13. See Goldschmidt, *supra* note 11, at 5 & n.6.

14. Vermont, admitted to the Union in 1791, was the first state to provide for the election of some lower court judges. See ROGER K. WARREN, *STATE JUDICIAL ELECTIONS: THE POLITIZATION OF AMERICA’S COURTS* 3 (2006). In 1810, Georgia made “justices of the inferior courts and justices of the peace” elective. FLETCHER M. GREEN, *CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776–1860*, at 202 (1930). In 1832, Mississippi became the first state to elect its entire judiciary. ALLAN ASHMAN & JAMES J. ALFINI, *THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS* 9 (1974).

15. See Larry C. Berkson, *Judicial selection in the United States: A special report*, 64 JUDICATURE 176, 176 (1980) (“By the time of the Civil War, 24 of 34 states had established an elected judiciary with seven states adopting the system in 1850 alone.”).

First, judicial decisions favoring landlords and creditors in the wake of the 1819 and 1837 Panics caused outrage in many states and structural alterations in some.<sup>16</sup> Popular elections were perhaps a delayed reaction to these unpopular rulings, although little in constitutional convention debates or other historical records suggests such a relationship.

Second, the watchword of Jacksonian Democracy, "Let the People Rule,"<sup>17</sup> led to a dramatic expansion of suffrage<sup>18</sup> and a marked increase in the variety of officials chosen directly by the voters. For example, in addition to judicial elections, many states and municipalities abandoned a cabinet type of executive government in favor of individually elected department heads.<sup>19</sup> As one exasperated delegate to the Kentucky constitutional convention complained, "We have provided for the popular election of every public officer save the dog catcher, and if the dogs could

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16. In Kentucky, the legislature responded to the state constitution's prohibition on the removal of judges for less than criminal activity by repealing the act that created the Court of Appeals. The legislature then created a new court with different members. See 5 JOHN BACH MCMASTER, *A HISTORY OF THE PEOPLE OF THE UNITED STATES: FROM THE REVOLUTION TO THE CIVIL WAR* 162-66 (1901). The new court, however, was short-lived. See *id.* at 166. In Alabama, as a result of the supreme court's unpopular decision in *Jones v. Watkins*, 1 Stew. 81 (Ala. 1827) (holding that borrowers could not avoid a contract they signed voluntarily, high interest rate was not per se evidence of fraud, and statute of limitations barred suit), three of the court's judges were charged and tried before the Alabama Senate under the state constitution's removal-by-address provision, which provided that "judges could be removed for 'wilful [sic] neglect of duty, or other reasonable cause' even though the grounds were not sufficient for impeachment." Howard P. Walthall, Sr., *A Doubtful Mind: Understanding Alabama's State Constitution*, 35 CUMB. L. REV. 7, 29 (2005) (alteration in original) (quoting ALA. CONST. of 1819, art. V, Judicial Department § 13). Although the judges were exonerated, the state soon thereafter adopted an amendment to the constitution reducing judicial terms to six years. See *id.*

17. See WILLIS MASON WEST, *THE STORY OF AMERICAN DEMOCRACY: POLITICAL AND INDUSTRIAL* 454 (1922).

18. See Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1348-52 (2003) (discussing, in particular, black enfranchisement and absentee voting, and effects thereof).

19. See George W. Liebmann, *The New American Local Government*, 34 URB. LAW. 93, 108 (2002) (stating that by "1954, 356 cities operated under this plan") (citing HAROLD F. ALDERFER, *AMERICAN LOCAL GOVERNMENT AND ADMINISTRATION* 296-98 (1956) and *MANAGEMENT POLICIES IN LOCAL GOVERNMENT FINANCE* 4 (J. Richard Aronson & Eli Schwartz, eds., 4th ed. 1996)); Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 207 (1993).

vote, we should have that as well.”<sup>20</sup> That the movement started with the New York constitutional convention of 1846, dominated by Jacksonian acolytes, lends credence to this theory.<sup>21</sup> If true, the change was not so much a philosophical reaction to particular judges or particular decisions as it was a logical result of an underlying philosophy of government.

A third reason, emphasized by some scholars as the most decisive, was a pervasive belief by leading lawyers that both governors and legislators had degraded the bench by appointing partisan hacks and political cronies.<sup>22</sup> Under this theory, political reformers and legal elites combined to elevate the independence, integrity, and importance of the judiciary by eliminating their dependence on the good graces of the political branches. Enhanced public accountability, if a factor at all, was little more than an incidental by-product.<sup>23</sup>

### B. From Partisan to Non-Partisan Elections

Popular elections seem to have worked well at first. Because each state had only a handful of judges, voters were capable of evaluating all the candidates, often from personal knowledge. Running for office required little preparation or even premeditation: There were no filing fees or deadlines, and no official ballots.<sup>24</sup> Campaigning was almost as simple—at most, it involved

20. Nelson, *supra* note 19, at 207 (citing Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846–1860*, 45 HISTORIAN 340–41 (1983)).

21. See MARTHA DERTHICK, DILEMMAS OF SCALE IN AMERICA’S FEDERAL DEMOCRACY 101–03 (1999).

22. See Roy A. Schotland, *Myth, Reality Past and Present, and Judicial Elections*, 35 IND. L. REV. 659, 661 (2002) (“[R]esearch into the [state] constitutional convention histories found that, ‘delegates from across the ideological spectrum criticized the party-directed distribution of [judicial] offices whether by the executive or the legislative branch[es].’” (quoting Hall, *supra* note 20, at 346–47)).

23. See *id.* at 659–60 (stating that judicial elections were chosen “to elevate the judiciary and make it more independent of other branches so that it could better render justice”). But see, e.g., Glenn R. Winters, *Selection of Judges—An Historical Introduction*, 44 TEX. L. REV. 1081, 1082 (1966) (arguing that judicial elections were “not particularly designed for improving justice but [were] simply another manifestation of the populism movement”).

24. In most states, voters in the nineteenth century voted by ballot, but in a few the voting was oral—so-called *viva voce* voting. See 1 CHARLES SEYMOUR & DONALD PAIGE FRARY, *HOW THE WORLD VOTES: THE STORY OF DEMOCRATIC DEVELOPMENT IN ELECTIONS* 246–47 (1918). But this was not a modern ballot; it was “a motley variety” of printed or written papers, prepared by political parties, candidates, or indi-

penning a few letters to the editor and “treating” thirsty voters to adult beverages.<sup>25</sup>

Population growth, changes in electoral processes, and the rise of party organizations soon rendered the old “friends and neighbors” system of high-salience judicial elections obsolete. In urban centers, voters chose multiple judges from among candidates they did not know. Detailed election regulations increased the length and expense of campaigns. And political parties began endorsing and even selecting judicial candidates.<sup>26</sup> Partisanship and anonymity caused the defeat of several renowned jurists in the late nineteenth century, most notably Thomas Cooley in Michigan.<sup>27</sup> By the end of the nineteenth century, a popular outcry arose against the bench being populated by—*déjà vu* all over again—partisan hacks and political cronies. This sentiment was most memorably captured in Roscoe Pound’s famous warning to the 1906 meeting of the American Bar Association that “[p]utting courts into politics, and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the Bench.”<sup>28</sup>

Judicial reform was a priority of the Progressive Movement.<sup>29</sup> Some Progressive enthusiasms, like the recall of judicial decisions or judges themselves, failed to carry the day.<sup>30</sup> Others,

vidual voters, with “no rule for the size and color of the ballot.” *Id.* at 247. The “Australian,” or official printed ballot, was not adopted anywhere in America until 1888, TRACY CAMPBELL, *DELIVER THE VOTE: A HISTORY OF ELECTION FRAUD, AN AMERICAN POLITICAL TRADITION—1742–2004*, at 97, 115 (2005), but by 1892 it had spread to thirty-two states. *See id.* at 96–97; 1 SEYMOUR & FRARY, *supra*, at 250.

25. *See* MARK EDWARD LENDER & JAMES KIRBY MARTIN, *DRINKING IN AMERICA: A HISTORY* 54–56 (rev. & expanded ed. 1987).

26. *See* Nathan Richard Wildermann, Casenote, *Bought Elections: Republican Party of Minnesota v. White*, 11 GEO. MASON L. REV. 765, 767 (2003) (noting early control of judicial elections by political parties). In Texas, for example, the State Democratic Convention began endorsing state’s rights candidates as political philosophies hardened. Sam Houston, the leading opponent of the Democratic establishment in Texas, said of the State Democratic Chair: “[O]ne drop of his blood would freeze a frog.” A.W. Terrell, *Recollections of General Sam Houston*, 16 SW. HIST. Q. 113, 120 (1912).

27. *See* Kathleen M. Sullivan, *Republican Party of Minnesota v. White: What Are the Alternatives?*, 21 GEO. J. LEGAL ETHICS 1327, 1336–37 (2008).

28. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 20 J. AM. JUDICATURE SOC’Y 178, 186 (1937).

29. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1393–94 (2001).

30. *See From Arizona to New York*, N.Y. TIMES, Feb. 12, 1911, at 10 (discussing a “concerted effort” to put a recall provision into the constitution of New York, but noting that “[w]e do not expect that the recall device will be put into the Constitu-



such as requiring an extraordinary majority for a court to declare a statute unconstitutional, survive in a few jurisdictions.<sup>31</sup> But nonpartisan judicial elections, perhaps the least ambitious item on the Progressive judicial agenda, survive in a number of states.<sup>32</sup> At last, the reformers believed, judges would be both independent and accountable.

### C. From Non-Partisan Elections to Merit Selection

But non-partisan elections had their own disadvantages. An absence of political affiliation meant virtual public anonymity. With no partisan cue on the ballot, and no partisan apparatus to help build a grassroots campaign, judges had few practical means to reach a generally apathetic electorate.<sup>33</sup> All too often, a familiar name trumped education, experience, and establishment support at the polls.<sup>34</sup>

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tion"); *President Vetoes the Statehood Bill*, N.Y. TIMES, Aug. 16, 1911, at 3 (discussing President Taft's veto of the bill to make Arizona a state as a result of its "pernicious" constitutional provision allowing judicial recall). Nevertheless, Arizona reinserted the provision after receiving statehood. See ARIZ. CONST. art. 8, pt. 1, § 1.

31. See, e.g., N.D. CONST. art. VI, § 4 (requiring an extraordinary majority vote of the supreme court to declare a statute unconstitutional).

32. See AM. JUDICATURE SOC'Y, *supra* note 1.

33. See Nancy Marion, Rick Farmer & Todd Moore, *Financing Ohio Supreme Court Elections 1992–2002: Campaign Finance and Judicial Selection*, 38 AKRON L. REV. 567, 574 (2005) (noting that "[p]olitical parties educate voters" and "campaign literature increases partisan awareness and information levels about judicial candidates").

34. See Luke Bierman, *Beyond Merit Selection*, 29 FORDHAM URB. L.J. 851, 854 (2002) (noting that name recognition was "hardly better than party affiliation as an indicator of a judge's qualifications for office"). For example, in 1990, Washington Chief Justice Keith Callow lost to attorney Charles Johnson, who shared his name with a television anchor. See Robb London, *For Want of Recognition, Chief Justice is Ousted*, N.Y. TIMES, Sept. 28, 1990, at B16; Steve Miletich, *Johnson and Smith—What's In a Name?*, SEATTLE POST-INTELLIGENCER, Oct. 15, 1996, at B2; Jim Simon, *Upset Victor is Settling Into Court—'He's Not the Oddball I Thought He Was,'* SEATTLE TIMES, Aug. 25, 1991, at B1. And in 2006, highly-regarded Los Angeles Superior Court judge Dzintra Janavs was ousted by a "bagel-shop owner who only recently reactivated her license to practice law." Andrew Cohen, *Bagels on the Bench a Bad Idea*, WASH. POST, June 13, 2006, [http://blog.washingtonpost.com/benchconference/2006/06/bagels\\_on\\_the\\_bench\\_a\\_bad\\_idea.html](http://blog.washingtonpost.com/benchconference/2006/06/bagels_on_the_bench_a_bad_idea.html); see also Joel Achenbach, *Juris Impuris*, MIAMI HERALD TROPIC, Aug. 28, 1988, available at <http://www.tropicfan.com/juris%20impuris%20by%20joel%20achenbach.htm> (discussing political consultants in Miami who tell candidates to change their names in order to win elections, and consultants who line up "floaters" with good names to run against judges who decline to hire the consultants).

One observer has noted that voters like "color" names, such as Green, Brown, White, and Black. See Rick Casey, *How judge candidates waste money*, Hous. CHRON., Oct. 24, 2008, at B1. ("'People seem to like colors,' Harris County [De-

The most widespread response to these problems was a hybrid plan known as “merit selection.” Originally advanced by Albert Kales of the American Judicature Society in 1914,<sup>35</sup> the method was first adopted by Missouri in 1940 for statewide and selected urban courts.<sup>36</sup> The “merit selection” or “Missouri Plan” attempts to emphasize the best and minimize the worst of all existing judicial selection methods.<sup>37</sup> When a vacancy arises, a select but diverse committee screens potential nominees and sends several names to the governor.<sup>38</sup> In most states, the governor must choose a judge from this list, sometimes with an option to request alternative or additional names. In some states, the appointee takes office immediately; in others, confirmation by the governor’s council or the legislature is required.<sup>39</sup> At the end of each term, every judge runs against his own record

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mocratic) chairman Gerry Birnberg told me . . . Sure enough, [after party affiliation the] second most important factor in Harris County for putting people in black robes seems to be whether they had the foresight to acquire—through birth, marriage or legal action—a last name that appears on a palette.”).

Of course, the same problem exists in partisan states that choose judicial nominees in party primaries. For example, in 1976 an unknown Houston lawyer, Don Yarbrough, defeated a well-regarded appellate judge in the Democratic primary for an open seat on the Texas Supreme Court when voters confused him with Don Yarbrough, a three-time gubernatorial candidate. See Herbert M. Kritzer, *Law Is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-First Century*, 56 DEPAUL L. REV. 423, 435–36 (2007). Justice Yarbrough resigned in July 1977 after facing numerous ethics charges and being caught on tape plotting to kill a former business associate. See *id.* at 436; see also Anthony Champagne, *Coming to a Judicial Election Near You: The New Era in Texas Judicial Elections*, 43 S. TEX. L. REV. 9, 9–10 (2001).

35. See Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 96 n.119 (1998).

36. See Berkson, *supra* note 15, at 177. Six years earlier, California voters adopted a system of gubernatorial appointments, confirmation by a commission, and retention elections for appellate judges. See DEBORAH KILEY, MERIT SELECTION OF CALIFORNIA JUDGES 4–5 (1999), available at [www.mcgeorge.edu/documents/centers/government/ccglp\\_pubs\\_merit\\_selection\\_pdf.pdf](http://www.mcgeorge.edu/documents/centers/government/ccglp_pubs_merit_selection_pdf.pdf). Because the governor did not choose names from a commission-screened list, however, credit for initiating “merit selection” is generally given to Missouri.

37. MO. CONST. art. V, § 25. See generally James E. Lozier, *The Missouri Plan a/k/a Merit Selection: Is it the Best Solution for Selecting Michigan’s Judges?*, 75 MICH. B.J. 918, 918–20 (1996) (discussing the history of merit selection); Glenn R. Winters, *The Merit Plan for Judicial Selection and Tenure—Its Historical Development*, 7 DUQ. L. REV. 61 (1968).

38. See Robert A. Schroeder & Harry A. Hall, *Twenty-Five Years’ Experience with Merit Judicial Selection in Missouri*, 44 TEX. L. REV. 1088, 1091 (1966).

39. See, e.g., *id.*; Shira J. Goodman & Lynn A. Marks, *A View from the Ground: A Reform Group’s Perspective on the Ongoing Effort to Achieve Merit Selection of Judges*, 34 FORDHAM URB. L.J. 425, 447–48 (2007) (“[S]even states with a commission-based, merit selection system . . . require legislative confirmation . . .”).

in a "retention" election.<sup>40</sup> A judge who receives more "yes" than "no" votes stays in office. If the judge dies, resigns, declines to stand again, or receives more "no" than "yes" votes, the process starts anew.<sup>41</sup>

Beginning in the 1950s, primarily in the course of adopting new constitutions, eighteen states adopted merit selection plans for most or all of their judgeships.<sup>42</sup> Other states seemed on the verge of adopting this reform, and it looked as though it would sweep the nation just as surely as contested elections had a century before. At last, seemingly to general approbation, the nation's cadre of state judges appeared ready to be more professional and less political than ever before.

#### D. Alternatives to Merit Selection

But several events, largely unrelated to judicial performance, converged to halt the spread of merit selection. First, increasing controversy over single issues like abortion or right-to-work made constitutional conventions increasingly fractious, and hence increasingly uncommon.<sup>43</sup> Even if neither legislators nor voters were particularly satisfied with their courts, they were not sufficiently concerned to enact a separate, stand-alone constitutional amendment.<sup>44</sup> Second, beginning in the 1960s, the Kennedy Assassination, the Vietnam War, Watergate, and various social and demographic changes caused a marked decline in public confidence in public and private institutions. This cynicism made merit selection vulnerable to populist appeals like, "Don't let them take away your vote." Third, the reality of the merit system sometimes fell short of its promise. The supposedly independent and high-minded merit commissions were subject

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40. See Schroeder & Hall, *supra* note 38, at 1091–92.

41. See *id.* at 1092. Illinois and New Mexico's merit selection systems require a supermajority for retention. See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SHARED EXPECTATIONS: JUDICIAL ACCOUNTABILITY IN CONTEXT 11 n.19 (2006), available at <http://www.du.edu/legalinstitute/pubs/sharedexpectations.pdf>.

42. See G. Alan Tarr, *Rethinking the Selection of State Supreme Court Justices*, 39 WILLAMETTE L. REV. 1445, 1445 (2003).

43. See Peter J. Galie & Christopher Bopst, *The Constitutional Commission in New York: A Worthy Tradition*, 64 ALB. L. REV. 1285, 1323–24 & n.342 (2001).

44. See *Nonpartisan elections not enough to solve problem*, MOBILE REG., May 7, 1999, at A ("[T]he ordinary voter understands little about judicial selection.").

to regulatory capture, most often by the Governor<sup>45</sup> or a faction of the bar.<sup>46</sup> Fourth, as state courts decided ever-larger business and personal injury cases and became more enmeshed in controversial social issues, those with a vested interest in any particular status quo became vigorous and committed opponents of change.<sup>47</sup> Taken together, these factors essentially halted the trend to merit selection by the mid-1980s.<sup>48</sup>

This is not to say that judicial selection is completely static. In the last three decades, about half the Southern states have switched from partisan to non-partisan elections,<sup>49</sup> for political as well as good-government motives.<sup>50</sup> Some jurisdictions—several Southern states and Cook County, Illinois—have also switched from at-large to sub-district elections for urban trial court judgeships, prodded by challenges under Sections 2 and

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45. See, e.g., Henry R. Glick, *The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. MIAMI L. REV. 509, 521 (1978) (describing the means governors frequently use to control the appointment process for their own political ends).

46. See *id.* at 528 (noting that bar associations' representatives on nominating commissions thwart the reform of the judicial selection process because they are "preoccupied with the decisional propensities of potential judges").

47. See Jeffrey W. Stempel, *Malignant Democracy: Core Fallacies Underlying Election of the Judiciary*, 4 NEV. L.J. 35, 56–57 (2003) (noting that reform of judicial selection is unlikely because "[t]oo many vested interests like the current system[,] and they are in a strong position to thwart any movement toward merit selection by appointment").

48. American Judicature Society, *Voters in Four Jurisdictions Opt for Merit Selection* on November 4, [www.ajs.org/selection/sel\\_voters.asp](http://www.ajs.org/selection/sel_voters.asp) [hereinafter American Judicature Society, *Voters*] (last visited Dec. 14, 2008) (noting that decision of a fifth Missouri county to adopt merit selection for local judges in 2008 "marks the first time since 1985 that a jurisdiction has moved from contestable elections to merit selection"). Prior to that, voters had rejected merit selection in Ohio in 1987 and had declined to extend merit selection from appellate to trial courts in Florida in 2000 and South Dakota in 2004. See American Judicature Society, *Chronology of Successful and Unsuccessful Merit Selection Ballot Initiatives*, [http://www.judicialselection.us/uploads/documents/merit\\_selection\\_chronology\\_1e233BS002692.pdf](http://www.judicialselection.us/uploads/documents/merit_selection_chronology_1e233BS002692.pdf) (last visited Dec. 14, 2008).

49. See, e.g., Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why it Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1262 (2008); see also Janie L. Shores & Robert Martin Schaefer, *The Judicial Article as Amended and Adopted in 1973*, 33 CUMB. L. REV. 319, 335 (2003) (discussing non-partisan elections in eighteen states, including Georgia, Mississippi, and Florida).

50. See Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1414 (2003) (discussing North Carolina, where Republicans claimed that because they had recently increased their share of judgeships, the Democratic legislature's shift to nonpartisan elections was "ironically partisan").

5 of the Voting Rights Act.<sup>51</sup> Finally, two states—North Carolina and New Mexico—have recently experimented with public financing schemes for appellate courts.<sup>52</sup> But, despite the controversy surrounding judges and their selection, little else has been done. Most of the country is, therefore, in an unfortunate period of dissatisfied stasis: People are not particularly pleased with their current method of choosing judges, but they are not sufficiently outraged to demand any change.<sup>53</sup>

## II. THE CHALLENGE TO JUDICIAL INDEPENDENCE FROM JUDICIAL ELECTION CHANGES

Today, judicial elections suffer from new, unprecedented challenges. The common denominators are campaign money and special-interest agitation, making judicial elections “nastier, noisier, and costlier” than ever before.<sup>54</sup> These new, high-octane campaigns threaten judicial independence as surely as mediocre appointments in the nineteenth century or anonymous elections in the twentieth century ever did.<sup>55</sup> The more partisan, the more

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51. See generally Frederick G. Slabach, *Equal Justice: Applying the Voting Rights Act to Judicial Elections*, 62 U. CIN. L. REV. 823 (1994); Pasquale A. Cipollone, Comment, *Section 2 of the Voting Rights Act and Judicial Elections: Application and Remedy*, 58 U. CHI. L. REV. 733 (1991); Kristen Lundguard Izatt, Note, *The Voting Rights Act and Judicial Elections: Accommodating the Interests of the States Without Compromising the Goals of the Act*, 1996 U. ILL. L. REV. 229; Anna M. Scruggs, et al., *Recent Voting Rights Act challenges to judicial elections*, 79 JUDICATURE 34 (1995).

52. See George W. Soule, *The Threats of Partisanship to Minnesota's Judicial Elections*, 34 WM. MITCHELL L. REV. 701, 726 (2008). Wisconsin offers limited public financing for judicial and other races, but candidates capable of raising substantial campaign funds have rejected public financing and its accompanying spending restrictions. See *id.* at 726–27.

53. See Thomas R. Phillips, *Electoral Accountability and Judicial Independence*, 64 OHIO ST. L.J. 137, 144–46 (2003) (discussing the results of a 2001 survey).

54. Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1081 (2007).

55. See William C. Cleveland III, *Money and Judicial Elections*, 68 DEF. COUNS. J. 393, 393 (2001) (citing various studies, including an examination of Louisiana district court elections finding that “70 percent of contested elections are won by the candidate who spent the most money”; an Ohio citizens’ committee finding “that nine of 10 Ohioans believe that judicial decisions are affected by political contributions”; and a Pennsylvania commission’s findings that “59 percent of Pennsylvania voters felt that too much money was spent on judicial campaigns, . . . 88 percent thought judges’ decisions were influenced at least some of the time by campaign contributions, . . . [and] 37 percent thought it was most or all of the time”).

frequent, and the more easily contestable the elections are, the more susceptible they are to these unfortunate influences.

Why the sudden interest in judicial elections, long seen as "about as exciting as a game of checkers . . . [p]layed by mail"?<sup>56</sup> Three factors seem to predominate.

A. *The Explosion of Large Campaign Contributions*

First, wealthy individuals and groups with economic interests in various public policy questions realized that an individual judge can have a far greater impact on their fortunes than an individual legislator. Although judges face far more constraints in basing their official actions on their personal philosophical predilections than do legislators, few would insist that personal philosophies never affect judicial behavior. Personal injury trial lawyers in Texas were probably the first to discover that increased gifts to judicial campaigns could make a big difference in electoral outcomes, and pay big dividends in more favorable judgments.<sup>57</sup> Business and professional groups countered by supporting their own judicial candidates, especially after state courts invalidated key tort reform laws.<sup>58</sup> These battles were swiftly replicated in other states, particularly California and Alabama.<sup>59</sup> By 2000, these local battles had essentially been nationalized, with national trial lawyer and consumer groups battling business-oriented groups in multiple jurisdictions each

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56. Schotland, *supra* note 50, at 1405 (alteration in original) (internal quotation marks omitted) (quoting William C. Bayne, *Lynchard's Candidacy, Ads Putting Spice into Judicial Race: Hernando Attorney Challenging Cobb*, COM. APPEAL, Oct. 29, 2000, at DS1).

57. See Carrington, *supra* note 35, at 105–06.

58. See *id.*; Anthony Champagne & Kyle Cheek, *The Cycle of Judicial Elections: Texas as a Case Study*, 29 FORDHAM URB. L.J. 907, 915 (2002) (noting that, during the 1998 Texas Supreme Court campaign, the Texas Medical Association donated over \$181,000 in direct contributions and encouraged doctors to donate at least \$250,000 after the court had earlier struck down certain tort-reform laws).

59. See Anthony Champagne, *Tort Reform and Judicial Selection*, 38 LOY. L.A. L. REV. 1483, 1484–85 (2005) (noting that the intense politicization of Alabama's supreme court elections following the Court's partial invalidation of Alabama's tort reform legislation led one scholar to conclude that these elections had become "a battleground between businesses and those that sue them" (internal quotation marks omitted)); see also Glenn C. Noe, Comment, *Alabama Judicial Selection Reform: A Skunk in Tort Hell*, 28 CUMB. L. REV. 215, 232–33 (1998) (noting that, following a ten million dollar campaign, three justices of the California Supreme Court were defeated in their 1986 retention elections as a result of public response to the justices' position on the constitutionality of the death penalty).

election cycle.<sup>60</sup> Increasingly, these groups tried to influence the vote through independent expenditures, largely eschewing the candidates' individual campaigns.<sup>61</sup> The advertisements purchased by these groups often feature "slash and burn" messages crafted to trigger a vote against a candidate or slate of candidates, not to enhance support for anyone or anything.<sup>62</sup> Such potent phrases and images often overwhelmed the candidates' own messages, which touted boring factoids involving qualifications, experience, and community ties. Perversely, many of these independent campaigns feature dueling charges over which candidate's record is the most "soft on crime," even though the funders themselves care only about civil jurisprudence.<sup>63</sup>

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60. Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1398–99 (2001) (discussing U.S. Chamber of Commerce's efforts to support election of pro-business judges in Alabama, Illinois, Michigan, Mississippi, and Ohio by both direct campaign contributions and issue advertising). In the 2000 election cycle, for example, "[private] individuals constitute[d] the largest source of campaign money in congressional elections, giving approximately \$567.7 million . . . to all primary and general election candidates in the . . . House and Senate elections." Paul S. Herrnsen & Kelly D. Patterson, *Financing the 2000 Congressional Elections*, in FINANCING THE 2000 ELECTION 106, 121 (David G. Magleby ed., 2002). By contrast, in that same year, state supreme court candidates raised \$45.6 million for their campaigns, with lawyers, business interests, and political parties contributing more than half of all campaign funds. See Phyllis Williams Kotey, *Public Financing for Non-Partisan Judicial Campaigns: Protecting Judicial Independence While Ensuring Judicial Impartiality*, 38 AKRON L. REV. 597, 616 & nn.162–63 (2005).

61. See Roy Schotland, *New Challenges to States' Judicial Selection*, *supra* note 54, at 1080 ("The sea change came in 2000, when judicial candidates' campaign spending soared and interest groups were dimensionally more active than ever before, even dominating some races.").

62. See, e.g., DEBORAH GOLDBERG ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS: HOW 2000 WAS A WATERSHED YEAR FOR BIG MONEY, SPECIAL INTEREST PRESSURE, AND TV ADVERTISING IN STATE SUPREME COURT CAMPAIGNS 17, 21–24 (2002), available at <https://www.policyarchive.org/bistream/handle/10207/5936/20020201.pdf> (reproducing negative storyboards from television ads funded by independent groups); see also Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 476–78 (1988) (suggesting that imposing limits on contribution size may give an advantage to wealthy candidates because candidates can still fund their own campaigns, and that absolute prohibitions against large contributions may prevent well-qualified but unknown candidates from getting recognition).

63. See B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1431–37 (2001) (describing judicial election campaigns in Tennessee, California, and Nebraska in which judges lost their seats on the court when they were portrayed as being "soft on crime"); see also DEBORAH GOLDBERG ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2004: HOW SPECIAL INTEREST PRESSURE ON OUR COURTS HAS REACHED A "TIPPING POINT" — AND HOW TO KEEP OUR COURTS FAIR AND IMPARTIAL 10 (Jesse Rutledge, ed. 2004), available at <http://brennan3cdn.net/>

### B. *The Emergence of Special Interest Group Participation*

Second, politically-oriented social-issue groups have discovered that judicial campaigns can highlight “hot-button” issues that may excite and energize their “base” and enhance turnout for the entire election. As in the tort wars, most of these groups rely on independent efforts, working outside any candidate’s particular campaign organization. Normally, they rely less on paid media than on grassroots networking, which can be hard for an outsider even to detect, much less to respond to effectively. Chief Justice Randall Shepard of Indiana noted that the presence of a gay marriage ban on the ballot inadvertently affected Ohio’s judicial elections by influencing which voters showed up at the polls. He explained that when such issues are at the forefront, “judges are not the target at all, we’re just roadkill . . . for some other venture.”<sup>64</sup>

### C. *The Retreat of State Regulation of Judicial Campaign Speech*

#### 1. *The Holding of Republican Party of Minnesota v. White*

Third, the landscape of judicial races changed abruptly in 2002 when the United States Supreme Court decided *Republican Party of Minnesota v. White*.<sup>65</sup> The decision was itself unremarkable, merely striking down an isolated, obscure section of the Minnesota Code of Judicial Conduct which stated that a “candidate for a judicial office, including an incumbent judge[,] . . . shall not . . . with respect to cases, controversies or issues that are likely to come before the court, make pledges or promises that are inconsistent with the impartial performance of the adjudicative duties of the office.”<sup>66</sup> Although the holding—that because the Announce Clause applied to speech only in a campaign context it was too

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dd00e9b682e3ca2f17\_xdm6io68k.pdf (“[In 2004 i]n Illinois, the Justice For All Political Action Committee, a trial lawyer and labor group, ran an ad criticizing Republican Judge Lloyd Karmeier as ‘lenient’ because he ‘gave probation to kidnappers who tortured and nearly beat a 92-year-old grandmother to death.’”).

64. Randall T. Shepard, Chief Justice of Indiana, Panel Discussion at the Georgetown University Law Center & American Law Institute’s Fair and Independent Courts: A Conference on the State of the Judiciary (Sept. 29, 2006), available at <http://www.law.georgetown.edu/news/documents/CoJ092906-panel5.pdf>.

65. 536 U.S. 765 (2002).

66. MINN. CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(i) (2000).



underinclusive to survive strict scrutiny<sup>67</sup>—was quite narrow, portions of the Court's discussion en route to that holding seem dismissive of the entire conduct code regime.

## 2. State Codes of Judicial Conduct

Judicial codes of conduct are hardly a rash or novel experiment. For many years, states have regulated the balance between judicial independence and public accountability through these codes, generally promulgated through the exercise of inherent power by the state's highest court.<sup>68</sup> Most of the codes derive from a common source: the American Bar Association's Model Code of Judicial Conduct.<sup>69</sup> First promulgated in 1972,<sup>70</sup> then re-issued in 1990 and revised several times since,<sup>71</sup> the Model Code contains several provisions constraining the speech and conduct of judges.<sup>72</sup> Through lawyer disciplinary rules, these restrictions generally extend to judicial candidates as well.<sup>73</sup> For the bench and bar as a whole, however, it was simply an article of faith, perhaps not too closely examined, that the state's interest in a fair and impartial judiciary was sufficiently compelling to justify virtually any such restriction. But not everyone agreed, as suits from time to time challenged code provisions as violating the First Amendment. These cases met with mixed results, until *White* caused a paradigm shift in the debate.

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67. *White*, 536 U.S. at 780, 788.

68. See Geyh, *supra* note 49, at 1267.

69. See, e.g., Stephanie Cotilla & Amanda Suzanne Veal, Note, *Judicial Balancing Act: The Appearance of Impartiality and the First Amendment*, 15 GEO. J. LEGAL ETHICS 741, 742 (2002) (noting that "nearly all states have adopted standards of judicial conduct modeled after the ABA Model Code of Judicial Conduct").

70. The ABA Model Code was promulgated in 1972. Soon, the judicial discipline systems in most states became primarily responsible for enforcing the code provisions in their respective jurisdictions. See Adam R. Long, *Keeping Mud Off the Bench: The First Amendment and the Regulation of Candidates' False or Misleading Statements in Judicial Elections*, 51 DUKE L.J. 787, 795–96 (2001).

71. See MODEL CODE OF JUD. CONDUCT (2007).

72. See *id.* Canon 4 (setting restrictions on the speech and conduct of judges and judicial candidates).

73. See, e.g., WIS. SUP. CT. RULE 20:8.2(a)–(b) (providing that a "lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . . or of a candidate for election or appointment to judicial or legal office," and affirming that any "lawyer who is a candidate for judicial office shall comply with the applicable provisions in the code of judicial conduct").

### 3. *The Post-White World*

After *White*, new challenges to other code provisions have arisen. At least five distinct challenges have cast some doubt on the viability of any state regulation of judicial campaign behavior.

#### a. *Promises and Commitments by Judicial Candidates*

Several federal district courts have enjoined enforcement of the so-called Pledges or Promises Clause, which forbids judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office."<sup>74</sup> Although some decisions have upheld the clause,<sup>75</sup> or at least postponed resolving the issue,<sup>76</sup> candidates in the affected states can no longer point to the code in dismissing questions about their prospective behavior as the judge. Unlike the Announce Clause, the Pledges or Promises Clause has been included in most states' codes of judicial conduct.

#### b. *Commit Clause*

Another common canon that has been subject to repeated successful attack is the Commit Clause, which provides that judicial candidates shall not "make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."<sup>77</sup> Several federal courts have enjoined enforcement of the canon,<sup>78</sup> although some courts have declined to enjoin its enforcement.<sup>79</sup> Some have dismissed complaints for lack of stand-

74. *Bauer v. Shepard*, No. 3:08-CU-196-TLS, 2008 WL 1994868 (N.D. Ind. May 6, 2008); *Duwe v. Alexander*, 490 F. Supp. 2d 968 (W.D. Wis. 2007) (enjoined as applied, not on a facial challenge); *Ind. Right to Life v. Shepard*, 463 F. Supp. 2d 879 (N.D. Ind. 2006); *N.D. Family Alliance v. Bader*, 361 F. Supp. 2d 1021 (D.N.D. 2005); *Family Trust Found. of Ky., Inc. v. Wolnitzek*, 345 F. Supp. 2d 672 (E.D. Ky. 2004).

75. *See Pa. Family Inst., Inc. v. Celluci*, 521 F. Supp. 2d 351 (E.D. Pa. 2007); *Wolfson v. Brammer*, No. CIV 06-2357, 2007 WL 2288024 (D. Ariz. Aug. 8, 2007).

76. *See Kan. Judicial Watch v. Stout*, 440 F. Supp. 2d 1209 (D. Kan. 2006); *Alaska Right to Life Political Action Comm. v. Feldman*, 380 F. Supp. 2d 1080 (D. Alaska 2005), *vacated as unripe*, 504 F.3d 840 (9th Cir. 2007).

77. MODEL CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(ii) (1997).

78. *See Bauer*, 2008 WL 1994868; *Duwe*, 490 F. Supp. 2d 968 (enjoining clause as applied); *Ind. Right to Life*, 463 F. Supp. 2d 879; *Family Alliance*, 361 F. Supp. 2d 1021; *Family Trust Found.*, 345 F. Supp. 2d 672.

79. *See Wolfson*, 2007 WL 2288024.

ing.<sup>80</sup> Armed with those decisions holding that candidates and voters alike have a First Amendment right to discuss issues, inquiring minds among the press, political parties, special interests, and the voting public are pressing for specific answers to pointed questions about performance in office. Some groups now send identical questionnaires to both judicial candidates and aspirants for executive or legislative office.<sup>81</sup> For example, gun rights groups might now ask judges directly “Do you believe that the Second Amendment prohibits any restrictions on handgun ownership?” rather than posing indirect “attitudinal” questions such as “How many deer heads are mounted in your den?” or “How many times did you take your children to the shooting range last month?”

*c. Partisan Activity by Judicial Candidates*

Third, the safeguards installed in certain states to keep contested or retention elections truly non-partisan have been compromised by the circuit opinion on remand in *White*. It held that the First Amendment permits judicial candidates to claim party affiliation, to attend political gatherings, and to seek, accept, and advertise endorsements from partisan organizations.<sup>82</sup> The experiences of Michigan and Ohio, where parties dominate the nominations of and campaigns for technically non-partisan candidates, may become the norm in those states which have chosen non-partisan ballots because they believe that party interference compromises both the appearance and reality of judicial impartiality.

*d. Solicitation Clause*

Fourth, the traditional boundaries between judicial candidates and their financial supporters have been weakened or eradicated by the decisions of two federal circuit courts. Until recently, all but a handful of states prohibited judicial candi-

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80. *Pa. Family Inst., Inc. v. Black*, 489 F.3d 156 (3d Cir. 2007); *Carey v. Wolnitzek*, No. 3:06-36-KKC, 2006 WL 2916814 (E.D. Ky. Oct. 10, 2006); *Wells v. Hardin*, No. 04-2585, 2006 WL 1586565 (E.D. La. May 26, 2006).

81. See, e.g., T.C. Brown, *Judicial Hopefuls Reluctant to Give Stances on Issues*, CLEVELAND PLAIN DEALER, Sept. 23, 2002, at A1 (criticizing candidates for refusing to respond to a questionnaire about their views on political issues).

82. *Republican Party of Minn. v. White*, 416 F.3d 738 (8th Cir. 2005) (en banc), cert. denied, 546 U.S. 1157 (2006).

dates from personally soliciting or accepting contributions from donors, instead requiring them to raise funds through campaign committees.<sup>83</sup> On remand in *White*, the Eighth Circuit held that Minnesota's Solicitation Clause was unconstitutional with regard to solicitations to "large groups."<sup>84</sup> Several years earlier, the Eleventh Circuit on its own motion struck down Georgia's Solicitation Clause in its entirety.<sup>85</sup> The personal contact between candidate and donor clearly changes the dynamic of a judicial campaign, making it more like any other electoral campaign, and thus enhancing the possibility that the public will perceive justice as being influenced by contributions.

*e. Recusal*

Finally, a number of challenges have been brought to state recusal rules that require judges to step aside from cases when they have, for example, made pledges or promises, committed to a position on an issue, affiliated with a party, or solicited from a donor such that "in any proceeding . . . the judge's impartiality might reasonably be questioned."<sup>86</sup> To date, only one court has enjoined such a recusal provision. In *Duwe v. Alexander*, the federal district court held that Wisconsin's recusal provision was unconstitutionally overbroad and vague in providing that:

[A] judge shall recuse himself or herself in a proceeding when . . . the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to any of the following: 1. An issue in the proceeding. 2. The controversy in the proceeding.<sup>87</sup>

The court reached this holding despite Justice Kennedy's suggestion in *White* that states were free to "adopt recusal stan-

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83. See Alan B. Morrison, *Judges and Politics: What To Do and Not Do About Some Inevitable Problems*, 28 JUST. SYS. J. 283, 286 (2007) (noting that "[v]irtually every state except Texas recognizes the special problem of a sitting judge or candidate for judicial office making a direct request request for a contribution to a supporter.")

84. *White*, 416 F.3d at 763–67.

85. *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002) (holding that the canon prohibiting judicial candidates from personally soliciting campaign contributions violated First Amendment).

86. MODEL CODE OF JUD. CONDUCT Canon 2(A) (2007).

87. *Duwe v. Alexander*, 490 F. Supp. 2d 968, 970 (W.D. Wisc. 2007).

dards more rigorous than due process requires, and censure judges who violate these standards.”<sup>88</sup>

D. *The Cumulative Effect of New Developments*

One should not overstate the impact of large contributors, special interest groups, or *White* and its progeny on judicial election behavior. Many states still have quiet elections, or at least their highly-charged campaigns have been limited to those for their highest courts. Most candidates have moved cautiously, if at all, away from the old Marquis of Queensbury rules of decorum.<sup>89</sup> But the big money, hot-button issue, post-*White* campaign landscape certainly facilitates a “race to the bottom” mentality in closely contested races. When large contributors make huge media buys, or interest groups bring their organizational talents to judicial campaigns, many candidates and their supporters find it hard to behave with perfect equanimity.<sup>90</sup> Bitter, nasty races have occurred often enough to raise serious concerns among many who believe the judiciary’s traditional norms of behavior have contributed to the widespread, longstanding support for the role of law and the judicial branch in America.<sup>91</sup> If future elections continue to reinforce the idea that judges are mere political players, very serious consequences could ensue: The basic notion that we are a nation of laws, interpreted and applied by judges but ultimately made by the people themselves through the democratic instruments (constitutions and ballot propositions), by their chosen representatives (statutes and executive

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88. *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring).

89. See Schotland, *supra* note 54, at 1096–97.

90. See Owen G. Abbe & Paul S. Herrmson, *Campaigning For Judge: Noisier, Nastier?*, CAMPAIGNS & ELECTIONS, Apr. 1, 2002, at 43 (“[A] growing number of judicial elections are competitive and involve substantial campaign spending and significant campaign activity by outside groups. . . . [M]ore and more judges are turning to political consultants for help with their campaigns,” and in turn, interest groups targeting judges hire staff including media consultants, pollsters, and researchers.).

91. See Sandra Day O’Connor, Letter to Conference Participants, Sandra Day O’Connor Project on the State of the Judiciary, 2008 Conference: Our Courts and Corporate Citizenship (on file with author) (“The perception, or the reality, that justice can be ‘bought’ is bad for the legitimacy of our courts, and bad for democracy.”); see also Owen G. Abbe & Paul S. Herrmson, *How Judicial Election Campaigns Have Changed*, 85 JUDICATURE 286, 287 (2002) (“[J]udicial elections can no longer be characterized as inexpensive, quiet, uncompetitive affairs.”). The authors surveyed 261 judicial candidates from twenty-nine states, concluding that “judicial elections are even more competitive than elections for the U.S. House of Representatives and most state legislatures.” *Id.* at 289.

orders), by their representatives' agents (rules and regulations), or by a formal and highly structured process of gradual accretion (common law), would sustain a terrible blow.<sup>92</sup>

### III. AN OLD ANSWER SOLVES NEW PROBLEMS: ADVANTAGES OF MERIT SELECTION OVER CONTESTED JUDICIAL ELECTIONS

In view of all these developments, a profound pessimism might seem to be in order. After all, big-dollar, high stakes judicial politics is no respecter of systems; it has affected states choosing judges in straight partisan elections (for example, Alabama and Texas), initial partisan elections with retention re-elections (Illinois and Pennsylvania), pure non-partisan elections (for example, Washington and Wisconsin), non-partisan elections with candidates selected by political parties (Michigan and Ohio), gubernatorial appointment with retention election systems (California appellate courts), pure merit selection systems (Tennessee Supreme Court), and even legislative elections (South Carolina).

In the face of all these problems, old and new, the Missouri merit selection plan, for all its flaws, is the best option for maintaining dignity, stability, and accountability in the judiciary. In theory, merit selection should produce more judges who will respect their proper role in the governmental process. In practice, merit selection has worked well most of the time in most places. Taken together, these benefits should be sufficient to command support from the bench, the bar, and a concerned public in general, and from the active and informed lawyers who belong to the Federalist Society in particular.

Much of merit selection's appeal lies in the defects that inhere in other systems, particularly given the new pressures discussed above. These problems are especially endemic in contested elections.

#### A. *Turnover and Recruitment*

Contestable election systems undercut the stability of the judiciary. The concern about partisan sweeps that caused reformers to

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92. See James Michael Scheppele, Note, *Are We Turning Judges into Politicians?*, 38 LOY. L.A. L. REV. 1517, 1528 (2005) ("By contributing to a judge's campaign, persons and entities are essentially 'lobbying' the judiciary in a fashion similar to lobbying the legislature.").

push for non-partisan elections more than a century ago is an even bigger problem today. In Texas, for example, well over one third of all opposed judges have been defeated since 1980, generally because of straight-ticket voting.<sup>93</sup> But the extremely low salience of non-partisan judicial election contests make them little better. A person with an unusual name probably has a better chance of being elected President of the United States than state judge on an urban non-partisan ballot.<sup>94</sup> The retention rate for judges in merit systems, in contrast, has been remarkably stable—and consistently high—over many decades in many different states.<sup>95</sup>

Moreover, the occasional “no” victories in retention elections typically follow a scandal or widespread disgust with a judge’s perceived judicial philosophy. Interestingly, no state supreme court justice in America has *ever* been defeated in a retention election because he or she was perceived as too conservative, too closely aligned with big business, too devoted to precedent, or too faithful to the literal words of a constitution, statute, or rule. To the contrary, *all* seven supreme court justices rejected in retention elections lost because they were perceived—rightly or wrongly—as too liberal,<sup>96</sup> because they wrote an unpopular

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93. See Michael Grabell, *Democrats short on courtroom recognition: But new judges may have more skills than they're given credit for*, DALLAS MORNING NEWS, Nov. 9, 2006, at 18A; Michael Grabell & Gromer Jeffers, Jr., *Dozens of judges lose seats in Democratic tidal wave: Victories reflect general shift as GOP loses grip in Dallas County*, DALLAS MORNING NEWS, Nov. 8, 2006, at 15A; see also Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 780 (1995) (“Republican straight-ticket voting [in 1994] contributed to the defeat of nineteen Democratic judges and a Republican sweep of all but one of the forty-two contested races for countywide judgeships in Harris County, Texas, which includes Houston.”).

94. In 2008, Democrats won twenty-two of twenty-six countywide contested judicial races in Harris County, Texas. Despite expensive campaigns mounted by individual candidates, party organizations, and independent groups, all evidence is that these efforts made no impact. The four Republicans who won shared one common link: Their opponents had unusual names. The defeated were Mekisha Murray, Goodwille Pierre, Andreas Pereira, and Ashish Mahendru. See Mary Flood & Brian Rogers, *Election defeat stuns incumbent Harris Co. judges*, HOUS. CHRON., Nov. 6, 2008, <http://www.chron.com/dispatch/story.mpl/hotstories/6097733.html>.

95. Of the 3912 elections between the years 1964 and 1994 in the ten states that used the retention election system, only fifty judges were defeated. Twenty-eight of those defeats occurred in Illinois, which required a judge to get 60% of the vote to remain on the bench. Dann & Hansen, *supra* note 63, at 1430 (citing Larry Aspin & William K. Hall, *Thirty Years of Judicial Retention Elections: An Update*, 37 SOC. SCI. J. 1, 3, 8–10 (2000)).

96. Wyoming’s Walter Urbigkit lost following concerns that he was too lax on criminals. See CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CON-

opinion,<sup>97</sup> or because of voter outrage over state government in general.<sup>98</sup> Although few would defend all these outcomes as admirable or fair, they were rational, not random—which is all an electoral system can hope to achieve.

One criticism of merit selection has been that too many undesirable judges are retained because voter ignorance or voter apathy permits all but the very worst judges to retain their jobs. Many merit selection states have recognized this problem, however, and are initiating new and more rigorous judicial evaluation programs to give voters a comprehensive picture of each judge's performance in office.<sup>99</sup> When voters have access to this information, interested voters have a much better chance of casting an intelligent vote in a yes-or-no election than in an open race among two or more names on a ballot. If the public does its job, good judges will stay in office and bad judges will go.

### B. Campaign Contributions

Retention campaigns also have the advantage of being neither as nasty nor as expensive as contested campaigns. The exceptions are few and well-known: The 1986 defeats of three California Supreme Court justices remain, after more than two decades, by far the most expensive and notorious retention election battles. The rapid escalation of multi-million dollar races in states with contested elections has simply not occurred in retention election campaigns.<sup>100</sup>

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TROVERSIES AND HISTORICAL PATTERNS 169 (G. Alan Tarr ed., 1996). Similarly, California's Chief Justice Rose Bird, Justice Cruz Reynoso, and Justice Joseph Grodin were defeated in a 1986 retention election after being portrayed as soft on crime. See Dann & Hansen, *supra* note 63, at 1431–32.

97. See Patrick Emery Longan, *Judicial Professionalism in a New Era of Judicial Selection*, 56 MERCER L. REV. 913, 915–17 (2005) (attributing Tennessee Justice Penny White's defeat to her failure to impose the death penalty in a case involving the rape and murder of an elderly woman).

98. See Laura Parker, *Judges pay when their salaries tied to lawmakers': Raises entangled in political issues, re-election jitters*, USA TODAY, Sept. 24, 2007, at 4A (noting that Pennsylvania Justice Russell Nigro lost his seat due to public outcry following an unpopular decision to raise the salaries of various government officials, including Nigro's).

99. See Rebecca Love Kourliss, *Judicial Independence and Independent Judges*, 80 DENV. U. L. REV. 746, 749–50 (2003).

100. See Jordan M. Singer, *Knowing is Half the Battle: A Proposal for Prospective Performance Evaluations in Judicial Elections*, 29 U. ARK. LITTLE ROCK L. REV. 725, 729–30 (2007) ("In 2000, candidate spending in the twenty states with supreme court races rose to almost \$45.5 million, a 61% increase over the prior high, and spending set records in ten states. That year, interest groups in five states alone (Ala-



By contrast, the lamentable public perception of a justice system selected by high-dollar, contested elections is well documented.<sup>101</sup> Although I am convinced that most judges are never influenced, at least consciously, by contributions, I do recognize the inevitable problem of persuading the public otherwise. Mayor Fiorello LaGuardia is said to have explained that contributions never influenced his conduct because "I'm an ingrate." But, unlike the Little Flower, state judges seldom enjoy a platform to convince the public at large of their personal rectitude. Instead, defeated political parties, disappointed interest groups, and press reports all feed on natural suspicions that the recipients of substantial campaign contributions must be beholden to somebody.<sup>102</sup> It is hard to persuade a losing litigant whose opponent gave a lot of money to the judge that his or her case was resolved solely on the merits. For our system to thrive, justice must seem to be done, as well as actually be done.<sup>103</sup>

This natural suspicion is exacerbated when big donors, like trial lawyers and business associations, fund "scholarly" studies showing that judges they do not support have been "bought off" by their opponents' contributions.<sup>104</sup> In short, these big donors

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bama, Illinois, Michigan, Mississippi, and Ohio) collectively spent \$16 million on hotly contested supreme court elections." (footnotes omitted)).

101. See Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 54-55 (2003).

102. See Anthony Champagne & Kyle Cheek, *The Cycle of Judicial Elections: Texas as a Case Study*, 29 FORDHAM URB. L.J. 907, 931-32 (2002) (On December 6, 1987, "the national television news program *60 Minutes* featured the Texas Supreme Court in a story titled 'Is Justice for Sale?' The program questioned whether Texas judges were being exposed to undue influence by deep pocket interests contributing heavily to candidates friendly to their views. Current Chief Justice Tom Phillips concedes that the story 'had a tremendous impact on Texas judicial politics,' while his predecessor, John Hill, has argued that the 'news reports only reflect a growing belief among many citizens of Texas that [the] state's legal system no longer dispenses evenhanded justice.'").

103. See *Offutt v. United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice.").

104. Compare AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2 (2007), available at <http://www.atra.org/reports/hellholes/report.pdf> ("Trial lawyer contributions make up a disproportionate amount of donations to locally elected judges. A poll found that 46 percent of judges said donations influenced their judicial decisions."), with EMILY GOTTLIEB, CHAMBER OF HORRORS: THE HIJACKING OF THE 2004 ELECTIONS BY THE U.S. CHAMBER OF COMMERCE 10, available at <http://www.centerjd.org/archives/studies/ChamberWhitePaper.pdf> ("Despite fundamental constitutional concerns, corporate front groups like the Chamber's Institute for Legal Reform (ILR) have broadened their efforts to strong-arm judges into voting their way and tried to defeat judges who don't.").

either win the election or they lose the election and begin a press battle to undermine the authority of those who prevailed. The result is a perceptible decline in public confidence.<sup>105</sup>

### C. *Enhanced Accountability*

Contrary to popular belief, merit selection enhances the judicial accountability that elections are supposed to achieve. Opponents of merit selection have done well with the populist cry, "Don't let them take away your vote!" This hits the right emotional buttons, but it makes little rational sense. Perhaps because the age, educational, and professional requirements for serving as a judge are so stringent, far fewer judicial races are contested than are races for political office.<sup>106</sup> Whether a judge draws opposition seems to depend not so much on the judge's performance in office as on the likelihood that he or she can be defeated, either because of an unpopular party label or an unfortunate ballot name. Some ostensibly "elected" judges have never drawn an opponent, having been initially appointed to fill an unexpired term and then having run unopposed for each succeeding term.<sup>107</sup> These statistics seem more likely to have come from a Middle Eastern oligarchy than from the birthplace of popular sovereignty.

In contrast to the hit-or-miss reality of contestable elections, the powerful truth of merit selection is that every judge will be subject to the vote of every voter. If, as election enthusiasts maintain, the campaign itself makes judges more courteous, punctual, or humble, then the retention election seems designed to improve the performance of every judge—not only those who draw an opponent in contested elections.

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105. See Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 283 (2002) (A 1998 study sponsored by the Texas Supreme Court found that 83% of Texas adults, 69% of court personnel, and 79% of Texas attorneys believed that campaign contributions influenced judicial decisions 'very significantly' or 'fairly significantly.'").

106. In Texas, about two thirds of all judicial elections since 1980 have been unopposed. See Elizabeth Ames Jones, Editorial, *Remove the partisanship, money from judicial races*, SAN ANTONIO EXPRESS-NEWS, Nov. 9, 2003, at 5H (noting that 65% of Texas judges run in unopposed elections).

107. See *id.* ("[A]bout [fifty] percent of all [Texas district and appellate] judges are initially appointed by the governor. . . . [Twenty] percent of sitting judges have never had an opponent.").

#### D. Merit Selection's Proven Record of Success

The proof of merit selection's success is that the people have never repealed merit selection in any state or part of a state where they have ever adopted it, although one state is now in the process of allowing it to expire.<sup>108</sup> Efforts have been mounted in Missouri, Arizona, Colorado, and elsewhere, with no success.<sup>109</sup> In fact, in 2008 voters extended merit selection in Missouri to another county.<sup>110</sup>

#### E. Failure of Less Ambitious Reforms

Efforts to cure the defects of contested elections while preserving the system have generally been as bad as the disease. Single-member judicial electoral districts may shrink the size of the ballot, but they make judges seem more like ward-heelers and less like learned dispensers of impartial justice.<sup>111</sup> Contribution limits may curb some of the worst excesses, but they need to be carefully calibrated if they are to achieve a positive effect. If they are too high, they will merely breed public cynicism. If they are too low, they will either result in an even more uninformed electorate, or they will drive more contributions to independent groups. And public funding, which logically should represent the next "wave" of reform after merit selection,<sup>112</sup> has attracted only isolated support for judicial contests.<sup>113</sup>

108. Editorial, *Three Gavels for Tennessee*, WALL ST. J., May 27, 2008, at A20 (noting that Tennessee's decision to allow its merit selection system to expire "marked the first time a merit selection plan ha[d] been ousted in any state").

109. *See id.* (noting that no other states have done away with merit selection).

110. *See* American Judicature Society, *Voters*, *supra* note 48 (noting that in 2008 Greene County became the fifth Missouri county to adopt judicial merit selection).

111. *See* Ronald W. Chapman, *Judicial Roulette: Alternatives to Single-Member Districts as a Legal and Political Solution to Voting-Rights Challenges to At-Large Judicial Elections*, 48 SMU L. REV. 457, 468 (1995) ("The smaller the group a judge serves, the greater the likelihood that constituents will expect a judge to be responsive to their special needs." (quoting Mary T. Wickham, Note, *Mapping the Morass: Application of Section 2 of the Voting Rights Act to Judicial Elections*, 33 WM. & MARY L. REV. 1251, 1281-82 (1992) (internal quotation marks omitted))).

112. *See* Thomas R. Phillips, *Keynote Address: Electoral Accountability and Judicial Independence*, 64 OHIO ST. L.J. 137, 146-47 (2003) (noting that public financing, at least for state supreme court elections, has received strong public support as reflected by polling data).

113. *See, e.g.*, Charles Gardner Geyh, *Publicly Financed Judicial Elections: An Overview*, 34 LOY. L.A. L. REV. 1467, 1478-80 (2001) (discussing the hurdles to adoption of a public financing system); Editorial, *Judges and their donors*, CHI. TRIB., Mar. 19, 2007, at 16 (noting that public financing does not eliminate the influence of trial

F. *Philosophical Objections to the  
Popular Election of Judges*

Perhaps the biggest concern with judicial elections is how the electoral process itself influences the successful candidate.<sup>114</sup> When a judge is elected on the same ballot, by the same means, and under the same rules as a candidate for Congress or city council, might not the judge begin to think like a political official?<sup>115</sup> Might not he regard his supporters as his constituents, his campaign rhetoric as his platform, and his party leaders as his allies?<sup>116</sup> Might not such a judge, as a seasoned veteran of the campaign trail, think he or she understands the pressing problems of the hour and the public policy solutions better than some legislator from a single, isolated district?

A system that treats judges differently from other officials helps remind both the public and the judges that they do something very different. A system that encourages good judges to stay and encourages bad judges to go serves all of us well. And a system that lets judges spend most of their time on the bench or in the library, rather than dialing for dollars or riding in parades, delivers justice more efficiently. Right now, the Missouri Plan could best meet those needs in most of our states.

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lawyers and business organizations, which can "still spend as much as they want airing their own ads").

114. See JAMES SAMPLE ET AL., BRENNAN CTR. FOR JUSTICE, *FAIR COURTS: SETTING RECUSAL STANDARDS* 11 (2008), [http://www.brennancenter.org/content/resource/-fair\\_courts\\_setting\\_recusal\\_standards](http://www.brennancenter.org/content/resource/-fair_courts_setting_recusal_standards) ("In a 2002 written survey of 2,428 state lower, appellate, and supreme court judges, over a quarter (26%) of the respondents said they believe campaign contributions have at least 'some influence' on judges' decisions and nearly half (46%) said they believe contributions have at least 'a little influence.' The survey also revealed that 56% of state court judges believe 'judges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign.'" (quoting GREENBERG QUINLAN ROSNER RESEARCH & AMERICAN VIEWPOINT, *JUSTICE AT STAKE—STATE JUDGES FREQUENCY QUESTIONNAIRE* 5, 11 (2002), [http://www.gqrr.com/articles/1617/1411\\_JAS\\_judges.pdf](http://www.gqrr.com/articles/1617/1411_JAS_judges.pdf))).

115. See George D. Brown, *Political Judges and Popular Justice: A Conservative Victory or a Conservative Dilemma?*, 49 WM. & MARY L. REV. 1543, 1592 (2008) ("Neutrality in the conduct of a trial requires a decision maker who is not subject to pressure from the parties or, a fortiori, from the public at large. There is something contrary to this ideal in the notion of an adjudicator campaigning on how he or she is going to adjudicate. The existence of political 'debts,' especially campaign contributions, 'owed' to parties who then litigate before the debtor raises the same concerns." (footnotes omitted)). Professor Brown also raises the possibility that as a result, "federal court distrust of politicized state courts will affect relations between the two systems." *Id.*

116. See *id.*

Some say that merit selection is just a poor cousin to the real reform of purely appointed judges. But only a few Eastern states, plus Hawaii, have genuine appointive systems.<sup>117</sup> I do not think the States are going to embrace purely appointed judges, for reasons of history, if for nothing else. Moreover, the one appointive system with which every American is familiar—the federal system—has not inspired much confidence in recent decades. Certainly lifetime judges are insulated from campaign contributions and partisan sweeps, but the federal appointment and confirmation process has its own significant problems. Not only have recent Administrations come under increasing pressure to appoint men and women whose performance in office can be “safely” predicted, but some recent Senate confirmation battles have been as nasty and as misleading as any election contest. For example, one senator voted against confirming Chief Justice Roberts because he declined to answer questions about a particular legal issue “as a son, a husband, a father” and because he declined to commit to a particular vote if another issue were to come before the Court.<sup>118</sup> Supporters and opponents have run multi-million dollar media campaigns to support or oppose confirmation of Supreme Court and even circuit nominees.<sup>119</sup>

Like it or not, the central role of the judicial system is not going to wither away, or even recede. As George F. Will observed, “As traditional sources of social norms—families, schools,

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117. Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, Rhode Island, South Carolina, Vermont, and Virginia employ appointive judicial selection methods. See Roy A. Schotland, *Judicial Elections*, in GUIDE TO POLITICAL CAMPAIGNS IN AMERICA 391–92 (Paul S. Herrnson et al. eds., 2005) (“Thirty-nine states have judicial elections, and eleven states are strictly appointive. In twenty states, all or some judges run in nonpartisan elections; in sixteen all or some run in partisan elections; and in nineteen all or some face ‘retention’ elections in which the voters either keep or fire an incumbent judge.” (citation omitted)).

118. Sheryl Gay Stolberg, *Panel Approves Roberts, 13-5, As 3 of 8 Democrats Back Him*, N.Y. TIMES, Sept. 22, 2005, at A1 (discussing Senator Feinstein’s reasons for opposing John Roberts).

119. For example, presidential candidates use barely-disguised code words in telling voters what kind of judges they will appoint. See, e.g., David G. Savage, *John McCain: Two visions of the Supreme Court*, L.A. TIMES, May 19, 2008, at A8 (quoting both McCain and Obama discussing “activist judges,” McCain discussing the “clear meanings of the Constitution,” and Obama discussing judges’ “empathy”). Both sides of the political spectrum have created cottage industries that raise millions of dollars to support or oppose nominees for the Supreme Court and even some courts of appeals. See Debra Rosenberg, *Bush’s Choice: His judicial record is limited, his credentials unquestioned. That makes John G. Roberts a tough target.*, NEWSWEEK, July 20, 2005, <http://www.newsweek.com/id/50355/output/print>.

churches—weaken, law seeps into the vacuum.”<sup>120</sup> Courts may have lost some of their autonomy in devising the common law,<sup>121</sup> but they are more involved than ever before in the real problems of real people, such as child education and welfare,<sup>122</sup> employment discrimination,<sup>123</sup> marriage,<sup>124</sup> students’<sup>125</sup> and prisoners’ rights,<sup>126</sup> and so on. As advances in information and biological technology raise new issues of personal privacy, personal autonomy, and perhaps even what it means to be a human being, the courts will be even more significant in every American’s life.

Our courts are simply too important to be left to benign neglect. As future leaders of the bar, your ideas on how judges are selected, and how they perform once in office, will be heard and respected. If, in the course of your professional careers, you can give the American people a better judicial system, you will have, in your own way, “[l]ived greatly in the law.”<sup>127</sup>

120. George F. Will, *The Tangle of Egos and Rules*, NEWSWEEK, July 26, 1993, at 60.

121. See generally John C.P. Goldberg, *Ten Half-Truths About Tort Law*, 42 VAL. U. L. REV. 1221, 1270–73 (2008) (discussing how tort law has often been codified).

122. See generally Daniel E. Witte & Paul T. Mero, *Removing Classrooms from the Battlefield: Liberty, Paternalism, and the Redemptive Promise of Educational Choice*, 2008 BYU L. REV. 377, 405–06 (2008) (discussing a recent California Court of Appeals decision which held that parents do not have a constitutional right to home school their children and that parents who do home school their children may be guilty of a criminal infraction (citing *In re Rachel L.*, 73 Cal. Rptr. 3d 77 (Ct. App. 2008))). Note that *In re Rachel L.* was superseded by a grant of rehearing, and was reversed in part by *Jonathan L. v. Superior Court*, 81 Cal. Rptr. 3d 571, (Ct. App. 2008).

123. See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005) (holding that Title IX, which prohibits sex discrimination in schools, provided a cause of action for retaliation to a male high school girls’ basketball coach who received negative work evaluations and was ultimately removed after complaining that his team was not receiving equal funding).

124. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (holding a Massachusetts law denying marriage to same-sex couples unconstitutional).

125. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316 (2000) (holding a Texas high school’s tradition of sanctioning student-led prayer at football games unconstitutional); *Bush v. Holmes*, 919 So. 2d 392, 415 (Fla. 2006) (Bell, J., dissenting) (rejecting the Florida Supreme Court’s holding that the public school system “is the exclusive means set out in the constitution for the Legislature to make adequate provision for the education of children,” because such an exclusivity requirement is neither expressed in the constitution nor necessarily implied (internal quotation marks omitted)).

126. See *Johnson v. California*, 543 U.S. 499, 509 (2005) (ruling that a California prison policy that segregated prisoners by race, apparently for security purposes, was constitutionally suspect).

127. OLIVER WENDELL HOLMES, *The Profession of Law: Conclusion of a Lecture to Undergraduates of Harvard University* (Feb. 17, 1886), in *COLLECTED LEGAL PAPERS* 29, 30 (Harcourt, Brace & Co. 1920).

# MERIT SELECTION: CHOOSING JUDGES BASED ON THEIR POLITICS UNDER THE VEIL OF A DISARMING NAME

CLIFFORD W. TAYLOR\*

Given the dispute in this country about the proper role of judges and how the people perceive what judges are doing, any sophisticated observer must conclude that judicial selection in the United States today is "political."<sup>1</sup> People, whether or not they are educated, sophisticated, or engaged in a legal career, are largely divided into two schools of thought about what judges ought to do. This dispute has at its heart one question: What is the proper scope of a judge's authority?

There is a traditional approach to judging that is advanced by conservatives and judges in the Scalia and Bork model. According to this traditional approach, judges are to interpret constitutions and statutes by attempting to discern the original understanding of the drafters or ratifiers and judges are then to follow that original understanding.<sup>2</sup> There is very little latitude

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\* Judge in Residence, Ave Maria School of Law; Chief Justice, Michigan Supreme Court, 2005–08; Justice, Michigan Supreme Court, 1997–2005. I would like to thank my intern, Bradley Fowler, for his invaluable assistance. Remarks originally delivered to the Twenty-Seventh Annual National Federalist Society Student Symposium, held at the University of Michigan Law School in Ann Arbor, Michigan.

1. See, e.g., AM. BAR ASS'N, JUSTICE IN JEOPARDY: REPORT OF THE ABA COMM'N ON THE 21ST CENTURY JUDICIARY 13–18 (2003), available at <http://www.abanet.org/judind/jeopardy/pdf/report.pdf> (describing "recent developments that have politicized the American judiciary"); ZOGBY INT'L, ATTITUDES AND VIEWS OF AMERICAN BUSINESS LEADERS ON STATE JUDICIAL ELECTIONS AND POLITICAL CONTRIBUTIONS TO JUDGES 4–5 (2007), available at [http://www.ced.org/docs/report/report\\_2007/judicial\\_survey.pdf](http://www.ced.org/docs/report/report_2007/judicial_survey.pdf) ("[F]our in five executive-level respondents from the companies surveyed (79%) indicat[ed] a belief that campaign contributions have an impact on judges' decisions."); George D. Brown, *Political Judges and Popular Justice: A Conservative Victory or a Conservative Dilemma?*, 49 WM. & MARY L. REV. 1543, 1569 (2008) ("[F]our Supreme Court Justices [(Souter, Stevens, Ginsburg, and Breyer)] recently voiced concern about the effects of politicization on state courts.").

2. See, e.g., Robert H. Bork, *The Judge's Role in Law and Culture*, 1 AVE MARIA L. REV. 19, 27–28 (2003); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862–64 (1989).

in this approach to judicial interpretation. The judge's role is important but constrained.<sup>3</sup>

The other approach, advanced by liberals, including almost the entire legal academy, supports a more aggressive role for judges. This model—the Douglas-Brennan-Breyer model—sees judges as possessing a greater capacity to make policy in politically contentious areas such as the death penalty, affirmative action, abortion, religion in the public square, sexual liberty, same-sex marriage, and so on through vehicles such as living constitutions, unenumerated rights, and the infamous emanations and penumbras.<sup>4</sup>

The point not to be missed, then, is that a split exists on the issue of the role of a judge. Moreover, few would doubt that this is an important public policy issue, as the titanic battles of the last twenty years in the United States Senate over the confirmation of federal judges demonstrate.<sup>5</sup> Those battles inescapably turn on the potential judge's position in this debate.<sup>6</sup>

Everyone wants judges who agree with them on the proper role of a judge. This reality cannot be wished away. Any effort to construct a judicial-selection system that acts as though this is not the current state of affairs ignores the proverbial elephant in the room. Yet the merit-selection approach—which asserts that all a state has to do is find the best-qualified lawyers and make them judges<sup>7</sup>—asks the states to operate as though there is no elephant. Indeed, that is the fatal flaw of a merit-selection approach.

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3. See Clifford W. Taylor, *A Government of Laws, and Not of Men*, 22 T.M. COOLEY L. REV. 199, 201–02 (2005).

4. See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 6 (2005); Michael Waldman, *Introduction for the Brennan Center for Justice and Thomas Jorde Living Constitution: A Symposium on the Legacy of Justice William J. Brennan, Jr.*, 95 CAL. L. REV. 2185, 2185–86 (2007); Justice William J. Brennan, Jr., *Speech to the Text and Teaching Symposium at Georgetown University* (Oct. 12, 1985), in *ORIGINALISM: A QUARTER-CENTURY OF DEBATE* 55–70 (Steven G. Calabresi ed., 2007); Travis A. Knobbe, Note, *Brennan v. Scalia, Justice or Jurisprudence? A Moderate Proposal*, 110 W. VA. L. REV. 1265, 1269–70 (2008).

5. See, e.g., David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1033 (2008) (book review).

6. See, e.g., Stephen B. Presser, *Judicial Ideology and the Survival of the Rule of Law: A Field Guide to the Current Political War over the Judiciary*, 39 LOY. U. CHI. L.J. 427, 434 (2008).

7. See, e.g., Mark S. Cady & Jess R. Phelps, *Preserving the Delicate Balance Between Judicial Accountability and Independence: Merit Selection in the Post-White World*, 17 CORNELL J.L. & PUB. POL'Y 343, 352–53 (2008).



I am not in favor of merit selection, even though it has the benefit of an appealing title. I am, with certain misgivings, an advocate for the popular election of judges, with the elections being full of robust debate as anticipated by the Supreme Court decision in *Republican Party of Minnesota v. White*.<sup>8</sup> There are certainly problems with the election of judges, as there are problems with all elections. These include voter ignorance and voter misdirection by clever partisans.<sup>9</sup> Although the electoral system has these problems, at least it acknowledges this reality. Rather than having elites make the decision while operating in a "good government" fog—which is also a largely political decision—judicial elections give the choice to ordinary, rank-and-file voters.

It is common in the modern age to condescend to regular folks, but this attitude should give us pause because the notion that citizens can make wise choices is unquestionably at the very heart of our system of government.<sup>10</sup> In considering this recent bias against elections, it is useful to recall the famous quip by William F. Buckley, Jr., who said he would rather entrust the government of the United States to the first 2000 people listed in the Boston telephone directory than to the faculty of Harvard University.<sup>11</sup> There is wisdom in that quip.

Edmund Burke, the eighteenth-century English statesman and political philosopher, made one of his many penetrating and arresting observations when he argued for something akin to popular government. Burke maintained that although individual Englishmen could make poor choices, as a whole and over time the English people would not.<sup>12</sup> Thus, popular government could work. It is a simple but nonetheless sophisticated notion. Indeed, American and English history proves the truth

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8. 536 U.S. 765, 772, 781–82 (2002).

9. See, e.g., Lee Goldman, *False Campaign Advertising and the "Actual Malice" Standard*, 82 TUL. L. REV. 889, 917–18 (2008); Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 CORNELL J.L. & PUB. POL'Y 295, 331 (2008); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1291–93 (2004).

10. See THE FEDERALIST NO. 71 (Alexander Hamilton).

11. See Lino A. Graglia, *Grutter and Gratz: Race Preference to Increase Racial Representation Held "Patently Unconstitutional" Unless Done Subtly Enough in the Name of Pursuing "Diversity"*, 78 TUL. L. REV. 2037, 2040 (2004).

12. See EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 185 (London, J. Dodsley 1790).

of that insight. Americans should be reluctant to assume incompetence in their fellow citizens to make judicial choices, especially because history has shown them competent to make other difficult electoral choices in other branches of government.

Moreover, upon closer examination, even merit-selection advocates would have to admit that their favored system in practice is also driven by politics. The difference is that in merit selection the politics are driven underground, whereas the politics of elections are public and obvious. Studies of the flagship merit-selection process in Missouri indicate that merit selection does not remove politics from the process but instead makes the politics harder to unearth by hiding it from public scrutiny and voter reaction.<sup>13</sup>

The classic study of the first twenty-five years of Missouri merit selection, *The Politics of the Bench and the Bar*, indicates that the attorneys who chose the lawyer members of the nominating commissions—merit selection is always lawyer-dominated—tended to split into two groups, the plaintiffs' bar and defense attorneys.<sup>14</sup> Their choices were founded in part on their clients' broad socioeconomic interests. No one should be surprised that lawyers would consider their clients' interests, or their own, in choosing those who choose judicial nominees. In other words, one type of politics—the politics of self-interest—replaced another.

Recently, when Justice O'Connor contended that judicial elections have become "political,"<sup>15</sup> one was tempted to respond, "You say that as if it is a bad thing." For those who advocate merit selection, "political" seems to be code for having the people involved in the selection of their judges. I am not persuaded that the reputation or quality of state courts suffers because the people have that choice. Moreover, there is little evidence that states with merit selection have better judicial decision-making than those that elect their judges.<sup>16</sup> How then

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13. RICHARD A. WATSON & RONDAL G. DOWNING, *THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN* 352 (1969).

14. *See id.* at 21–22.

15. Sandra Day O'Connor & Ronnell Andersen Jones, *Reflections on Arizona's Judicial Selection Process*, 50 ARIZ. L. REV. 15, 23–24 (2008).

16. *See* Stephen J. Ware, *Selection to the Kansas Supreme Court*, 17 KAN J.L. & PUB. POL'Y 386, 396–97 (2008).

can we justify taking the choice away from voters and placing it in the hands of a select few? The arguments presented so far are unconvincing.

What must be acknowledged, even if perhaps unwelcome, is that there is an increasing national perception that courts are out of control.<sup>17</sup> The appropriate response to that concern is not to take the people out of the selection process. Notice who is not calling for merit selection: it is not the business community, not labor unions, not farmers, teachers, retirees, or church pastors. Merit selection calls come only from either lawyers or advocacy groups who are opponents of judicial elections.<sup>18</sup> They are hardly the only people who care about justice; they simply want the whip hand in choosing who dispenses it. These people do not truly want to preserve judicial independence, which is not really threatened. They want to make sure that candidates who share their views in the great debate over the role of judges will have a selection system that strengthens their prospects of making it to the bench.

Merit selection is a solution that fails to acknowledge the real problem. Politics will always play a role in the selection of judges. Do we want it openly and robustly present in the public square or behind closed doors with phony proclamations that the process is looking for the best person using impartial measures? In sum, all selection systems for the foreseeable future will be political. We need to acknowledge that reality and evaluate methods of selection with that truth in mind. Public elections, though not flawless, appear better in that regard compared to the alternative merit-selection system.

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17. See, e.g., Leita Walker, *Protecting Judges from White's Aftermath: How the Public-Employee Speech Doctrine Might Help Judges and the Courts in Which They Work*, 20 GEO. J. LEGAL ETHICS 371, 382-83 (2007) ("[F]orty-six percent of [survey] respondents agreed that judges were 'arrogant, out-of-control and unaccountable.'").

18. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 309 (2008).



*The Twenty-Seventh Annual  
National Federalist Society Student Symposium:  
The People & The Courts*

**III.**

**KELO, GRUTTER, AND POPULAR RESPONSES  
TO UNPOPULAR DECISIONS**

*ESSAYISTS*

WARD CONNERLY  
MARCI A. HAMILTON



# ACHIEVING EQUAL TREATMENT THROUGH THE BALLOT BOX

WARD CONNERLY\*

Since the founding of the United States, the relationship between the citizens and their government has been central to the definition of our nation. We were established as a nation of individuals who rely on certain “self-evident truths”<sup>1</sup> to guide how we conduct our official business. Personal liberty, maximum individual freedom, and a God-given endowment of equality form the centerpiece of our system.<sup>2</sup> These gifts from our Creator are inalienable—they cannot be detached from us as individuals—and the government must operate within a framework that acknowledges and protects the supremacy of these individual rights.<sup>3</sup>

The proposition that the best form of government is that which is closest to the people is central to the relationship between the government and its citizens. There is no form of government that is closer to the people than direct democracy, namely citizens governing themselves by way of such measures as citizen-sponsored initiatives. Sometimes direct democracy is crucial to protecting individual freedoms in the face of abuses perpetrated by representative democracy.

Every generation has to evaluate and redefine the relationship between its citizens and their government. The relationship is never etched in stone. Events and demands of our times always intrude to force the relationship in one direction or another. Today, we confront terrorist activity and the response of our government to that activity, we confront the issues of race, sex, and ethnic preferences, and we deal with a host of other

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\* President, American Civil Rights Coalition; Member, Board of Regents, University of California, 1993–2005. Mr. Connerly was a 2005 recipient of the prestigious Bradley Prize for his defense of the American ideals of freedom, liberty, and equality.

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

2. See *id.*

3. See *id.*

issues. Generally, circumstances encourage expanded power to the government. Rarely is the citizen on the receiving end of expanded rights and personal freedom.

Sometimes, the government receives expanded authority as a result of the direct consent of the governed. More often, however, that consent comes by quiet acquiescence. The relationship may also be altered in subtle ways on an incremental basis. Take, for example, the Civil Rights Movement of the 1960s. Initially, the 1964 Civil Rights Act<sup>4</sup> was enacted to extend to black Americans their right to equal treatment.<sup>5</sup> In this instance, the grant of equal rights to black people did not affect the rights of other citizens.

This extension of basic rights to blacks also did not initially affect the relationship between private citizens and the government. Over time, however, the government approved additional legislation designed to benefit blacks, other minorities, and women beyond the level of equal treatment.<sup>6</sup> Each new enactment reduced not only the rights of non-minorities and males, but also increased the power of the government to make decisions about such matters as diversity.<sup>7</sup> In so doing, this legislation treated the question of the relationship between the private citizen and government as secondary to the more specific issue of race and gender preferences and their effect on respective groups. It is undeniable that these incremental initiatives reordered the basic relationship between citizens and the government.

At other times, cataclysmic events occurred and substantial reforms were put in place to address such events. We need look no further than September 11, 2001, to find such an event. In response to those attacks, the U.S. government deemed dra-

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4. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 42 U.S.C.) (2000).

5. See *id.* § 201(a), 42 U.S.C. § 2000a(a); Thomas H. Barnard & Adrienne L. Rapp, *Are We There Yet? Forty Years after the Passage of the Civil Rights Act: Revolution in the Workforce and the Unfulfilled Promises that Remain*, 22 HOFSTRA LAB. & EMP. L.J. 627, 628 (2004-05).

6. See, e.g., Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1502, 121 Stat. 266, 424 (codified at 6 U.S.C.A. § 1152(g) (West 2008)); Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, §§ 501(a), 1204, 103 Stat. 183, 367-68, 520-21 (examples of legislation that provide preferential treatment to women and minorities).

7. See Implementing Recommendations of the 9/11 Commission Act of 2007; Financial Institutions Reform, Recovery, and Enforcement Act of 1989.



conian security measures essential to protect the people.<sup>8</sup> The passage and enforcement of such measures instantly, substantially, and perhaps irrevocably achieved a major restructuring of the relationship between private citizens and the government.<sup>9</sup>

Although few can deny the legitimacy of the rationale for greater governmental power to protect the security of our nation, the result is an unmistakable expansion of the government and a severe diminution in the rights of the citizen. Witness the intrusive, although understandable, inspections of persons and property at airports.<sup>10</sup>

The great challenge of a democracy is determining how to reconcile issues that threaten to diminish the role of the citizen with solutions that would have the effect of embellishing the role of the government. Unfortunately, this challenge cannot be answered so long as the American public is unaware of the threats that certain government policies and actions present. This unawareness often opens the door to the feared "slippery slope" in public policy.

It is not, however, only the legislative branch that has the power to threaten individual freedoms. The subject of civil rights illustrates quite vividly how the relationship between citizens and their government may be altered by the courts and why citizens may be forced to take matters into their own

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8. See generally USA PATRIOT Act of 2001, Pub. L. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.).

9. See, e.g., Todd Landman, *Imminence and Proportionality: The U.S. and U.K. Responses to Global Terrorism*, 38 CAL. W. INT'L L.J. 75, 76-77 (2007) ("[B]oth countries have fallen victim to violent terrorist attacks perpetrated by operatives from the loose global terrorist network known as al-Qaeda. Less than four years after the terrorist attacks on New York City and Washington, D.C. on the morning of September 11, 2001, London experienced a series of successful terrorist attacks on July 7, 2005, followed by a series of unsuccessful attacks on July 21, 2005. These attacks from Islamist extremists have led to a response from both countries that has curbed the kinds of civil liberties and eroded long-cherished legal guarantees that have served as the beacon for free people the world over. The United Kingdom expanded already-permanent anti-terror legislation and the United States passed the U.S.A. Patriot Act and other related statutes that, taken together, have extended unprecedented power and discretion in the executive branches of government across broad dimensions of citizen and non-citizen life in both countries. Such discretion has meant that over the last five years the domestic protection of individual liberties has become more precarious as the writ of executive authority has expanded in ways that could never have been imagined before the attacks of September 11.").

10. See, e.g., Joe Sharkey & Hilary Howard, *Easing the Pain at Airports*, N.Y. TIMES, Apr. 30, 2008, at H1.

hands to preserve the rights promised to them by the Declaration of Independence, and guaranteed by the Constitution and Congressional action.<sup>11</sup>

Rightly recognizing that black Americans had been deprived of their basic right to equal treatment by their government, the United States Supreme Court over the years adopted an expedient view of the Equal Protection Clause of the Fourteenth Amendment. Essentially, the Court suspended the constitutional guarantee of equal protection for some citizens, particularly whites, in the interest of compensating blacks because their civil rights had been denied for many years.<sup>12</sup> However, instead of bringing unequal treatment to a halt, even as blacks were gaining equal access to virtually all facets of American life, the Court allowed such practices to continue and even gave them a hint of permanency in 2003 by ruling that racial preferences were constitutional for the purpose of achieving diversity in institutions of higher education.<sup>13</sup>

As a result of the Supreme Court's politically correct decisions, Congress and state legislatures have become reluctant to take the necessary steps to enforce the Civil Rights Act or to remove "affirmative action" programs granting preferential treatment on the basis of race, sex, color, ethnicity, or national origin.<sup>14</sup> It is thus highly unlikely that any legislative body or state or federal chief executive could be prevailed upon today to enforce the simple command of the Civil Rights Act to treat all Americans as equals "without regard to their race, color, . . . or national origin."<sup>15</sup>

Fortunately, there are twenty-four states in America where the people have reserved for themselves the right of self-governance through the citizen initiative process. Already, three of those twenty-four—California, Michigan, and Wash-

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11. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

12. *See, e.g.*, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 325 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part) ("[T]he central meaning of today's opinions [is]: Government may take race into account . . . to remedy disadvantages cast on minorities by past racial discrimination.").

13. *See Grutter*, 539 U.S. at 343 (2003).

14. *See, e.g.*, Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1502, 121 Stat. 266, 424 (codified at 6 U.S.C.A. § 1152(g) (West 2008)); Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, §§ 501(a), 1204, 103 Stat. 183, 367-68, 520-21.

15. Civil Rights Act of 1964, § 401(b), 42 U.S.C. § 2000c(b) (2000).

ington—have determined that the issue of racial distinctions is of sufficient importance to the relationship between citizens and the government that they forbid government agencies from making such distinctions.<sup>16</sup>

In addition, active efforts are now underway in three other states—Arizona,<sup>17</sup> Colorado,<sup>18</sup> and Nebraska<sup>19</sup>—to restore the principle of equal treatment for all by enacting constitutional amendments similar to those amendments and statutes that have been instituted in California, Michigan, and Washington. The basic language involved in all identified states is:

The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting.<sup>20</sup>

Those who have been elected to “represent” the people, as we have seen, frequently resent it when the people exercise their right to govern themselves through direct democracy. They label such efforts as “clumsy”<sup>21</sup> and “cumbersome.”<sup>22</sup> Oc-

16. See CAL. CONST. art. I, § 31; MICH. CONST. art. I, § 26; WASH. REV. CODE ANN. § 49.60.030 (West 2008).

17. See Application for Initiative or Referendum Petition Serial Number: A Proposal to Amend the State Constitution to Prohibit Preferential Treatment or Discrimination by State Government (Nov. 5, 2007), <http://www.azsos.gov/election/2008/general/ballotmeasuretext/c-17-2008.pdf>.

18. See Section 31: Nondiscrimination by the State (May 18, 2007), [http://www.elections.colorado.gov/WWW/default/Initiatives/Title%20Board%20Filings/2007-2008%20Filings/Final%20Text/final\\_text\\_31.pdf](http://www.elections.colorado.gov/WWW/default/Initiatives/Title%20Board%20Filings/2007-2008%20Filings/Final%20Text/final_text_31.pdf).

19. See Initiative Petition (Dec. 3, 2007), <http://www.sos.state.ne.us/elec/pdf/affirmative%20action%20ban.pdf>.

20. Application for Initiative or Referendum Petition Serial Number, *supra* note 17; Section 31: Nondiscrimination by the State, *supra* note 18; Initiative Petition, *supra* note 19.

21. See, e.g., LOUIS LUSKY, OUR NINE TRIBUNES 8–9 (1993) (“Legislatures—state and federal—are a component of our system of self-government, and a critically important one. Self-government, as we know it, is *representative* government. It is not ‘direct democracy’ after the fashion of the New England town meeting, where the voters themselves formulate bills and enact laws. Electorates larger than a few hundred, if they legislate directly, tend to function as mobs and exhibit the dangerous tendencies already mentioned. That is why the initiative, referendum, and direct recall—though perhaps useful in extreme cases—yield clumsy and unsatisfactory results. What these procedures lack is the ability to effect compromise among competing needs and demands and thus achieve optimum accommodation to them. That is the core of the legislative function, and when legislatures move toward such compromises, I say they act ‘normally.’”).

casionaly, elected representatives even attempt to thwart the people's use of the initiative process.

The tension that frequently exists between citizens and their government can best be viewed by examining the initiative process in two of the states that allow initiatives. In Oklahoma, the constitution preserves the right for citizens to gather signatures and to place on the ballot initiatives that would have the force of law if approved by the voters.<sup>23</sup> The legislature has enacted a statute that requires signatures to be gathered within a ninety-day period.<sup>24</sup> This time frame is the most restrictive in the nation and makes the citizen initiative process highly difficult.<sup>25</sup> In short, the legislature has effectively undermined a right that the citizens intended to preserve for themselves. The Oklahoma legislature has also imposed a residency requirement for those hired to collect signatures.<sup>26</sup> This requirement, coupled with the restrictive time constraint, makes it extremely difficult to qualify any initiative for the ballot.

In Missouri, the secretary of state and the attorney general are empowered to write ballot titles and summaries of any initiative proposed for the ballot.<sup>27</sup> When a group of citizens submitted the language quoted above to the secretary of state and attorney general, both of whom opposed the initiative, the two officials prepared a distorted and perversely worded summary that left the impression that the initiative would expressly

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22. See, e.g., Shawn P. Flaherty, "*Dollars, CPI, and Voter Empowerment*": *Public Act 94-976 and Its Impact on Local Government Tax Referenda*, 27 N. ILL. U. L. REV. 377, 387 (2007) ("It is axiomatic that the electorate should understand and be fully informed about the public policy matters they are asked to approve or reject. To the contrary, Illinois voters, voting rights organizations, and other media commentary have long took umbrage with the manner in which tax referenda must be submitted to the electorate; the process has generally been regarded as unnecessarily confusing and cumbersome.").

23. See OKLA. CONST. art. V, § 2.

24. See OKLA. STAT. ANN. tit. 34, §§ 1, 2 (West 2008).

25. See Initiative and Referendum Institute at the University of Southern California, *Signature, Geographic Distribution and Single Subject (SS) Requirements for Initiative Petitions*, <http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Requirements/Almanac%20-%20Signature%20and%20SS%20and%20GD%20Requirements.pdf>.

26. OKLA. STAT. ANN. tit. 34, § 3.1 (West 1999).

27. See MO. ANN. STAT. § 116.334 (West 2003).

harm women and racial minorities.<sup>28</sup> Fortunately, a Missouri circuit judge overturned their language, calling it “unfair” and “insufficient.”<sup>29</sup>

Oklahoma and Missouri are examples of the constant tensions that arise between citizens and their government. This should not be, because under the American system of government the citizens essentially are the government. But, in the fullness of time, the government has become a separate and distinct body.

The principle of “equal treatment” is at the core of American democracy. The guarantee of equal rights for all Americans is not something to be bargained away through racial favoritism or to be misappropriated by the President, Congress, or any state legislature. It is the American Constitution, derived from the founding principle that equality is a gift endowed by the Creator, which guides the relationship between the citizen and the government.<sup>30</sup>

Although I have often been characterized as “the high priest” of citizen initiatives,<sup>31</sup> I do not favor the unbridled use of the initiative process. I recognize its inherent dangers.<sup>32</sup> But I also recognize that there are times when representative government woefully fails the people. With respect to the matter of equal treatment before the law, representative government at all lev-

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28. See *Asher v. Carnahan*, No. 07AC-CC00648 (Cir. Ct. of Cole County, Mo. Jan. 7, 2008), <http://www.colecountycourts.com/Asher%20Judgment.pdf>. The summary reads as follows:

Shall the Missouri Constitution be amended to: [b]an affirmative action programs designed to eliminate discrimination against, and improve opportunities for, women and minorities in public contracting, employment and education; and [a]llow preferential treatment based on race, sex, color ethnicity, or national origin to meet federal program funds eligibility standards as well as preferential treatment for bona fide qualifications based on sex?

*Id.* at 12.

29. *Id.* at 4.

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

31. E.g., William F. Buckley, Jr., *On the Right*, NAT'L REV., Aug. 30, 1999, at 58 (naming Ward Connerly “the high priest of equal treatment, and the targeted enemy of the preference brigade”).

32. See, e.g., THE FEDERALIST NO. 10 (James Madison) (comparing direct democracy with republican government).

els has become totally unresponsive to the people, who clearly support the principle of "colorblind" government.<sup>33</sup>

When the Supreme Court ruled in favor of racial discrimination in the *Grutter*<sup>34</sup> decision in 2003 and Justice Sandra Day O'Connor expressed the hope that race preferences would no longer be necessary in twenty-five years from that decision,<sup>35</sup> the Court was telegraphing the fact that it was willing to make a ruling in the interest of racial expediency rather than to interpret the Constitution and the 1964 Civil Rights Act objectively. In circumstances such as this, there is little choice for the people but to do what can legally be done to negate the effect of the Court's decision. Ballot initiatives are the most obvious route to take to achieve this objective.

The status of the relationship between the citizen and the government is a muddled one at present. The people need to understand that the principle of equal rights is a primary means by which the government seeks to expand and exercise its control over citizens to achieve certain objectives. This understanding, coupled with continuous efforts to resist altering the principle of equal rights in America, provide hope that private citizens can retain control over their government.

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33. See Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1502, 121 Stat. 266, 424 (codified at 6 U.S.C.A. § 1152(g) (West 2008)); Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, §§ 501(a), 1204, 103 Stat. 183, 367-68, 520-21.

34. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

35. See *id.* at 343.

# POLITICAL RESPONSES TO SUPREME COURT DECISIONS\*

MARCI A. HAMILTON\*\*

## I. REPRESENTATIVE DEMOCRACY AT THE CONSTITUTIONAL CONVENTION

Direct democracy, as Professor Clark has pointed out, is not necessarily the people talking.<sup>1</sup> Quite appropriately, he has focused on the ways in which representative democracy—the republican form of democracy—works.<sup>2</sup> This Essay will make a separate point, which ties in with the Framers' original intent in choosing republicanism over direct democracy. If one refers to the notes of the debates at the Constitutional Convention—as opposed to relying solely on the Federalist Papers, which were, after all, in significant part propaganda to obtain ratification—one discovers that when the Framers gathered in Philadelphia for the Constitutional Convention they were not very fond of "the people."<sup>3</sup> They thought of the people as an unruly mob, incapable of being corralled to attain the larger public good.<sup>4</sup>

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\* A general note on terminology: the words "popular" and "unpopular" have many connotations that are not always in opposition. A popular decision can mean that the people as a whole approved of a result, that a majority of the people approved the result, or that the people were simply involved in reaching the result. An unpopular decision can be one that everyone dislikes, a majority dislikes, or a vocal minority dislikes. These various definitions were used interchangeably during the Twenty-Seventh Annual National Federalist Society Student Symposium, entitled "The People and the Courts." To avoid this confusion, this Essay focuses on the differences in the structure of decision-making between "direct" and "representative" democracy, and avoids the terms "popular" and "unpopular."

\*\* Paul R. Verkuil Chair in Public Law, Benjamin N. Cardozo School of Law, Yeshiva University.

1. See Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 435–37, 478–79 (1998).

2. See *id.* at 473–78.

3. Compare THE FEDERALIST NO. 68, at 412 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[T]he sense of the people should operate in the choice of the [President] . . ."), and *id.* at 413 ("[T]he executive should be independent for his

The Convention was not only *not* a populist movement, it was also deeply suspicious of the capacities of the people to even elect public leaders, let alone decide matters of public policy. Roger Sherman of Connecticut, for example, stated that "[t]he people . . . [immediately] should have as little to do as may be about the Government."<sup>5</sup> Sherman insisted that Congress should be elected by the state legislatures and opposed election by the people on the grounds that their lack of information made them easily susceptible to deception.<sup>6</sup> Elbridge Gerry of Massachusetts added: "The evils we experience flow from the excess of democracy. The people do not want virtue; but are the dupes of pretended patriots."<sup>7</sup> Colonel George Mason of Virginia rejected direct election of the President as follows: "The extent of the Country renders it impossible that the people can have the requisite capacity to judge of the respective pretensions of the Candidates."<sup>8</sup>

The Framers sought a way to repair the republican form of democracy that had been codified by the Articles of Confederation and that had failed so spectacularly. This, our first constitution, was an abject failure.<sup>9</sup> Our second constitution—the one we employ today—was decidedly more successful, and that success is due in part to the Framers' tinkering not with populism or direct democracy, but with representative democracy. The Articles were seen as a failure because they had not yielded high-minded representatives or legislatures that operated to serve the public good. Instead, state legislatures had become bastions of corruption.<sup>10</sup>

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continuance in office on all but the people themselves."), with 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 48 (Max Farrand ed., 1911) [hereinafter FARRAND] ("The people . . . [immediately] should have as little to do as may be about the Government. They want information and are constantly liable to be misled." (brackets in original) (statement of Roger Sherman)).

4. See *infra* notes 5–8 and accompanying text.

5. 1 FARRAND, *supra* note 3, at 48 (brackets in original) (statement of Roger Sherman).

6. See *id.*

7. *Id.* (footnote omitted) (statement of Elbridge Gerry).

8. 2 *Id.* at 31 (statement of George Mason).

9. See Kenneth W. Starr, *The Court of Pragmatism and Internationalization: A Response to Professors Chemerinsky and Amann*, 94 GEO. L.J. 1565, 1582 (2006) ("In 1787, America knew that the Articles of Confederation had failed badly . . .").

10. See 2 FARRAND, *supra* note 3, at 288 ("What led to the appointment of this Convention? The corruption & mutability of the Legislative Councils of the States." (statement of John Mercer)).



## II. CAN DIRECT DEMOCRACY AND REPRESENTATIVE DEMOCRACY COOPERATE TO ACHIEVE A COMMON PURPOSE?

For the Framers, representative democracy was intended to filter faction—what today we would call interest groups—because when narrowly focused groups act unilaterally, they can undermine the public good.<sup>11</sup> The Framers wanted to create a system that would enable representatives to operate as independent decision makers who would take interests and factions into account as they looked toward the larger public good.<sup>12</sup>

If we agree that the representative constitutional order is intended to move decision making away from factional-centered goals toward objectives that take into account the larger good, the question for direct democracy is whether it can perform the same horizon-altering function. In other words, however popular decision making happens—whether through town hall meetings, referenda, or initiatives—the question is whether the process is capable of framing factional interest in a way that moves public decision making beyond the view of the narrow group.

The short answer is that we have not yet studied direct democracy processes sufficiently to pose a certain, or near certain, answer to the question. Although direct democracy has existed in the United States since the late nineteenth century,<sup>13</sup> it is

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11. See Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 401–02 & n.23 (2003).

12. See Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17, 24 (1997) (“The framers . . . realized that the real world legislature would often diverge from an ideal one. Accordingly, they constructed an institutional structure designed to constrain the influence of factions and to encourage deliberation . . .”); Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. REV. 477, 523–32 (1994) [hereinafter Hamilton, *Discussion and Decisions*] (arguing that the Framers intended that elected representatives exercise independent judgment with a view toward the common good while at the same time always remaining accountable to the people, from whom they receive their power and authority); Marci A. Hamilton, *The People: The Least Accountable Branch*, 4 U. CHI. L. SCH. ROUNDTABLE 1, 8–10 & nn.34 & 40 (1997) (“The Constitution frees representatives from direct control by the people during the term of representation so that they may make the decisions that are in the country’s best interest.”).

13. See Garrett, *supra* note 12, at 17 (explaining that many “mechanisms of direct democracy” originated in the populist and progressive movements at the turn of the twentieth century); Maimon Schwarzschild, *Popular Initiatives and American Federalism, or, Putting Direct Democracy in Its Place*, 13 J. CONTEMP. LEGAL ISSUES 531, 537 (2004) (“The initiative is . . . a device that was championed by the late

mostly a creature of our Western states and today remains largely under-examined.<sup>14</sup>

### III. PROBLEMS POSED BY THE DIRECT DEMOCRACY PROCESS

The notion of direct democratic decision making as “the people” making public policy is a romantic ruse for what is actually a much more complicated process. In many circumstances, the people do not have a meaningfully more significant role in direct democracy processes than they do in the representative process.<sup>15</sup>

Their role in both boils down to pulling a lever in the voting booth. Yet there is also a radical difference between the two situations. In the representative process, the voter is choosing an individual who will be held accountable for public policy decisions in many policy areas. The voter delegates decision-making authority based on the premise that the representative will serve the larger good.<sup>16</sup> In the direct process, the voter is choosing a public policy itself without having to account to others for those choices. This immediately raises the specter of self-interested decision making on the part of the individual who can cast a secret ballot without ever having to disclose the content of the vote or the reasons for it. This is not to say that representatives do not act out of self-interest; obviously, they do. The point, rather, is that the danger of self-interested voting is simply higher with individuals than with publicly scrutinized representatives.<sup>17</sup>

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nineteenth and early twentieth century Progressives as a counterweight to what the Progressives saw as corrupt back-room politics.”).

14. See Garrett, *supra* note 12, at 18 (“Very little scholarly attention has been directed to the appropriate method of interpreting laws passed by direct democracy.” (footnote omitted)); Schwarzschild, *supra* note 13, at 537 (indicating that the initiative process exists in about half of the states, most of which are west of the Mississippi).

15. See Garrett, *supra* note 12, at 18 (arguing that “special interests, not ordinary citizens,” wield a disproportionate influence in both “[t]raditional lawmaking and direct lawmaking”).

16. See Hamilton, *Discussion and Decisions*, *supra* note 12, at 523–27 (explaining that, under the delegated authority model, “the . . . legislator . . . was supposed to be seeking the ideal common good, not listening to a daily cacophony”).

17. Cf. Marci A. Hamilton, *Direct Democracy and the Protestant Ethic*, 13 J. CONTEMP. LEGAL ISSUES 411, 416, 452 (2004) (arguing that part of the Framers’ intent in selecting a representative form of government was to curb self-interest in favor of the common good).

Furthermore, direct democracy does not wash interest groups or factions out of the process. Thus, bringing more people into the decision-making process does not necessarily lead to the conclusion that the larger public good is being served. Interest groups play a rather significant role in both choosing what will be an initiative or a referendum and deciding how it will be framed.<sup>18</sup> They also frequently determine how the proposal will be explained to the public.<sup>19</sup> Unlike an election to choose a representative—which revolves around a candidate's character and stance on a variety of issues—the direct democracy process singles out one issue, which is introduced and sold to individual voters by interest groups, political parties, or both.<sup>20</sup>

What is more, individual voters are poorly positioned to coordinate taxation and spending when they vote on issues one at a time and ultimately are not responsible for balancing the state budget. Initiatives tend to decrease *state* spending by shifting costs to local government.<sup>21</sup> And although some initiatives decrease taxes, initiatives are more likely to increase taxes and initiate more public services.<sup>22</sup>

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18. See Garrett, *supra* note 12, at 18–23 (“Special interests have a comparative advantage in determining both what questions are placed on the ballot for popular decision and how those questions are drafted.”); see also David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 46 (1995) (arguing that many proposals blocked in the legislature by “powerful interests . . . run into the same phalanx of interest groups in the [ballot] election campaign”).

19. See Garrett, *supra* note 12, at 23 (“[T]he salience of issues for public debate and decision in both [direct democracy and representative democracy] turns largely on how organized interests spend their money to influence the media, to pay for advertising, and to put issues before the public.” (footnote omitted)).

20. See Glenn C. Smith, *Solving the “Initiatory Construction” Puzzle (and Improving Direct Democracy) by Appropriate Refocusing on Sponsor Intent*, 78 U. COLO. L. REV. 257, 265 (2007) (arguing that “initiative sponsors” campaign “through simplistic, and, at times, misleading, slogans in short, emotional advertisements and in media ‘sound bites’” (footnote omitted)).

21. See John G. Matsusaka, *Fiscal Effects of the Voter Initiative in the First Half of the Twentieth Century*, 43 J.L. & ECON. 619, 641 (2000) (concluding that “initiative states decentralized expenditure (from state to local governments) more than noninitiative states”).

22. See *id.* at 639–40 (evaluating empirical data in three states and finding that “21 initiatives were approved that increased spending, taxes, or borrowing compared to 11 initiatives that reduced spending, taxes, or borrowing”); see also Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy*, 78 S. CAL. L. REV. 949, 973 (2005) (discussing the Colorado initiative “FasTracks,” which passed in November 2004 and appropriated increased funds for mass transit).

In sum, there are three principal concerns about the direct democracy process itself. The first concern is the potential for interest groups to control public policy without needing to account for their actions. That is, there is no element in the process to filter the self-interest of the group seeking to create the law. The second concern is rank majoritarianism. A primary reason that we have republicanism is a fear of majoritarianism—or the mob in the thoughts of the Framers.<sup>23</sup> Numbers do not necessarily dictate good policy. The third concern is that direct democracy processes lack the benefits that stem from deliberation in the legislature. There is a frequent and not too inaccurate characterization of legislation as sausage, which is an intentionally ugly picture. Otto von Bismarck is reported to have said that “[l]aws are like sausages. It’s better not to see them being made.”<sup>24</sup> Whether or not one likes sausage, no one thinks of it as a particularly pretty thing, but legislative sausage—created through deliberation and compromise—can be a healthy byproduct of the lawmaking process.

When citizens vote in an initiative or referendum, they vote either “yes” or “no,” an either-or choice that political parties or interest groups have crafted. Legislators, on the other hand, are not automatically forced into an either-or position. If legislators do their job, they ask questions about pending legislation and, preferably, hard questions that expose the weaknesses in a proposal or bill. This deliberative process typically alters the proposal to take into account concerns not even apprehended when the bill was drafted.<sup>25</sup> Legislators have the power to question and to study a proposal in depth. Thus, enacted legislation

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23. See ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 110 (1970) (contrasting populist majoritarianism against the Framers’ system of complex checks and balances among countervailing groups and factions); Hamilton, *supra* note 17, at 452 (“The mob was a vivid image for the Framers, and they crafted the Constitution . . . to restrain mobs and factions from violence and law-making against the public interest.” (footnote omitted)).

24. 1,911 BEST THINGS ANYBODY EVER SAID 232 (Robert Byne ed., 1988) (quoting Otto von Bismarck). Despite the truth of the quotation, it may be apocryphal and it has appeared in different versions. In 1958, the Florida Supreme Court attributed a different version of the same quotation to Bismarck: “[T]o retain respect for sausages and laws, one must not watch them in the making.” *In re Graham*, 104 So. 2d 16, 18 (Fla. 1958).

25. See Clark, *supra* note 1, at 477 (arguing that representative government not only identifies popular will but also modifies and improves it through the deliberative process).

can reflect a wide range of considerations and, like sausage, often ends up a mixture of different elements. The resulting legislation may be *better* than the proposal because, in Professor Clark's description, it may well take into account other legislative concerns and, in the best of all possible worlds, reflect an even better idea.<sup>26</sup> There is something intrinsically good about discussion, deliberation, and research on complex issues. Yet individual voters rarely have the capacity to engage in such review themselves, making them more likely to be misled at the voting booth by an interest group's artfully crafted proposal.<sup>27</sup>

Admittedly, only when our elected representatives are doing their jobs do they vindicate the legislative improvement theory of deliberation. Elected representatives do not always ask the hard questions that lead to an increase in the public good. The focus here, however, is on the inherent differences in *structural* decision making between representative and direct democracy.

#### IV. LEGISLATIVE AND CITIZEN-INITIATED RESPONSES TO TWO MALIGNED SUPREME COURT CASES

Let us now examine how the republican and direct democratic processes responded to two widely criticized Supreme Court cases, beginning with *Kelo v. City of New London*.<sup>28</sup> *Kelo* was an obvious test case chosen for the purpose of going to the Supreme Court.<sup>29</sup> It involved, to speak colloquially, a little old lady in her longtime home and a thoughtless local government intent on making her move out, which means eminent domain was being

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26. See *id.* at 476–82.

27. See Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505, 608 (1982) (“[T]he power of some groups to raise enormous sums of money to oppose ballot propositions . . . seriously interferes with the ability of other groups to use the institutions of direct democracy for their intended purpose.”); cf. James A. Gardner, Comment, *Protecting the Rationality of Electoral Outcomes: A Challenge to First Amendment Doctrine*, 51 U. CHI. L. REV. 892, 892 (1984) (asserting that people often vote irrationally by casting their vote “on the basis of incomplete information, or without understanding election issues, or in response to factors unrelated to the candidates’ fitness for office” (footnotes omitted)).

28. 545 U.S. 469 (2005).

29. See Jonathan Zasloff, *Left and Right in the Middle East: Notes on the Social Construction of Race*, 47 VA. J. INT’L L. 201, 228 (2006) (relating that *Kelo* was selected as a test case by the Institute for Justice).

wielded in a particularly brutal way.<sup>30</sup> When the Supreme Court held in favor of the local government,<sup>31</sup> there was a large public outcry responding to the facts as the media framed them.<sup>32</sup> The public was told that the Supreme Court had made a dramatic change in the law,<sup>33</sup> but that assessment is not accurate.<sup>34</sup>

What is interesting about *Kelo* is the truth: The holding was not really newsworthy in terms of doctrine, which up to that moment had not been great for homeowners.<sup>35</sup> Yet *Kelo* created a moment of education. So regardless of whether the decision accurately reflected the Court's precedent, it suddenly caused the people, the interest groups, and the States to pay attention.

Good questions followed: Had we gone too far down the wrong path with respect to eminent domain? Had we created a

30. See *Kelo*, 545 U.S. at 475.

31. *Id.* at 489.

32. See, e.g., Tim Cavanaugh, *Property Seizures and the New London Tea Party*, REASON, Nov. 2005, at 25 ("Few events in the last 25 years have prompted a national uproar over a specifically libertarian issue. Fewer still have produced as much outrage as the U.S. Supreme Court's June ruling in *Kelo v. City of New London*."); Kenneth R. Harney, *Court Ruling Leaves Poor at Greatest Risk*, WASH. POST, July 2, 2005, at F1 ("In brief: The court's decision leaves you in a weaker position, at least under federal law, than you might imagine."); Adam Karlin, *A Backlash on Seizure of Property*, CHRISTIAN SCI. MONITOR, July 6, 2005, at 1 ("[*Kelo*] is fueling a nationwide backlash . . ."); Elizabeth Mehren, *States Acting to Protect Private Property*, L.A. TIMES, Apr. 16, 2006, at A1 (discussing the "landslide of legislation" that *Kelo* spurred); Mark Steyn, *Eminent Case of Domain Poisoning*, WASH. TIMES, July 3, 2005, available at <http://www.washingtontimes.com/news/2005/jul/03/20050703-101101-4646r/> ("On this Independence Day weekend, the people might wish to give some thought as to how they might reclaim their independence from the godlike Supremes.");

33. See, e.g., Marie Price, *Their Way or the Highway*, TULSA WORLD, Nov. 21, 2005, at A11; Dimitri Vassilaros, Editorial, *This Won't Protect Property*, PITT. TRIB.-REV., Dec. 23, 2005, at A15.

34. See Marcilynn A. Burke, *Much Ado About Nothing: Kelo v. City of New London, Babbitt v. Sweet Home, and Other Tales from the Supreme Court*, 75 U. CIN. L. REV. 663, 683 (2006) ("Perhaps the only surprising part of [*Kelo*] was Justice Sandra Day O'Connor's scathing dissent . . ."); John M. Zuck, Note, *Kelo v. City of New London: Despite the Outcry, the Decision is Firmly Supported by Precedent—However, Eminent Domain Critics Still Have Gained Ground*, 38 U. MEM. L. REV. 187, 187–88, 192 (2007) (relating that despite the Supreme Court's adherence to precedent in *Kelo*, "[n]ewspapers and magazines exploded with reaction and analysis").

35. See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244–45 (1984) (sustaining the constitutionality of the taking at issue and adding that the "Court long ago rejected any literal requirement that condemned property be put into use for the general public"); *Berman v. Parker*, 348 U.S. 26, 35–36 (1954) (upholding government's use of the taking power to condemn blighted areas, including parcels of well-kept properties lying within designated blighted areas).

doctrine that was actually bad for the people? It was an excellent moment in American democracy—not necessarily because of the decision itself, but rather because of the valuable debate the ruling ignited. In this case, the United States Supreme Court stimulated an increase in state activity. Many states reacted through state initiatives and referenda.<sup>36</sup> The response to *Kelo* called into action the fifty-state experiment, a process that furthers policymaking by encouraging states to follow their own paths while watching and assessing the paths of others. That was a good result.

Thus, although *Kelo* was widely criticized and probably deserved it—even if the case did not depart very far from preceding doctrine—it was good for the country to be spurred to discuss a topic few would naturally debate or discuss. Some out-of-favor Supreme Court decisions are extremely important, because they educate the public and instigate meaningful debate. If a state rejects a Supreme Court ruling without crossing constitutional barriers, its decision to do so is not a bad result. It is an especially felicitous result if the public discussion generates a variety of answers, because the fifty-state experiment works best when there are a relatively large number of different experiments.

Another broadly criticized Supreme Court decision is a religion case, *Employment Division v. Smith*, which held that neutral, generally applicable laws do not violate the Free Exercise Clause when applied to religiously motivated actions.<sup>37</sup> The history following *Smith* shows how rapidly *legislatures* can act in response to Supreme Court decisions, thus demonstrating that initiatives and public responses are not the only ways our system responds quickly to disliked decisions.

Three years after the *Smith* decision, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA)<sup>38</sup> which spoke directly and quite negatively to that decision.<sup>39</sup> Later, thirteen state legislatures passed what are called mini-RFRAs.<sup>40</sup> Regard-

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36. In 2006, thirteen states included takings initiatives on their ballots. See Bill Want, *The Lucas Case: The Trial Court Strategy and the Case's Effect on the Property Rights Movement*, 27 STAN. ENVTL. L.J. 271, 294 (2008).

37. 494 U.S. 872, 878–82, 890 (1990).

38. Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

39. See 42 U.S.C. §§ 2000bb.

40. ALA. CONST. amend. DCXXII; ARIZ. REV. STAT. ANN. §§ 41-1493 to -1493.02 (2004); CONN. GEN. STAT. ANN. § 52-571b (West 2005); FLA. STAT. ANN. §§ 761.01-.05 (West 2005); IDAHO CODE ANN. §§ 73-401 to -404 (2006); 775 ILL. COMP. STAT.

less of the merits of the RFRA legislation,<sup>41</sup> it is a great example of the ability of legislators and legislatures to respond to maligned decisions just as quickly as either public movement or initiatives can respond.

#### V. THINKING BEYOND—OR BETWEEN—REPRESENTATIVE DEMOCRACY AND DIRECT DEMOCRACY

Professor Elizabeth Garrett has chosen a very helpful name for the American system: “hybrid democracy.”<sup>42</sup> We do not have fully republican democracy. We do not have direct democracy. We have a hybrid democracy, with different mixes in each state. Accepting that ours is a hybrid democracy enables one to move beyond merely defending one or the other pure form of democracy and thus promotes a more meaningful discussion of the goals of government. The focus should be on whether our system is reaching the kinds of checks and balances needed to achieve the larger public good.

The key problem for republicanism and republican democracy is the corruptibility of representatives. Anyone holding power will abuse that power. That is the fundamental Calvinist perspective of the Constitutional Convention.<sup>43</sup> From this standpoint, to the extent direct democracy curbs abuses of power by legislators, it is a positive development.

Some states have amended their state constitutions in an effort to increase the accountability of their elected representatives and thereby reduce the opportunities for corruption. Two examples of such reforms are, first, rules requiring three read-

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35/1-35/99 (2006); MO. ANN. STAT. §§ 1.302, 1.307 (West Supp. 2008); N.M. STAT. ANN. §§ 28-22-1 to -5 (LexisNexis 1978); OKLA. STAT. ANN. tit. 51, §§ 251-258 (West 2008); 71 PA. CONS. STAT. ANN. §§ 2401-07 (West Supp. 2008); R.I. GEN. LAWS §§ 42-80.1-1 to -4 (2006); S.C. CODE ANN. §§ 1-32-10 to -60 (2005); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001-.012 (Vernon 2005).

41. MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* 10 (2005) (identifying RFRA as “the grand blind exemption of all time”).

42. Elizabeth Garrett, *Hybrid Democracy*, 73 GEO. WASH. L. REV. 1096, 1097 (2005) (defining a “hybrid democracy” as a government that is “neither wholly representative nor wholly direct, but rather a complex combination of both at the local and state levels, which in turn influences national politics”).

43. See Marci A. Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 293, 293 (Michael W. McConnell et al. eds., 2001) (describing the Calvinist perspective as a “marriage of distrust in individuals but hope in properly structured institutions”).



ings of a bill so that a legislator cannot secretly push a bill through the legislature, and, second, rules that require titles to reflect content so that the legislature cannot pass a bill entitled "We Love You" when actually it is a tax increase.<sup>44</sup> These measures—aimed at correcting perceived shortcomings in the representative process—are evidence that departing from representative democracy may not always be the best solution; there may be "fixes" for the representative system that keep its best parts intact while weeding out the temptations that lead to corruption.

## VI. CONCLUSION

Although these state-level advancements are a step in the right direction, there has generally been a lack of originality in thinking about, or a lack of will in supporting, constitutional amendments to increase accountability at the federal level and in many states. We have never enacted a structural amendment intended to increase accountability in Congress, other than direct election of the Senate<sup>45</sup>—and there is a good debate on whether that actually increased the Senate's accountability.<sup>46</sup> Although direct democracy is just as susceptible to capture as representative democracy, it is nevertheless an effective tool in limiting a legislature. I would like to call for more serious thinking about what we can do, beyond direct democracy, to make legislatures more accountable.

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44. See G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 335 (2003) (explaining that states enacted these rules "with the expectation that greater transparency in the legislative process would deter abuses or at least increase accountability for them" (footnote omitted)); Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797, 798–99 (1987) (citing examples of procedural limitations).

45. See U.S. CONST. amend. XVII.

46. See, e.g., Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 567–69 (1997) (arguing that state legislatures were, and are, better able to hold senators accountable than the people at large); Sean Gailmard & Jeffery A. Jenkins, *Agency Problems and Electoral Institutions: The 17th Amendment and Representation in the U.S. Senate 1–2* (Feb. 2008), <http://www.gmu.edu/departments/economics/bcaplan/jenkins.pdf> (arguing that by doing away with "the informed selection and monitoring of U.S. Senators by relative political experts, [namely] state legislators," the Seventeenth Amendment decreased the Senate's standard of accountability).



*The Twenty-Seventh Annual  
National Federalist Society Student Symposium:  
The People & The Courts*

**IV.**

**THE PEOPLE'S COMMON LAW: IS LAW AND  
ECONOMICS ANTI-DEMOCRATIC?**

*ESSAYIST*

HENRY E. SMITH



# LAW AND ECONOMICS: REALISM OR DEMOCRACY?

HENRY E. SMITH\*

Is law and economics anti-democratic? One hears complaints from many quarters that law and economics is a form of technocracy that cuts off legitimate debate and suppresses other important values that people hold dear.<sup>1</sup> On this view, law and economics privileges efficiency and focuses on quantifiable values to the exclusion of other, less measurable values that could have found expression through the political process. These concerns are central to debates in areas ranging from environmental protection to intellectual property. The irony in these complaints is that they are offered by commentators who are heirs of the legal realists, many of whom would in the same breath decry excessive formalism and applaud judicial sensitivity to policy. There may not be an inherent contradiction here, but there is a tension in practice.

Law and economics and democracy are not enemies, but I contend that legal realism—or its lingering aftershocks—causes

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\* Fred A. Johnston Professor of Property and Environmental Law, Yale Law School, henry.smith@yale.edu. I would like to thank Bob Ellickson and the participants at the Twenty-Seventh Annual National Federalist Society Student Symposium, held at the University of Michigan Law School in Ann Arbor, Michigan, for their helpful comments. All errors are mine.

1. See, e.g., William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 709 (1991) (noting the “technocratic tendencies of the law-and-economics right”); Duncan Kennedy, *Law-and-Economics from the Perspective of Critical Legal Studies*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 465, 471 (Peter Newman ed., 1998) (criticizing law and economics commentators for “manipulating the apparently value neutral, technocratic discourse of efficiency to support their preferred outcomes”); Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 619 (1989) (“[L]aw and economics offers a new technocratic discourse to legitimate the universal perspective of mainstream legal thought.”); Robert Post, *The Challenge of Globalization to American Public Law Scholarship*, 2 THEORETICAL INQUIRIES L. 323, 325 (2001) (“Law and economics celebrates a narrow, reductionist, and technocratic focus on the formalization of means-ends relationships, which, in turn, has spurred the development of genuine expertise about the nature and consequences of legal rules. Law and economics has not been successful, however, with respect to forms of legal purposivism that resist such formal representation.”).

law and economics to be more technocratic and less democratic than necessary. While legal realism as a movement itself may be dead, it rules us from the grave. As the saying goes, "We are all realists now."<sup>2</sup> There is nothing wrong with law-and-economics-inspired theories as theories—or with legal realism as a theory for that matter. Analyzing law and legal relations in their smallest parts and considering micro incentive effects (to the extent data is available) are worthy exercises, but without some sensitivity to institutional detail and competence, the tendency is to substitute the wisdom of the analyzing expert, especially in courts and agencies, for the collective wisdom emerging either from democracy or tradition.<sup>3</sup>

Many movements in legal thought draw on legal realism,<sup>4</sup> and law and economics is no exception. Coase's articles on the FCC<sup>5</sup> and social cost<sup>6</sup> are hyperrealist in their assumptions about property, especially in their adoption of the most extreme version of the bundle of rights conception of property.<sup>7</sup> In the bundle of rights conception, property has no content on its own but instead emerges from policy-driven decisions about the actions that people might take.<sup>8</sup> Things are merely a

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2. E.g., LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960*, at 229 (1986); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 267 (1997) ("[A]s the cliché has it, . . . 'we are all realists now.'"); Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 467, 467 (1988) (reviewing KALMAN ("All major current schools of thought are, in significant ways, products of legal realism. To some extent, we are all realists now.")).

3. On the relation of legal realism to the technocratic ideal of early-twentieth-century Progressivism, see, for example, NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 210–32 (1995). The "bundle of rights" approach in particular is identified with legal realism. See, e.g., Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357 (2001); see also BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 26–31, 97–103 (1977).

4. See Anthony Kronman, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 335 (1988).

5. R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959).

6. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

7. See Merrill & Smith, *supra* note 3.

8. See, e.g., Thomas C. Grey, *The Disintegration of Property*, in *PROPERTY: NOMOS XXII* 69 (J. Roland Pennock & John W. Chapman eds., 1980); Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1086 (1984) ("[P]roperty is simply a label for whatever 'bundle of sticks' the individual has been granted."); Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 297 (1998) ("Labeling something as property does not predetermine what rights an owner does or does not have in it."); see also J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43

backdrop to this fine-grained analysis of potentially conflicting activities, and rights to exclude from things have no particular status as a starting point.

These assumptions were understandable in light of Coase's goal of demonstrating that, in a world of positive transaction costs, it matters how entitlements are assigned. But when it comes to using Coase's insights, his hyperrealist assumptions have been allowed to steal the show.<sup>9</sup> In Coase's analysis of nuisance, we expect judges to figure out *ex post* which of the conflicting parties should be awarded each stick in the bundle of rights.<sup>10</sup> And in making these decisions, the questions of "who invaded what" or "who caused what to whom" do no work at all.<sup>11</sup> In contrast to traditional and everyday notions of property as a right to things that is good against the world, Coasean agnosticism about causation leads one to see both the trampling animals and the trampled-upon crops as the cause of conflict. And under this conception, one is to ask whether fists or noses cause punches, or, for that matter, which are the cheapest cost avoiders.<sup>12</sup> None of this accords with non-economic intuition.<sup>13</sup> Although causal agnosticism is a useful theoretical con-

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UCLA L. REV. 711, 733–38 (1996) (discussing various approaches to the "bundle of rights" perception of property).

9. See Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 978 n.33 (2004) [hereinafter Smith, *Exclusion and Property Rules*] (citing Merrill & Smith, *supra* note 3, at 366–75); Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1178 (2006).

10. For the article that launched a thousand analyses in this vein, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

11. For recent analyses from a variety of perspectives that try to bring the more traditional invasion-based test back to the fore, see, for example, Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 53–65 (1979); J.E. Penner, *Nuisance and the Character of the Neighbourhood*, 5 J. ENVTL. L. 1, 14–25 (1993); Smith, *Exclusion and Property Rules*, *supra* note 9, at 992–96; Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights* (George Mason Law & Economics Research Paper No. 08-20, 2008), available at <http://ssrn.com/abstract=1117999>.

12. See, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 135–73, 261–63 (1970); Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972); Harold Demsetz, *When Does the Rule of Liability Matter?*, 1 J. LEGAL STUD. 13, 27–28 (1972).

13. See Donald H. Gjerdingen, *The Coase Theorem and the Psychology of Common-Law Thought*, 56 S. CAL. L. REV. 711, 724–25 (1983); Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1860–66 (2007) [hereinafter Merrill & Smith, *The Morality of Property*]; Merrill & Smith, *supra* note 3, at 391–94; see also MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 68–69, 118–19 (1987) (criti-

struct and fine as far as it goes, it does not go very far: for transaction-cost reasons—not to mention basic moral reasons—causation is unidirectional. We have made *ex ante* decisions about what counts as an invasion,<sup>14</sup> and absent good reasons—and sometimes good reasons exist—we should stick to those decisions.

Now it might be thought that this technocratic tendency in fine-grained analysis is specific to property. Such a view seems unlikely when we consider that Coase and many of the bundle theorists are basically treating property as dissolving into torts. Echoes of this are to be found in current debates over intellectual property, in which skeptics of intellectually property would like to see more of a tort or regulatory regime than a property regime in IP.<sup>15</sup> In any case, the legal realist strand that became law and economics tackled torts relatively early,<sup>16</sup> and torts has featured much more largely in law and economics scholarship than has property proper. Torts seems tailor-made for the type of technical approach that legal realist-style law and economics offers. This Essay, therefore, will concentrate on torts and argue that even here, on the best terrain for legal realist law and economics, the technocratic tendency has led to similar, if less dramatic, results.

A word about technocracy and democracy is in order. I am using “democracy” and “technocracy” in a special sense, one in which they potentially conflict. In arguing against “technocracy” I am not opposing well-informed decision making of all sorts. Instead, I am making the narrower point that modes of legal decision making that ask judges to use a great deal of con-

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cizing transaction-cost analysis of questions of entitlement not to be raped and noting the role of reciprocal view of causation); A.W. Brian Simpson, *Coase v. Pigou Reexamined*, 25 J. LEGAL STUD. 53, 60 (1996) (“[O]nce the reciprocal nature of the problem is conceded, there is just no end to the possibilities . . . . The reciprocal nature of human interaction can raise emotive issues, as when women object to the idea that the way to stop sexual assaults on the streets at night is for them to stay at home. Even if they are the cheapest cost avoiders, ought this to be conclusive?”).

14. See, e.g., *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154 (Wisc. 1997) (refusing to consider actual damage caused or reasonableness of landowner’s refusal of entry); Smith, *Exclusion and Property Rules*, *supra* note 9, at 990–1021.

15. See Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1755–61 (2007).

16. See, e.g., Edward L. Rubin, *The Nonjudicial Life of Contract: Beyond the Shadow of the Law*, 90 NW. U. L. REV. 107, 112 (1995) (“[T]he early work in law and economics involved torts and regulatory programs . . .”).



textual information have their inherent limits. The argument is based on the presence of information costs, a limit that could be regarded as “technocratic,” but in a different sense. The information cost argument here is at a meta level: In evaluating a system of decision making, one might want to use all available information and techniques, even if these reveal limits, *within* the system, on our ability to use information.

In other words, I am making a meta-level, realist-style argument for a certain degree of formalism in ordinary legal decision making, where formalism is (relative) invariance to contextual information.<sup>17</sup> By contrast, combating formalism and thereby disregarding these limits to the use of contextual information is quite characteristic of legal realism in practice. Law and economics is only one branch of the tree whose trunk is legal realism proper, and many of the criticisms of thoroughgoing antiformalism apply to these other approaches as well. But today’s topic is law and economics, and more particularly antiformalist post-realist law and economics. Unconstrained contextual decision making tends to put more power in the hands of decision makers within the system—often unelected judges in the case of the common law—and this power tends to conflict with democracy to the extent that such decisions are difficult to reverse in the political process. Moreover, the information cost considerations for which I argue tend to point towards greater reliance on everyday morality, associated with the people, generally. Highly refined all-things-considered utilitarian decision making tends to conflict both with this popular morality and the congruent, more modest decision making that can be economically justified at the higher, systemic level.

There is nothing inherent in analyzing legal relations at the systemic level that would necessarily lead to technocracy, so it is worth considering why law and economics, and the economic analysis of torts in particular, partakes so heavily in those aspects of legal realism that emphasize expert decision making.

Like some strands of legal realism, the economic analysis of torts tends to emphasize, if not elevate, the role of the judge.

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17. See Francis Heylighen, *Advantages and Limitations of Formal Expression*, 4 FOUND. SCI. 25, 49–53 (1999). This approach to measuring linguistic formalism makes it a matter of degree, which is also true of formalism in law. See Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1167–90 (2003).

This elevation is somewhat ironic in light of the role of juries in tort law, as opposed to administrative decision making. The common law was fertile ground for the first generation of law and economics because bilateral interactions, including litigated disputes, are easier to model than the complex simultaneous interaction of many parties in taxation or regulation. Thus, in the sphere of primary actors, the bilateral impersonal tort-like conflict between the activities of *A* and *B*, or the more personal contract between *A* and *B*, make torts and contracts easier to understand than property, which is often about impersonal interactions between owners and the "rest of the world." In property, multiple parties may have some claim on a single resource and multiple systems may overlap. Some interactions, such as the tragedy of the commons, were amenable to economic tools,<sup>18</sup> but the bilateral interactions at the center of torts and contracts made these areas a top priority in law and economics. Further, in a world with zero transaction costs, solving every problem would be costless;<sup>19</sup> it takes some effort to remember that the choice of analytical unit itself has transaction cost implications in the real world. Common-law litigation thus looks more amenable to economic analysis.

From there, it was a short step to focus on judicial decision making and, in older law and economics, the kinds of cost-benefit analysis that judges might undertake. When analyzing an interaction, the *benefits* of fine grain are apparent—they are the point of the exercise—but the *costs* are less apparent. True, any analysis should take "administrative costs" into account. But as is quite apparent with the bundle of rights, the cheap-

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18. See, e.g., Steven N.S. Cheung, *The Structure of a Contract and the Theory of a Non-Exclusive Resource*, 13 J.L. & ECON. 49, 64 (1970); H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954); Jens Warming, *Aalgaardsretten*, 69 NATIONALÖKONOMISK TIDSSKRIFT 151 (1931); Jens Warming, *Om "Grundrente" af Fiskegrunde*, 49 NATIONALÖKONOMISK TIDSSKRIFT 495 (1911), translated in Peder Anderson, "On Rent of Fishing Grounds": A Translation of Jens Warming's 1911 Article, with an Introduction, 15 HIST. POL. ECON. 391 (1983); see also Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968) (popularizing Gordon's analysis, adopting the label "tragedy of the commons," and employing the misleading example of grazing commons). The basic intuition of the tragedy of the commons can be found in ARISTOTLE, *THE POLITICS AND THE CONSTITUTION OF ATHENS* 33 (Stephen Everson ed., Benjamin Jowett trans., 1996) ("[T]hat which is common to the greatest number has the least care bestowed upon it. Everyone thinks chiefly of his own, hardly at all of the common interest.").

19. See Coase, *supra* note 6.

ness of the baseline *in rem* right to exclude is easy to overlook. In the case of property, the convenience of the baseline stems in part from the diffuse nature of the processing costs. To the extent that these benefits of the baseline inhere in the system as a whole and are usually left implicit, they are especially easy to ignore in fine-grained analysis that puts a premium on articulated rationality.

It is somewhat ironic that law and economics overlooks the system-wide benefits of simplicity, because economists have long known that global systems show significant local variation. Partial equilibrium and general equilibrium are two very different things. Law and economics rarely rests on a general equilibrium analysis. But partial analyses must be taken with a grain of salt; it is characteristic of complex systems that a subpart may not share properties with the whole.<sup>20</sup> Similarly, the theory of the second best warns that when distortions are present, fewer distortions are not necessarily better, because one distortion might be offsetting another.<sup>21</sup> Again, in the case of law, to the extent that benefits inhere in a system as a whole, as opposed to its constituent rules, doctrines, or decisions, those benefits are easy to overlook. Although the first-generation arguments about the efficiency of the common law are harder to maintain now,<sup>22</sup> the analysis of law in terms of the desirability

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20. See HERBERT A. SIMON, *THE SCIENCES OF THE ARTIFICIAL* 195 (2d ed. 1981) (1969).

21. See R. G. Lipsey & Kevin Lancaster, *The General Theory of the Second Best*, 24 REV. ECON. STUD. 11 (1956–57).

22. Compare George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977) (arguing for a tendency of efficient legal rules to become dominant because inefficient rules will be litigated more often), and Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977) (arguing that access to courts encourages the development of efficient outcomes), with Vincy Fon & Francesco Parisi, *Litigation and the evolution of legal remedies: A dynamic model*, 116 PUB. CHOICE 419 (2003) (explaining why developments in law may be plaintiff friendly rather than purely efficient), William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 284 (1979) (arguing that the common law does not automatically produce efficient rules, but that there are areas in which the tendency to produce efficient rules can be predicted on economic grounds), Richard O. Zerbe, Jr., *Justice and the Evolution of the Common Law*, 3 J.L. ECON. & POL'Y 81 (2006) (suggesting that the trend towards efficiency is really a result of seeking justice), and Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551 (2003) (arguing that now-abandoned competition between courts once promoted efficiency of the common law but no longer). In part this question turns on a view of the inputs and criteria for judicial decision making. Compare RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 322 (1972) (As in the market, "it is primarily the criterion of efficiency rather

of individual rules stacks the deck against the basic baselines from which they may depart. This is clear in property, but I will argue that this problem arises in torts as well.<sup>23</sup>

The micro focus on individual rules also skews analysis towards the rules and the *ex ante* perspective. Indeed, legal realism—along with law and economics—is of two minds about the *ex ante* versus *ex post* perspective. Law and economics in particular is concerned with incentives for the future and is *ex ante* in this sense.<sup>24</sup> But like legal realism more generally, law and economics is not *ex ante* in another very important way. Neither legal realism nor its offshoot in conventional law and economics take seriously the idea of preexisting legal baselines. In areas like property we have made some fairly robust decisions about who has rights against whom, and these decisions are not to be lightly cast aside when someone comes along with a new efficiency analysis. Although it is true that the need for stability in the basic package of rights can be analyzed in economic terms, the tendency in law and economics, as it is practiced in law schools and on the bench, is often to allow economic analysis to drive very low-level decisions about individual rules.<sup>25</sup>

This eagerness to apply economics to individual rules has a vaguely Benthamite or technocratic cast.<sup>26</sup> Actually labeling all

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than of distributive justice that guides decision.”), with James E. Krier, Book Review, 122 U. PA. L. REV. 1664, 1695 (1974) (reviewing POSNER, *supra*) (questioning this view), and Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974) (reviewing POSNER, *supra*) (analogizing Posnerian efficiency to a character in a picaresque novel).

23. The issue of the particularity with which courts should address questions like duty in torts also arises in a corrective justice approach as well. See, e.g., W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671 (2008); Dilan A. Esper & Gregory C. Keating, *Abusing “Duty,”* 79 S. CAL. L. REV. 265 (2006); Dilan A. Esper & Gregory C. Keating, *Putting “Duty” in its Place: A Reply to Professors Goldberg & Zipursky*, 41 LOY. L.A. L. REV. (forthcoming 2008), available at <http://ssrn.com/abstract=1138340>; John C.P. Goldberg & Benjamin C. Zipursky, *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other “Quaint” Doctrines Can Improve Decisionmaking in Negligence Cases*, 79 S. CAL. L. REV. 329 (2006).

24. For examples of commentary characterizing law and economics as *ex ante*, see Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 STAN. L. REV. 381, 391–92 (2005); Nathan Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. 1483, 1492 (2005).

25. For an overview with an emphasis on property, see Merrill & Smith, *supra* note 3, at 375–97.

26. Although Bentham himself was a proponent of property, see, for example, JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 109–22 (C.K. Ogden ed., Harcourt, Brace & Co. 1931) (1802) (emphasizing property’s role in securing “the expectation

this Benthamite is somewhat ironic because Bentham was no fan of judges and the common law.<sup>27</sup> Nonetheless, the progress-oriented faith in articulated rationality and a narrow utilitarianism coupled with disregard for traditions make much of mainstream law and economics and its progeny thoroughly Benthamite. Indeed the legal realists found Bentham mostly congenial for similar reasons.<sup>28</sup>

By contrast, traditional notions of property rest on a base of everyday morality.<sup>29</sup> In property, core rights to exclude, backed up by norms and laws against trespass and theft, command widespread support. Only at the edges, where nuisance and regulations like zoning concern high-stakes specialized problems not amenable to the exclusion approach do we find another kind of morality of balancing that is more consistent with the type of analysis common in realist-inspired law and economics.<sup>30</sup> On certain dramatic occasions, as in the recent decision in *Kelo v. City of New London*,<sup>31</sup> there is a conflict between scientific policy making and the core moral sense of property, a sense that has tradition, and more recently democratic action, behind it.<sup>32</sup> Thus it is the low-level utilitarianism, which characterizes much of law and economics, that lends it a vaguely technocratic cast. By breaking law down into individual rules and holding these up to the light of articulated rationality, law and economics deemphasizes everyday notions of morality that find their expression in tradition and democratic decision making.

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of deriving certain advantages from a thing . . . in consequence of the relation in which we stand towards it"); Jeremy Bentham, *Principles of the Civil Code*, in 1 THE WORKS OF JEREMY BENTHAM (John Bowring ed., London, Simpkin Marshall & Co. 1843) (warning the attacks on property would result in the destruction of incentives to work), his disdain for tradition and penchant for scientific policymaking commended him to the realists. See *infra* note 28 and accompanying text.

27. See, e.g., Jeremy Bentham, *Rationale of Judicial Evidence*, in 6 THE WORKS OF JEREMY BENTHAM 204–05 (John Bowring ed., Russell & Russell Inc. 1962) (1827) (criticizing the common law of evidence and proposing legislative, not judicial, improvements). See generally JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT (London 1776).

28. See Merrill & Smith, *The Morality of Property*, *supra* note 13, at 1868–69. Early on Roscoe Pound's main problem with Bentham was that Bentham was not radical enough in challenging prevailing notions of individualism. See ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 158–61 (1921).

29. See Merrill & Smith, *The Morality of Property*, *supra* note 13.

30. See *id.* at 1890–94.

31. 545 U.S. 469 (2005).

32. See Merrill & Smith, *The Morality of Property*, *supra* note 13, at 1879–84.

One might think that torts is the common law area ideally suited to the type of law and economics this Essay criticizes and that some form of legal realism is really the only coherent way to think about torts. There is, however, some suggestive evidence to the contrary. Although this is not the time or place to compare utilitarian and corrective justice theories of torts, law and economics in a non-realist—or not exclusively realist—spirit is not only possible but desirable.

Economic analysis has tended to ignore baselines in those parts of torts that are the closest to property. Take, for example, nuisance law. According to authorities like the *Restatement (First) of Torts* and much of law and economics, nuisance is an exercise in balancing and looks like regulation writ small.<sup>33</sup> This approach misses important aspects of nuisance.<sup>34</sup> First, much—though not all—of nuisance is indeed about invasions: who caused what waves or particles to cross a boundary to the

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33. See RESTATEMENT (FIRST) OF TORTS §§ 822, 826 (1939); see also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 62 (6th ed. 2003) (“The alternative to absolute rights is balancing, and is the approach taken by the most important common law remedy for pollution, which is nuisance, the tort of interference with the use or enjoyment of land. The standard most commonly used for determining nuisance is *unreasonable* interference, which permits a comparison between (1) the cost to the polluter of abating the pollution and (2) the lower of the cost to the victim of either tolerating the pollution or eliminating it himself. This is an efficient standard . . .”); WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 89 at 596 (4th ed. 1971) (citing cases). Under the *Restatement (Second)*, a nuisance is a significant nontrespassory invasion of use and enjoyment of land that is caused by either intentional and unreasonable activities or by negligent, reckless, or abnormally dangerous activities. RESTATEMENT (SECOND) OF TORTS §§ 821F, 822 (1979). Intentional nuisances largely turn on reasonableness:

An intentional invasion of another’s interest in the use and enjoyment of land is unreasonable if

- (a) the gravity of the harm outweighs the utility of the actor’s conduct, or
- (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.

*Id.* § 826; see also *id.* § 827 (setting out factors relating to gravity of the harm, including the social value of the plaintiff’s use); *id.* § 828 (setting out factors relating to utility of actor’s conduct, including its social value); see also 6-A AMERICAN LAW OF PROPERTY § 28.22, at 66, § 28.26, at 75–77 (A. James Casner ed., 1954) (emphasizing the vagaries associated with, and importance of, a determination as to whether a defendant’s conduct is unreasonable); 1 FOWLER V. HARPER & FLEMING JAMES, JR., *THE LAW OF TORTS* § 1.24, at 70–74 (1956) (discussing the importance of reasonableness consideration in nuisance cases).

34. See Smith, *Exclusion and Property Rules*, *supra* note 9.

disturbance of the owner.<sup>35</sup> Further, some nuisances are nuisances per se;<sup>36</sup> when a noise is loud enough, for example, one simply does not need to know about context.

Moreover, the notion of invasion piggybacks on basic entitlements. The whole notion in the scheme of property rules and liability rules that “we” need to “decide” whether *A* or *B*, resident or polluter, “gets” the “entitlement” does great violence to the basic package of rights in land.<sup>37</sup> That package includes a right to exclude,<sup>38</sup> a right to which for some purposes we might make exceptions or of which we might weaken the protection (from injunction to damages).<sup>39</sup> But it does not include a “right to pollute.”<sup>40</sup> One might get away with pollution, but the put-upon neighbor is allowed to blow the smoke back. Or one might have an easement which would be a right to pollute but which is definitely not part of the default package of rights. In its enthusiasm for breaking legal relations down into interesting analytical bits and discovering intriguing symmetries, the economic approach to nuisance, and by extension other torts, often disregards the asymmetry built into *ex ante* baselines of property rights.<sup>41</sup> This is true of rights to bodily integrity and rights to land or chattels. Again, we do not think in terms of reciprocity of causation for assaults.

More generally, the enthusiasm for liability rules over property rules flows from the technocratic impulse in law and economics. Sophisticated arguments for ever more complex liability rules overlook the virtues of simple baselines that also

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35. See *id.* at 990–1007.

36. See, e.g., *Morgan v. High Penn Oil Co.*, 77 S.E.2d 682, 687 (N.C. 1953); Smith, *Exclusion and Property Rules*, *supra* note 9, at 998 & n.100.

37. See Henry E. Smith, *Self-Help and the Nature of Property*, 1 J.L. ECON. & POL'Y 69, 70–80 (2005).

38. See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (characterizing the right to exclude others as “one of the most essential sticks in the bundle of rights that are commonly characterized as property”).

39. See, e.g., Smith, *Exclusion and Property Rules*, *supra* note 9, at 973.

40. *Id.* at 1011–16.

41. See, e.g., Lee Anne Fennell, *Property and Half-Torts*, 116 YALE L.J. 1400, 1404 n.10 (2007); Frank I. Michelman, *There Have To Be Four*, 64 MD. L. REV. 136, 147–52 (2005) (discussing asymmetries in “remedial entailments” in the C&M framework); Jeanne L. Schroeder, *Three's a Crowd: A Feminist Critique of Calabresi and Melamed's One View of the Cathedral*, 84 CORNELL L. REV. 394, 433–35 (1999); Smith, *Exclusion and Property Rules*, *supra* note 9, at 1019–21; Smith, *supra* note 37, at 72–76.

accord with everyday morality.<sup>42</sup> To be sure, in situations of high transaction costs, it is worth considering liability rules, but even where the conventional wisdom would strongly favor liability rules, as in large-scale pollution by a factory employing many people,<sup>43</sup> the tendency in fine-grained utilitarian law and economics is to grasp much too quickly for liability-rule solutions. By contrast, recently some have argued that even the classic *Boomer* opinion was too quick to shift from injunctions to damages.<sup>44</sup> Even in high transaction cost situations, property and property rules should have some presumptive force, and especially in cases of deliberate, high-stakes violations, we should require the prospectively invading party to justify its selection of site in a hearing beforehand (and perhaps post a bond), as is typical of Mill Acts and limited private eminent domain statutes, rather than causing a *fait accompli*.<sup>45</sup> In other

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42. See, e.g., IAN AYRES, *OPTIONAL LAW: THE STRUCTURE OF LEGAL ENTITLEMENTS* (2005); Ronen Avraham, *Modular Liability Rules*, 24 INT'L REV. L. & ECON. 269 (2004) (advocating multiple-option liability rules); Ian Ayres & J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 YALE L.J. 703, 711 (1996) (noting that higher-order liability rules with ascending damages on successive takings create auctions); Ian Ayres & Paul M. Goldbart, *Correlated Values in the Theory of Property and Liability Rules*, 32 J. LEGAL STUD. 121, 121–26 (2003) (discussing higher-order rules and showing how allowing for multiple prices can never do worse than other rules, but alluding to practical problems with implementation); Lee Anne Fennell, *Revealing Options*, 118 HARV. L. REV. 1399 (2005); Saul Levmore, *Unifying Remedies: Property Rules, Liability Rules, and Startling Rules*, 106 YALE L.J. 2149, 2152 (1997).

43. See, e.g., *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870 (N.Y. 1970). For support for liability rules in situations of high transaction costs, see, for example, ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 170–71, 175–81 (1988) (noting problem and suggesting damages as solution), RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 16, 68–69, 79–81 (5th ed. 1998) (same), Calabresi & Melamed, *supra* note 10, at 1106–10 (same), and James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 452 & n.44 (1995) (describing survey of legal literature from 1975 to 1986 in which some dozen proposals for liability rules in high transaction costs settings were proposed, and giving examples).

44. See Daniel A. Farber, *Reassessing Boomer: Justice, Efficiency, and Nuisance Law*, in *PROPERTY LAW AND LEGAL EDUCATION: ESSAYS IN HONOR OF JOHN E. CRIBBET* 7, 7–8 (Peter Hay & Michael H. Hoeflich eds., 1988); Smith, *Exclusion and Property Rules*, *supra* note 9, at 1037–45; Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1733–34 & n.44 (2004) [hereinafter Smith, *Property and Property Rules*]. Also, when multiple plants are involved, liability rules are problematic, and property-like solutions involving tradable permits may become preferable. See Carol M. Rose, *The Shadow of The Cathedral*, 106 YALE L.J. 2175, 2193–96 (1997).

45. See, e.g., Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2114 (1997); John F. Hart, *Land Use Law in the Early*



words, if we are to have private eminent domain, it should come with due process safeguards at least as stringent, if not more so, than those to which we subject exercises of public eminent domain.

The "Boomer problem" has also been taken as support for a version of behavioral law and economics in which ordinary actors' decision making is interpreted as distorted by biases and heuristics.<sup>46</sup> Might property rule protection lead to a greater endowment effect than liability rules? In a recent paper, Rachlinski and Jourden find that experimental subjects show a greater gap between willingness to accept and willingness to pay for entitlements protected by property rules than those protected by liability rules, and the authors interpret this as an example of the endowment effect preventing efficient negotiation.<sup>47</sup> To address

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*Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1116 (2000); Smith, *Exclusion and Property Rules*, *supra* note 9, at 1042–43; *see also* Act of July 3, 1868, ch. 20, § 3, 1868 N.H. Laws 152, 152–53; *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 10 n.\* (1885) (quoting the New Hampshire Act of July 3, 1868). For examples of the *ex ante* protections under private eminent domain statutes, *see*, for example, IDAHO CODE ANN. § 42-1106 (2003) ("In case of the refusal of the owners or claimants of any lands, through which any ditch, canal or conduit is proposed to be made or constructed, to allow passage thereof, the person or persons desiring the right of way may proceed as in the law of eminent domain."); WYO. STAT. ANN. § 24-9-104 (2003) ("Upon the presentation of a petition signed by at least five (5) freeholders of any neighborhood, praying for passage to any watercourse for the purpose of watering livestock, or for the convenient access to timber, the board of county commissioners may, in their discretion, establish such water or timber way as provided in W.S. 24-9-101 through 24-9-103 relating to the opening of private roads.").

46. On the endowment effect, *see* Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990) (arguing that endowment effects persist even in market settings where participants have opportunities to learn), Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979) (discussing basics of prospect theory), Jack L. Knetsch, *The Endowment Effect and Evidence of Nonreversible Indifference Curves*, 79 AM. ECON. REV. 1277 (1989) (reporting tests demonstrating endowment effect), and Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q.J. ECON. 1039 (1991) (presenting theoretical explanation for endowment effect based on loss aversion). For a sympathetic summary of work in this area, *see* RICHARD H. THALER ET AL., *The Endowment Effect, Loss Aversion, and Status Quo Bias*, in *THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE* 63–78 (1992). For some recent challenges to the interpretation of experiments in terms of prospect theory, *see* Charles R. Plott & Kathryn Zeiler, *Exchange Asymmetries Incorrectly Interpreted as Evidence of Endowment Effect and Prospect Theory?*, 97 AM. ECON. REV. 1449 (2007), and Charles R. Plott & Kathryn Zeiler, *The Willingness to Pay-Willingness to Accept Gap, the "Endowment Effect," Subject Misperceptions, and Experimental Procedures for Eliciting Valuations*, 95 AM. ECON. REV. 530 (2005).

47. Jeffrey J. Rachlinski & Forest Jourden, *Remedies and the Psychology of Ownership*, 51 VAND. L. REV. 1541, 1566–72 (1998).

ecological validity they examine *Boomer* through the lens of behavioral decision theory; they interpret the behavior of the plaintiffs in *Boomer* as also reflecting the endowment effect rather than subjective value, on the grounds that the plaintiffs did not appeal the size of the damage award or ask for higher-than-market damages.<sup>48</sup> But the likely reason for the plaintiffs' failure to do so is not the endowment effect, but rather that under the law of nuisance, injunctions are available but supracompensatory damages are not.<sup>49</sup>

All this is familiar territory and vaguely property related. Another suggestive example of how the conventional rule-by-rule approach misses something that is captured in a more holistic appreciation of traditional baselines is the "economic loss" rule in torts.<sup>50</sup> As its name suggests, it should be amenable to economic analysis. And sure enough, there has been no dearth of speculative analysis about why courts apparently deny recovery in negligence for harm where there is only pure economic loss—no injury to person or property.<sup>51</sup> Rationales boil down to a pragmatic sense that applying negligence to all economic loss would lead to indeterminate and open-ended liability.<sup>52</sup> In keeping with current trends, the economic loss rule in the courts is now being studied empirically as well, revealing how many exceptions there are and, at

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48. See *id.* at 1543–44.

49. See Henry E. Smith, *Property and Property Rules*, *supra* note 44, at 1771–72; see also *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 874–75 (N.Y. 1970) (discussing damages available and referring to diminution in objective value); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 89, at 637–40 (5th ed. 1984) (discussing types of damages available to nuisance plaintiffs, including diminution in market value and, under some circumstances, special damages, but not damages for subjective value).

50. See, e.g., *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927) (Holmes, J.); *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931) (Cardozo, J.). See generally DAN B. DOBBS, *THE LAW OF TORTS* § 452 (2001).

51. See, e.g., W. Bishop, *Economic Loss in Tort*, 2 OXFORD J. LEGAL STUD. 1 (1982); Victor P. Goldberg, *Recovery for Economic Loss Following the Exxon Valdez Oil Spill*, 23 J. LEGAL STUD. 1 (1994); Richard A. Posner, *Common-Law Economic Torts: An Economic and Legal Analysis*, 48 ARIZ. L. REV. 735 (2006); Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513 (1985).

52. See, e.g., Fleming James, Jr., *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VAND. L. REV. 43 (1972).

the same time, how no one can really say what the efficient rule is.<sup>53</sup>

By contrast, in a recent, more doctrinally oriented analysis of the rule, Peter Benson shows that it is really quite simple: One can only recover from the tortfeasor if one has an *in rem* property right that has been violated.<sup>54</sup> Other lesser rights, such as a contract, are irrelevant to the tortfeasor. A good example comes from the classic *Robins* case:<sup>55</sup> If a ship is destroyed through the defendant's negligence, the ship owner can sue for the loss of the ship. The measure will be the market value of the ship. Someone who rented the ship cannot sue for the loss of his contract rights; he must sue the owner, who in turn can sue the tortfeasor.<sup>56</sup> But the allocation of the risks under the contract and the possible adoption of even greater risk by the owner—for example, if the owner warranted the ship for a particular purpose—are normally of no relevance to the outside world. Tort law deals with *in rem* dutyholders, and they are responsible for the standardized information that property law offers to the rest of the world. The opposite approach would allow contracting parties to impose a variety of hard-to-process duties on people at large. In this sense liability would be “excessive” or “unforeseeable,” but this is a much more specific sense than the way those terms are currently used by courts and commentators.

Thus, under the economic loss rule, recovery is only allowed to one who holds an *in rem* property right. Contractual and other relations between an owner and others are walled off and treated separately.<sup>57</sup> This makes sense on information cost grounds. Unfortunately, the kind of common-law reasoning that would get one there is an endangered species in

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53. See Anthony Niblett et al., *The Evolution of a Legal Rule* (2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1114941>.

54. See Peter Benson, *Economic Loss and the Prerequisites of Negligence* (Feb. 2008) (unpublished manuscript, on file with the University of Toronto).

55. *Robins*, 275 U.S. 303; see also Benson, *supra* note 54, at 15–39.

56. See *Robins*, 275 U.S. at 309.

57. This has the effect of preventing “ripple effects,” which are sometimes taken as a reason for the economic loss rule. See Robert L. Rabin, *Respecting Boundaries and the Economic Loss Rule in Tort*, 48 ARIZ. L. REV. 857, 862–64 (2006). Also, compartmentalizing information in the property rights keeps things simple, although in a different way than that recently proposed by Anita Bernstein. See Anita Bernstein, *Keep It Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss*, 48 ARIZ. L. REV. 773 (2006).

American law schools—and evidently in America's courtrooms as well.<sup>58</sup> This traditional approach was, despite the bad rap from the legal realists, neither incoherent nor necessarily less desirable than academics' and judges' familiar unstructured—and inconclusive—economic theorizing. Although it really is not possible without empirical evidence to say with any certainty whether the rule is efficient, one can point to a factor in its favor that typical academic law and economics analysis—and the more informal reasoning in judicial opinions—conspicuously leaves out: *in rem* property rights are designed to be broadcast to the world and have a simplicity and standardization that contract rights do not have. In other words, property rights are meant for an audience of impersonally interacting parties like potential tortfeasors.<sup>59</sup> How rights are internally carved up are idiosyncrasies that are internal to a deal and are not allowed to impose information costs on third parties.<sup>60</sup>

Is the traditional approach efficient? It is hard to say. But the structure that emerges, in which the property, tort, and contract systems have defined spheres and interact in simple ways, has the indirect effect of making simple the incentives facing potential tortfeasors and making clear the baseline from which people contract. The traditional approach gives roughly correct incentives in an overall structure that is easy to use—for judges and for people in ordinary life. That is a big plus.

The possibility of often unelected judges being encouraged to cut huge swaths through the common law based on economic speculation of the most selective—and therefore discretionary—sort should give one pause. A certain amount of judicial modification of rules is necessary, but I have argued that existing baselines, especially core rights to exclude, deserve a presumptive force that they do not receive from legal realism or its

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58. See Niblett et al., *supra* note 53.

59. See, e.g., Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000); Smith, *supra* note 17, at 1114, 1146–47, 1151.

60. In a more generalized setting, trusts and other entity property often allow *in personam* “internal” parties to allocate rights in resources among themselves in a way that the law keeps from being relevant *in rem* to outsiders. See THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 684–829 (2007); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 843–49 (2001).

offshoot in conventional law and economics. We do overcome these presumptions when making exceptions to exclusion rights (for example, for airplane overflights or necessity),<sup>61</sup> and they are surrounded by fuzzier governance regimes like much of the law of nuisance.<sup>62</sup> Nor is it easy to say how strong the presumption for these baselines should be; that is perhaps the central normative conflict in these areas of law. But a few tentative guidelines are possible.

In the light of these information cost considerations, when we can identify a situation in which legal innovation has occurred in a way that overturns a traditional rule with overlooked information cost advantages, we need to take a second look. Simplicity for third parties—as furnished by, for example, the economic loss rule—should strengthen the presumption for the rule. In general, where tort law implicates baselines furnished by property law, the reason for those baselines does not suddenly disappear. They need at least to be weighed against the considerations pointing to departure from them.

Second, the study of complex systems and cognitive psychology is beginning to make some of the traditional approach to custom and the common law look more attractive than it did to the realists.<sup>63</sup> With some exceptions the realists were positivistic and centralist.<sup>64</sup> Robert Ellickson and others have used economics to frame and test hypotheses about the importance of social norms and how they tend to be efficient within close-knit groups but may present wider externalities.<sup>65</sup> Information cost economics and cognitive science suggest some wisdom in

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61. See, e.g., *United States v. Causby*, 328 U.S. 256 (1946); *Hinman v. Pac. Air Transp.*, 84 F.2d 755 (9th Cir. 1936); MERRILL & SMITH, *supra* note 60, at 9–15.

62. See Smith, *Exclusion and Property Rules*, *supra* note 9, at 973–75. For examples of scholarly comment on the “fuzzy” nature of nuisance law, see, for example, Daniel A. Farber, *The Story of Boomer: Pollution and the Common Law*, 32 *ECOLOGY L.Q.* 113, 117 (2005), and Carol M. Rose, *Property in All the Wrong Places?*, 114 *YALE L.J.* 991, 1006 (2005).

63. See Henry E. Smith, *Community and Custom in Property*, 10 *THEORETICAL INQUIRY L.* (forthcoming Jan. 2009), available at <http://ssrn.com/abstract=1142987>.

64. See, e.g., George Rutherglen, *Custom and Usage as Action Under Color of State Law: An Essay on the Forgotten Terms of Section 1983*, 89 *VA. L. REV.* 925 (2003). Cf. MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 211–27 (1996) (finding both technocratic centralizing and decentralist strands in Progressivism).

65. See ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 167–206 (1991).

the common law's approach to the relation of custom and law. Judges had an intuitive sense—which can be explained and refined by economics—that custom is a danger if it binds those outside the community that originated the custom in question.<sup>66</sup> Besides consent—a democracy issue—community custom can impose high information costs on outsiders. Should the custom of hunters bind nonhunters? This is the question in *Pierson v. Post*.<sup>67</sup> Partly the desirability of applying such a custom more widely depends on whether nonhunters can or should be required to know the custom. In general, customs have been selected and formalized in the process of adoption in the common law. This judicial filtering is a necessary part of the process and can benefit from economic analysis. Nonetheless, the virtue of custom in the first place is that it is a partial substitute for a technocratic judicial analysis.

Finally, and more speculatively, the information cost virtues of traditional common law principles may point to a partial reconciliation of corrective justice and utilitarian approaches to tort law. Although this much-debated topic must be left for another day, note that corrective justice tends to reflect everyday morality that in the property context sensibly accommodates information cost.<sup>68</sup> Getting dutyholders to focus on intuitive and concrete harms to a well defined class of other parties has information cost advantages. If the information cost theory carries over from property to torts it may well be that the kind of everyday morality that has potential democratic support and the weight of tradition behind it can be rationalized on economic grounds. Such an economic approach to torts would be more democratic and more stable than the hyper-fine-grained utilitarianism and scientific policymaking in our post-legal realist law and economics as currently practiced.

In sum, as a branch of legal realism, law and economics has often cut out certain baselines that, subject to exceptions, have

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66. See Smith, *supra* note 63.

67. 3 Cai. R. 175, 179 (N.Y. Sup. Ct. 1805).

68. For example, Arthur Ripstein's Kantian analysis of liability for apparently harmless trespass, Arthur Ripstein, *Beyond the Harm Principle*, 34 PHIL. & PUB. AFF. 215, 218 (2006), is consistent with both the current state of the law, see, e.g., KEETON ET AL., *supra* note 49, § 13, at 75–77, and the prescriptions of an information cost theory of property, Smith, *Property and Property Rules*, *supra* note 44, at 1723–25; see also Merrill & Smith, *The Morality of Property*, *supra* note 13, at 1871–74.

the force of general consent and tradition behind them. A broader-gauged economic analysis that takes information costs into account suggests the wisdom in affording these baselines more presumptive force, even in an area as seemingly regulatory and activity-based as torts. In this way, rather than being a vehicle for overweening technocracy and therefore an enemy of democracy, law and economics can increase our appreciation for the information cost benefits of common-law starting points.





*The Twenty-Seventh Annual  
National Federalist Society Student Symposium:  
The People & The Courts*

**V.**

**AN ORIGINALIST JUDGE AND  
THE MEDIA**

*ESSAYISTS*

STEPHEN J. MARKMAN  
RICHARD PRIMUS



# AN INTERPRETIVIST JUDGE AND THE MEDIA

STEPHEN J. MARKMAN\*

The debate over the role of the judiciary has been particularly intense in Michigan for the past decade. With four of the seven justices on the Michigan Supreme Court committed to a traditional jurisprudence—one that views the responsibility of the courts to say what the law “is” rather than what it “ought” to be<sup>1</sup>—there is no state judiciary in which this debate has been more directly engaged than in Michigan. This debate is reflected by majority opinions containing strong counter-responses to dissents in which issues of jurisprudence are central;<sup>2</sup> it is reflected by opinions according careful attention to a broad range of interpretative issues such as the merits of an “absurd results” rule,<sup>3</sup> the uses and abuses of legislative history,<sup>4</sup> the hazards of premature invocations of ambiguity,<sup>5</sup> and

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\* Justice, Michigan Supreme Court; Judge, Michigan Court of Appeals, 1995–99; U.S. Attorney, Eastern District of Michigan, 1989–93; Assistant Attorney General of the United States, 1985–89.

1. See *Am. Trucking Ass’n v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in the judgment) (stating that the role of the judiciary “is to say what the law is, not to prescribe what it shall be”); *Mich. United Conservation Clubs v. Sec’y of State*, 630 N.W.2d 297, 313 (Mich. 2001) (Markman, J., concurring) (“[I]t is the responsibility of the judiciary to say what the law ‘is,’ not what it believes that it ‘ought’ to be.” (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

2. See, e.g., *Stokes v. Chrysler L.L.C.*, 750 N.W.2d 129, 142–46 (Mich. 2008); *Nat’l Wildlife Fed’n v. Cleveland Cliffs Iron Co.*, 684 N.W.2d 800, 815–25 (Mich. 2004); *Terien v. Zwit*, 648 N.W.2d 602, 611–16 (Mich. 2002); *Robertson v. DaimlerChrysler Corp.*, 641 N.W.2d 567, 581–83 (Mich. 2002).

3. See, e.g., *Cameron v. Auto Club Ins. Ass’n*, 718 N.W.2d 784, 797–98 (Mich. 2006) (Markman, J., concurring); *id.* at 810 n.12 (Cavanagh, J., dissenting); *id.* at 811 n.1 (Weaver, J., dissenting); *id.* at 814–16 (Kelly, J., dissenting).

4. See, e.g., *Nat’l Pride at Work, Inc. v. Governor of Michigan*, 748 N.W.2d 524, 541–42 n.23 (Mich. 2008) (“The dissent inadvertently illustrates the principal infirmity of reliance upon legislative history, namely that it affords a judge essentially unchecked discretion to pick and choose among competing histories in order to select those that best support his own predilections.”).

5. See, e.g., *Mayor of Lansing v. Mich. Pub. Serv. Comm’n*, 680 N.W.2d 840, 846 (Mich. 2004) (“The dissent avoids the difficult task of having to read the actual language of the law and determine its best interpretation by peremptorily concluding that [the statute] is ‘ambiguous.’ A finding of ambiguity, of course, enables an appellate

the propriety of “broad” and “narrow” interpretations of the law;<sup>6</sup> and it is also reflected by some of the most costly and contentious state judicial elections in the nation’s history.<sup>7</sup>

What most obviously distinguishes the judicial debate within Michigan—and increasingly within other states—from that within the federal judiciary is the reality of periodic election. Although this reality properly should have *no* impact on judicial analysis or the substantive results of decisions, it does, as a practical matter, impose some greater obligation on state judges to identify their judicial principles as clearly as possible so that the people can understand their differing attitudes toward the exercise of the “judicial power.” As it becomes increasingly evident to the people that judges are not fungible, and that differences among them are of considerable consequence to the public policies and legal cultures of their states, it becomes increasingly important that the elected judge communicates the values and philosophies underlying his decisions. After all, the people are entitled to know that Circuit Judge “Scalia” and District Judge “Breyer,” for example, are competing for an open position on the state supreme court.

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judge to bypass traditional approaches to interpretation and either substitute presumptive ‘rule[s] of policy,’ or else to engage in a largely subjective and perambulatory reading of ‘legislative history.’” (citations omitted)).

6. See, e.g., *Grebner v. State*, 744 N.W.2d 123, 126 (Mich. 2007) (“The consideration and balancing of ‘public’ and ‘private’ interests in this case do not require that this Court construe these or any other terms in a ‘broad’ or ‘narrow’ manner, as asserted by the Court of Appeals dissent. Rather, such terms need only be interpreted in a reasonable manner.”); *Melson v. Prime Ins. Syndicate*, 696 N.W.2d 687, 701 (Mich. 2005) (Markman, J., dissenting) (“[The concurrence] not only misapprehends this Court’s ‘judicial power’ by defining it in an overly narrow fashion, but arguably manages at the same time to define this power in what some may view an overly broad fashion . . . .”); *Brown v. Genesee County Bd. of Comm’rs*, 628 N.W.2d 471, 480 n.5 (Mich. 2001) (Markman, J., concurring) (stating that a particular case “was decided during a period in which this Court gave the term ‘governmental function’ a narrow reading, while giving broad readings of the statutory exceptions to governmental immunity” and that “[i]n contrast with that prior era, we now interpret the term ‘governmental function’ broadly and construe the exceptions narrowly”).

7. See Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL’Y 273, 275 (2002) (noting that “[i]n Michigan, a contentious race for three supreme court seats cost at least \$16 million” and providing two examples of politicized advertisements from Michigan judicial elections in 2000); Christopher Rapp, Note, *The Will of the People, the Independence of the Judiciary, and Free Speech in Judicial Elections after Republican Party of Minnesota v. White*, 21 J.L. & POL. 103, 118–19 (2005) (offering three examples of politicized television advertisements from recent Michigan Supreme Court races).

A second reality of the state judicial process is that the media plays a critical role in transmitting these communications from judges to the people. Based on my observations as a justice of the Michigan Supreme Court for the past nine years, this intermediary role poses a particular problem for judges committed to a traditional judicial philosophy, termed either "interpretivism," "textualism," or "originalism."<sup>8</sup> Not infrequently, the interpretivist majority of the Michigan Supreme Court has been characterized by the media as partisan, beholden to interests, or otherwise engaged in myriad forms of questionable decision making, simply because of its consistent commitment to read the law as it stands.<sup>9</sup> The interpretivist majority repeatedly refused to avail itself of opportunities to "improve" or to "enhance" the law, and has been determined to respect legislative compromises that may have produced laws that may be less rational and less consistent, and perhaps even in some ways less fair, than doubtlessly could have been achieved by judges unencumbered by the messiness of the democratic process.<sup>10</sup>

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8. My point here is not to defend originalism or interpretivism—the latter being the term I prefer to describe my own judicial philosophy—although I accept either characterization. Rather, my purpose is simply to suggest that those jurists who adhere to these doctrines will generally find themselves disproportionately disadvantaged by media communications to the public. The values and premises that underlie an interpretivist philosophy tend to be less well understood, and less highly regarded, by the media than the values and premises that underlie a noninterpretivist philosophy. In particular, and most obviously, the media's focus on winning and losing parties—an altogether understandable focus—accords little attention to the process by which a judge or justice reaches his results. As the debate over the judicial role intensifies in this country, these communications become of increasing importance to state appellate judges who must periodically present themselves to the people for retention or reelection.

9. See, e.g., Editorial, *Interest groups battle to influence justices*, TRAVERSE CITY REC.-EAGLE, May 30, 2008, at 4A ("A recent study of judicial elections in Great Lakes states dispels any doubt that a 'For Sale' sign figuratively—if not literally—should be nailed to the Michigan Supreme Court chamber."); Ted Roelofs, *State high court ranks low: GR forum examines its flaws*, GRAND RAPIDS PRESS, June 18, 2008, at B3.

10. See, e.g., *Cameron v. Auto Club Ins. Ass'n*, 718 N.W.2d 784, 790 (Mich. 2006) ("If the statute has provisions that are harsh, they undoubtedly reflect the compromises that were hammered out in the Legislature . . . It was for them, the legislators, not us, the judges, to weigh the 'competing interests' and 'cho[ose] the result' . . ."); *id.* at 800 (Markman, J., concurring) ("This Court lacks the authority to alter a statute simply because it is confident that such alteration will better fulfill some supposed purpose."); *Robertson v. DaimlerChrysler Corp.*, 641 N.W.2d 567, 581–82 (Mich. 2002) ("[W]e believe that it is the constitutional duty of this Court to interpret the words of the law-maker, in this case the Legislature, and *not* to substitute our own policy preferences in order to make the law less 'illogical.'").

The result has been a court that has eschewed the role of "adult supervisor" for the state of Michigan, and has abided instead by the view that it is a function of the country's experiment in self-government that the people are entitled to enact laws that judges or justices might view as unwise or imprudent, so long as these do not contravene the constitutions of the United States or Michigan. The interpretivist majority has sought to avoid the eternal judicial temptation: to "improve" the law as the judge sees it and thereby to "strengthen" the work-product of the legislature by its own lights.

The following are several not-altogether-random thoughts on the media and interpretivism, recognizing that these are necessarily generalities and that a single description does not necessarily fit all.

#### NOT-ALTOGETHER-RANDOM THOUGHT #1

For interpretivists, the critical aspect of the judicial role consists of the *means* (or the *process*) by which ultimate decisions are reached and not the substantive *results* of such decisions. The interpretivist is committed to a jurisprudence in which the "judicial power"—the only power properly wielded by courts under our federal<sup>11</sup> and state<sup>12</sup> constitutions—must be exercised in accordance with our system of separated powers, and in which it is the "legislative power"<sup>13</sup> that generally determines substantive results, or what the law "ought" to be.<sup>14</sup> Understandably, however, the fine points of legal analysis are of much less interest to the media than is the bottom line of who wins and who loses. Had the Associated Press covered the United States Supreme Court's decision in *Marbury v. Madison*,<sup>15</sup> it likely would have viewed the decision as a sweeping victory for the Jeffersonians, even though the Federalists

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11. See U.S. CONST. art. III, § 1.

12. See MICH. CONST. art. VI, § 1.

13. See U.S. CONST. art. I, § 1; MICH. CONST. art. IV, § 1.

14. See *FTC v. Jantzen, Inc.*, 386 U.S. 228, 235 (1967) ("The Legislature has the power to decide what the policy of the law shall be." (quoting *Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908))); *Stanard v. Olesen*, 74 S. Ct. 768, 771 (Douglas, Circuit Justice 1954) ("[I]t is for Congress, not the courts, to write the law."); *Cameron*, 718 N.W.2d at 790 ("It is the legislators who establish the statutory law because the legislative power is exclusively theirs.").

15. 5 U.S. (1 Cranch) 137 (1803).

emerged as the real prevailing party. What is newsworthy and of public interest is not the parsing of complex sentences, the invocation of dictionary definitions of words and phrases, or the application of Latin maxims of interpretation, but rather the resolution of winners and losers. Thus, what is most important to the interpretivist judge—the assurance of even-handed decision making effected through neutral rules by which laws are given reasonable meaning—is of little interest to the media. In contrast, what is most important to the noninterpretivist judge—the attainment of what he views as pleasant results, effecting social reforms, “enhancing” the work-product of the representative branches of government, and doing “equity”—is of considerable media interest.

#### NOT-ALTOGETHER-RANDOM THOUGHT #2

The adverse impact of the media focus on the interpretivist judge is compounded by the single greatest virtue of interpretivism: the establishment of clear rules of decision making in advance of the decision. The interpretative rules of the game are properly set forth *before* the judge is confronted with particular interests and specific parties with which he may have predispositions. By accepting these rules, the interpretivist judge commits himself to rendering judgments based on the language of a contract, statute, or constitution, and to reaching such judgments through the application of well-understood and consistently-applied principles of construction. Thus, the interpretivist binds himself; he imposes constraints and limitations on himself and thereby serves as a custodian of a limited constitutional government. In the words of President Franklin Roosevelt, such a judge thereby acts “under” the law rather than “over” the law.<sup>16</sup>

Like the interpretivist judge, the noninterpretivist judge reaches his decisions by applying rules of law; the problem is simply that such rules vary from case to case. Because no overarching rule *precedes* the decisions of such judges, the parties cannot be sure that what matters is the *law* and not a judge’s sympathies

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16. Franklin D. Roosevelt, A “Fireside Chat” Discussing the Plan for Reorganization of the Judiciary (Mar. 9, 1937), in 1937 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 122, 126 (1941) (“We want a Supreme Court which will do justice under the Constitution—not over it.”).

or antipathies toward the parties or their causes.<sup>17</sup> Any judge can concoct "rules" or "principles" after the fact; the equal application of the law, however, requires the *consistent* application of clearly articulated rules and principles. On many occasions, I have invited such articulation from my three dissenting colleagues on the Michigan Supreme Court, but they have yet to respond to these solicitations.<sup>18</sup>

Imagine two judges with contrary judicial philosophies. The first judge has bound himself by traditional understandings of the "judicial power," views it as imperative that he apply the same rules of interpretation today as he did yesterday, believes that the rule of law is principally a function of *consistent* decision making, and believes that a thumb is placed on the scales of justice when a judge may select from either column A or column B of a menu of interpretive rules. In contrast to this approach, the second judge places a premium on achieving "benevolent" results and "wise" public policies, approaches each case relatively unburdened by any need to apply the same tools of interpretation today that he applied yesterday, views innovation and creativity as greater judicial virtues than adherence to musty dictionary definitions and faithful application of the

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17. No judge would ever be explicit in saying that he construes the law as he wishes notwithstanding what the law says. Noninterpretivist judges, however, will be far more embracing in their decisions of such terms as "ambiguous," "balancing," and "spirit," and far more willing to base conclusions on "legislative history," "public policy," "equity," and "broad" and "narrow" constructions of the law, all of which will sometimes suggest a judicial determination to avoid the constraints of the written law. Such words and phrases ought to be carefully scrutinized to determine if a judicial decision is genuinely compelled by the law or instead by the judge's own personal sense of justice or conscience.

18. See, e.g., *Rowland v. Washtenaw County Rd. Comm'n*, 731 N.W.2d 41, 58 (Mich. 2007) (Markman, J., concurring) ("Justice Kelly [writing in dissent] would do well to share her *own* standards concerning when she would or would not overrule such obviously distasteful precedents."); *Terrien v. Zwit*, 648 N.W.2d 602, 614 (Mich. 2002) (Markman, J.) ("[W]e are curious as to the dissent's basis for asserting that a policy is truly a 'public' policy as opposed to merely a judge's own preferred policy."); *id.* at 615 ("The dissent offers no factors or criteria for a court to evaluate, it offers no guidance as to the particular circumstances that should be reviewed by a court in its analysis, and it offers no direction regarding when a court should conclude that a [commercial enterprise] has been transformed into a non-'business' because of its location."); *Robertson v. DaimlerChrysler Corp.*, 641 N.W.2d 567, 582 (Mich. 2002) (Markman, J.) ("In support [of its position], the dissent merely reiterates its view that the words of the statute must be subordinated to what the dissent believes are better policy choices, in other words, *its* policy choices. The dissent offers no argument that the four words that [it] would strike from the law are read unreasonably by this majority, or that a reasonable alternative interpretation exists.").



"last antecedent" rule, and believes that the constitutional architecture must be allowed to "breathe" in terms of the authorities of the separate branches of government. Which of these two judges is more likely to author opinions producing popular outcomes and media-friendly decisions? It does not take a rocket scientist to answer this question. If the judge's starting premise is that he is seriously circumscribed in the breadth of his decision making by the words of the law, quite assuredly he will be deciding far fewer cases in a manner applauded by the media than the judge whose starting premise is to determine what constitutes the most beneficent outcome in a given case.

One of the great challenges facing any purportedly interpretivist judge is how to address problematic precedents and the exercise of *stare decisis*. It sometimes can be difficult to balance the need for stability and continuity in the law by following precedent with the obligation to remain faithful to one's oath of office to say what the law means. The Michigan Supreme Court has been criticized for an allegedly cavalier attitude toward precedent. This criticism is unjustified. Rather, the court has merely rejected the view that noninterpretivist courts are entitled to periodic spasms during which they may reject precedents and "evolve" the law in more "modern" directions, and that later interpretivist courts are obliged simply to acquiesce to those new precedents. Instead, the court's presumptive position has been that it will reasonably interpret the law to the best of its ability and issue opinions consistent with those interpretations, unless there is some compelling reason not to do so.<sup>19</sup> The judge's first obligation is to the law and the Constitution, not to the wrongly decided precedents of ten years earlier. If the law says "up," it means "up," regardless of whether judges a decade ago proclaimed that it really meant "down."

### NOT-ALTOGETHER-RANDOM THOUGHT #3

Much of the media has little patience with legal doctrines that it views as distracting from the attainment of substantive results. For example, the Michigan Supreme Court received

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19. See *Robinson v. City of Detroit*, 613 N.W.2d 307, 319–22 (Mich. 2000) (stating that, when deciding whether to overrule precedent, the court considers whether the earlier decision was wrongly decided and whether overruling such decision would work an undue hardship because of reliance interests or expectations that have arisen).

almost unanimous media criticism when it called into question a state law authorizing "any person" to sue "any other person" for the redress of a broad range of environmental harms.<sup>20</sup> In reliance on a United States Supreme Court decision, as well as its own precedents, the court invoked the doctrine of "standing" and concluded that the "judicial power" simply did not extend to a lawsuit where a plaintiff in Ann Arbor was dissatisfied with the executive branch's enforcement of the state's environmental laws but had suffered no specific harm from the alleged polluting actions of a defendant five hundred miles away in the Upper Peninsula.<sup>21</sup> This Court was repeatedly scorned in the media for not interpreting "any person" to mean "any person."<sup>22</sup> Although this sudden outburst of interpretivist zeal within the media was admirable, the court's opinion hastened to remind the reader that it was also incumbent on a court of law to read the *constitution* at the same time that it read the *statute*, that the constitution in this instance limited our authority to the exercise of the "judicial power," and that such power did not extend to matters in which a plaintiff lacked standing, regardless of what the legislative branch might say. Judicial decisions and analysis focused on standing and other preconditions to the exercise of the judicial power—most of which are fundamental to delineating how the separation of powers as a practical matter will be accorded respect by the judiciary—do not appear to impress many in the media as much as judicial decisions and analysis that cut through all of this "legalistic" underbrush and enable judges to arrogate to themselves as many of society's important decisions as possible.

To put this another way, the more "passive" judicial virtues of restraint in decision making—deference to the determina-

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20. *Mich. Citizens for Water Conservation v. Nestlé Waters N. Am., Inc.*, 737 N.W.2d 447, 449, 452–53 (Mich. 2007); see, e.g., Peter Luke, *Court takes rights from citizens*, KALAMAZOO GAZETTE, July 29, 2007, at A18 ("A Supreme Court that often says cases should be decided strictly on the plain language in a statute, said in this case that 'any person' doesn't mean 'any person' at all.").

21. See *Mich. Citizens*, 737 N.W.2d at 449–50.

22. See, e.g., Pat Shellenbarger, *Milliken: Water ruling 'major setback': Former governor says decision destroys intention of state's Environmental Protection Act*, GRAND RAPIDS PRESS, Aug. 5, 2007, at A1 ("To former Michigan Gov. William Milliken, 'anyone' means 'anyone.'"); Editorial, *Supreme Court turns State Environmental law on its ear*, BAY CITY TIMES, Aug. 26, 2007, at 8A ("[T]he Supreme Court in a 4-3 ruling twists state environmental law into something the original signers of the Michigan Environmental Protection Act don't recognize.").

tions of other public institutions, respect for the limits of the judicial power, and regard for the ability of the private sector to manage its own affairs—seem to be considerably less admired by the media than more “aggressive” judicial understandings that dictate action, that “get things done” (albeit by creative and innovative methods), that repair the flaws and shortcomings of the popular branches, and that do not allow “technicalities” like standing, mootness, ripeness, and “political questions” to stand in the way of achieving pleasant results. When, for example, the interpretivists of the Michigan Supreme Court are accused of being a “rubber stamp” for the legislature,<sup>23</sup> a pejorative cast is placed on a constitutional relationship that the Founders viewed as indispensable to the achievement and maintenance of a free society.

#### NOT-ALTOGETHER-RANDOM THOUGHT #4

Finally, the media often fails to distinguish between the judicial and legislative roles. One cannot count the number of instances in which the Michigan Supreme Court has been on the wrong end of editorials, commentaries, and news stories that have neglected to mention that there were statutes or ordinances that were dispositive of an issue, as if the judiciary simply possessed *carte blanche* to reach a particular result. Yet, in a system in which judges are elected, it is essential that the media provide leadership in reminding the citizenry of first principles of civics, such as how the institutions of our system of government interact and how each is bound in different ways by the Constitution. Too often this leadership has not been forthcoming. The detrimental impact of this failure once again falls disproportionately on the judge whose approach to his responsibilities is premised on the binding nature of the law, rather than on the judge who essentially views himself as having a shared legislative role.

Moreover, the media, quite understandably, tends to focus on outcomes in *today's* decision while failing to recognize that an appellate court's decision—particularly a decision of the Michigan Supreme Court, which serves as the court of last resort in

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23. See, e.g., *Harvey v. State*, 664 N.W.2d 767, 776 (Mich. 2003) (Weaver, J., dissenting) (“This Court is not simply a rubber stamp for anything the Legislature enacts.”).

the state and whose docket is entirely discretionary—may control not only the instant case, but the resolution of five hundred future cases as well. Thus, the most important aspect of an appellate opinion is, almost always, the *principle of law* that is articulated. For it is this principle of law that must be applied equally to these succeeding five hundred cases if the rule of law is to constitute more than lip service. Yet media coverage often fails to convey this aspect of appellate decisions. And, once again, the interpretivist judge, who is conscious of his obligation to render a decision in tomorrow's case in a fashion consistent with his decision in today's case, is derided for his judicial integrity. The noninterpretivist, on the other hand, will deal with later cases as they arise.

### CONCLUSION

More often than not, the media does not set out to treat interpretivist judges unfairly. There is simply much that remains to be done by organizations such as the Federalist Society and by interpretivist judges themselves to better and more effectively communicate the nature of the judicial role and the parameters of the present judicial debate. The Federalist Society's extraordinary success should not obscure the reality that the dominant legal culture remains defined by a contrary point of view that is, not surprisingly, reflected throughout much of the media.

# LIMITS OF INTERPRETIVISM

RICHARD PRIMUS\*

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## INTRODUCTION

Justice Stephen Markman sits on the Supreme Court of my home state of Michigan. In that capacity, he says, he is involved in a struggle between two kinds of judging. On one side are judges like him. They follow the rules. On the other side are unconstrained judges who decide cases on the basis of what they think the law ought to be.<sup>1</sup> This picture is relatively simple, and Justice Markman apparently approves of its simplicity.<sup>2</sup> But matters may in fact be a good deal more complex.<sup>3</sup>

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\* Professor of Law, The University of Michigan. Thanks to Alex Christopher and Tina Sessions. I also thank the leadership of the University of Michigan chapter of The Federalist Society. In addition to organizing this Symposium, they have been generally terrific interlocutors on matters of constitutional law.

1. See Stephen J. Markman, *An Interpretivist Judge and the Media*, 32 HARV. J.L. & PUB. POL'Y 149, 154 (2009).

2. See Stephen J. Markman, *A Response to Professor Primus*, 32 HARV. J.L. & PUB. POL'Y 179, 180 (2009).

3. The same is true of Justice Markman's contention that the judges on his side of this divide are at a disadvantage in the court of public opinion. According to Justice Markman, the public learns about judicial decisions through the media, and the media tend to describe the outcomes of cases without explaining the reasoning, so when the text of the law requires an unpopular result, the textualist judge will be blamed for making an unpopular decision rather than appreciated for following the rules. See Markman, *supra* note 1, at 155–57. The intuition behind Justice Markman's concern is easy to follow, but it needs to be considered critically. For one thing, it is not clear that judges who keep strictly to the text of en-

Justice Markman describes his own jurisprudence as textualist, originalist, interpretivist, and traditional.<sup>4</sup> To his credit, he does not insist on any of those labels as if the name were the most important thing. But he does profess to follow the texts of statutes and constitutions, to honor original meanings, to interpret the law rather than make it up, and generally to respect the traditions of American law and the traditional role of the judge. These are substantive claims, not just claims about labels. One problem with this set of claims, though, is that they often come into conflict with one another. Textualism, originalism, and traditional judging are not just different names for the same thing. They are different jurisprudential approaches, with different strengths and weaknesses. Often, a judge must choose among them. In what follows, I will show that one cannot be a rule-following judge simply by being a textualist and an originalist and a traditionalist, because those approaches to judging often point in different directions.

So if Justice Markman is not all of those things at once, he may be less of each of them than he imagines. Though he considers himself an originalist, it may be the case that he is not really looking for original meanings quite as much as he asserts. Though he considers himself a textualist, it may be the case that his judging is less a product of enacted legal texts than one might think.

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acted law are the ones most likely to reach unpopular results—or if they are, something might be badly wrong with the premise that enacted law reflects the preferences of the public. Moreover, one paradigmatic foil for the textualist judge is the activist judge who foists his own values on an unwilling citizenry, and there is good reason to expect that activist judge to face a great deal of public criticism: By hypothesis, that judge imposes unpopular results. That said, these thoughts about which kinds of judges are the targets of the most criticism are speculative, and speculation is not a good way to settle an empirical question. An answer to the question of which judges face the most public criticism should come from data, and Justice Markman offers no data to support the claim that he and his methodological kind are the ones who suffer most.

I would not be surprised to learn that each judge believes that *his* kind of judge takes more incoming fire than other kinds of judges do. Judges are people, after all, and like other people they exhibit salience biases. Criticism of *me* is always more memorable—to me—than criticism of the other guy. And criticism of me is also more likely to be *unjustified*—in my view—than criticism of the other guy. It would be natural, therefore, for judges of each methodological school to think themselves subject to more criticism than other kinds of judges are.

4. See *id.* at 151.

It does not follow, of course, that Justice Markman is simply making things up, unconstrained by law. One would make that leap only if one believed that there are two choices in judging: either one is a textualist-originalist-interpretivist-traditional-rule-oriented judge, or else one is a renegade. But those are not the only choices.

## I. INTERPRETIVISM AND TEXTUALISM

Of the terms that Justice Markman uses to describe his jurisprudential theory, the two that are most compatible with each other are "interpretivist" and "textualist." These terms both name the idea that judges should decide constitutional and statutory cases by interpreting the words of the applicable constitutions and statutes. The difference between the terms is partly a matter of history and partly a matter of rhetoric.

To oversimplify the history of constitutional discourse only slightly, "interpretivism" is what textualism was called between 1975 and 1984. Before then, the term "interpretivism" was not in use. In his 1975 article *Do We Have an Unwritten Constitution?*, Thomas Grey called the model of judging on which judges confine themselves to reading and interpreting the words of the written constitutional text "interpretive."<sup>5</sup> Five years later, in his book *Democracy and Distrust*, John Hart Ely adopted Grey's term. In Ely's canonical formulation, "interpretivism" is the view "that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution."<sup>6</sup> Interpretivism is not shallow literalism: the interpretivist knows that judges must often *interpret* the written text rather than always being able to apply it mechanically. But the thing to be interpreted—the source of law—is the words of the text. Grey's article made a splash, and Ely's book dominated the field, so people remembered the term.

The trouble with this nomenclature, though, was that the word *interpretivism* does not name the distinctive commitment of the idea that it denoted. Nearly everyone thinks that judges

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5. See Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 703 (1975).

6. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1 (1980).

are supposed to *interpret* the law. The question is whether the law that judges interpret is wholly contained in the *text* as opposed to residing in some combination of sources among which text might be one. Common-law judging is not about interpreting the words of texts, but it is very much about interpreting the law. Even avowedly anti-positivist Dworkinians are engaged in interpreting the law, rather than making up what the law should be as if from whole cloth. They have a different view from most textualists about the set of factors that determine what the law is. According to the Dworkinians, that set of factors can include norms and morals. But the Dworkinians regard the norms and morals that are among the determinants of law as being within the law as it is, not as factors external to the law.<sup>7</sup> When they reason about principles of justice, therefore, Dworkinians are interpreting the law as they understand law.

In 1984, after due reflection, Grey confessed that “interpretivist” and “noninterpretivist” were not good names for the debate he had characterized with those labels. “We are all interpretivists,” he wrote, and rightly so. “[T]he real arguments are not over whether judges should stick to interpreting, but over what they should interpret and what interpretive attitudes they should adopt.”<sup>8</sup> To replace “interpretivist,” therefore, Grey adopted the term “textualist,” on the reasonable basis that the role of the written text is the crux of the relevant disagreement.<sup>9</sup> Constitutional discourse has generally followed this substitution of terms. We now speak of textualism, and the term “interpretivism” is rare, except as a throwback to the 1970s.<sup>10</sup>

One possibility is that when Justice Markman describes himself as an “interpretivist” as well as a “textualist,” he means to be comprehensive, or to indicate that it does not matter which of these terms is used to identify his approach. In the remain-

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7. See Christopher L. Eisgruber, *Should Constitutional Judges be Philosophers?*, in *EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN* 5, 5 (Scott Hershovitz ed., 2006).

8. Thomas C. Grey, *The Constitution as Scripture*, 37 *STAN. L. REV.* 1, 1 (1984).

9. See *id.*; see also Owen M. Fiss, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739, 743 (1982) (making an even stronger suggestion shortly before, writing that the theory known as “interpretivism” should actually be called “textual determinism”).

10. A Westlaw search for the terms “interpretivist” and “textualist” in law review articles published since 2000 found more than eight times as many documents using the latter term as using the former.



der of this Essay, I will generally proceed on that assumption. But there is also another possibility of which we should be aware. Instead of understanding “interpretivist” and “textualist” as two terms that have carried the same meaning at different points in history, we can understand them as terms with different rhetorical implications.

If I call myself a textualist in the course of explaining how my jurisprudence differs from that of my colleagues, it is pretty clear that I mean to say that I value the text differently—indeed, more—than they do. If I call myself an *interpretivist* in the course of such an argument, the implication is that I place a higher value on *interpretation*. That implication is precisely why Grey repented his use of “interpretivist.”<sup>11</sup> To imply that the people on the other side are not interpreting is by and large misleading. They, too, are interpreting, but they have a different understanding of the sources of law that are to be interpreted. As a matter of rhetoric, however, I can score points by implying that what my rivals are doing is something other than interpreting the law. If a judge is not interpreting the law when he decides a case, the audience’s intuition will run, then he is making things up according to his own preferences. The alternative to interpretation in this framing is legislation, or activism, or some other form of unjustified judicial overreaching.

When a judge calls himself an interpretivist in 2009, it is often hard to know whether he means to score these rhetorical points or whether he simply has not kept up with changes in the academic conversation. Perhaps one should give such a judge the benefit of the doubt. That said, Justice Markman’s major substantive claim about his jurisprudence is that he is constrained by rules where other judges simply choose their desired outcomes. The charge that judges choose outcomes rather than following rules is quite close to the charge that those judges are making things up. In other words, the substance of Justice Markman’s complaint about judges who do not share his approach aligns well with the rhetorical point that would be made by implying that those judges do something other than interpret the law.

Almost no judge thinks that his job is to make up whatever he thinks the answer should be, regardless of the law. If nonin-

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11. See Grey, *supra* note 8.

terpretivism means freedom from the law, then American law features almost no noninterpretivist judging. But our legal system does involve a good deal of nontextualist judging. Judges regularly decide cases by methods other than reading the words of the relevant constitutional and statutory clauses and figuring out how those words bear on the question presented. Indeed, *all* judges decide many of the cases they see by methods other than reading the words of the relevant clauses.<sup>12</sup> Some judges, however, are reluctant to admit this reality. Perhaps for rhetorical reasons, or perhaps because they have not come to terms with the truth about their own jurisprudence, some judges speak as if their decisionmaking were simply a matter of reading the text even when it is not.

## II. TEXTUALISM AND RULES

Textualism promises transparency. The law, says the pure textualist, is the set of words that the lawmaking body adopted. Those words are written in publicly available places. It follows that ordinary citizens can read the law and call officials to account if the officials do not follow the law. In a democratic society that values the rule of law, these are powerful attractions for a legal theory.

Sometimes, though, the impulse to hold officials to the transparent text of the law gives rise to unwarranted criticism. Indeed, Justice Markman's major example of unjustified media criticism aimed at his court is a matter of textualism gone awry. In the relevant case, *Michigan Citizens for Water Conservation v. Nestlé Waters North America, Inc.*,<sup>13</sup> Justice Markman joined the majority of the Supreme Court of Michigan in holding that the plaintiff lacked standing to pursue a claim under the Michigan Environmental Protection Act. The court reached that holding despite a statutory provision stating that, for the relevant kind of environmental-law violation, "any person may maintain an action in the circuit court."<sup>14</sup> Given the apparent conflict be-

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12. I do not mean that judges never decide cases by reading the words. I mean only that there is no judge—or at least no judge in the American system—for whom reading the words is the only method of deciding cases.

13. 737 N.W.2d 447, 456 (Mich. 2007).

14. MICH. COMP. LAWS § 324.1701(1) (1995) ("The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged

tween that language and the court's ruling, Justice Markman reports, the court faced a certain amount of derision in the media for "not interpreting 'any person' to mean 'any person.'" <sup>15</sup>

I have considerable sympathy for the supreme court at this juncture. If one knows only the language of the statute, the criticism seems valid, and that makes the court look either wanton or foolish. But the statute is not the only relevant source of law. The law also contains constitutional doctrines of standing. If the statute conferring standing on "any person" exceeded the constitutional limits of standing, then the court was right to rule as it did.

Note, however, the terms in which Justice Markman defends his court's decision. Yes, he says, he and his colleagues can read the words "any person" in the statute. But "it was also incumbent on a court of law to read the *constitution* at the same time that it read the *statute*." <sup>16</sup> Justice Markman is here correctly emphasizing that textualism requires acquaintance with more than one document. In addition to the statute, judges must read the relevant constitutional text, which has greater authority. In other words, Justice Markman is saying, he and his colleagues should not be faulted for departing from the text of the law. They should be applauded for following the text of the right law. They read the constitution, and it told them what to do.

But exactly what text did Justice Markman read in this case? The court cited two provisions of the Michigan Constitution, namely Article III, Section 2, and Article VI, Section 1. They are reproduced here in their entirety:

Article III, Section 2: The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise pow-

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violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.")

15. Markman, *supra* note 1, at 155–56 (citing Pat Shellenbarger, *Milliken: Water ruling 'major setback': Former governor says decision destroys intention of state's Environmental Protection Act*, GRAND RAPIDS PRESS, Aug. 5, 2007, at A1; Editorial, *Supreme Court turns State Environmental law on its ear*, BAY CITY TIMES, Aug. 26, 2007, at 8A).

16. Markman, *supra* note 1, at 156.

ers properly belonging to another branch except as expressly provided in this constitution.<sup>17</sup>

Article VI, Section 1: The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.<sup>18</sup>

The word "standing" does not appear in either of these texts. Nor is there any language that creates a doctrine of restricted standing by some other name.

According to the court, the separation of powers and the idea of "the judicial power" inherently require the standing doctrine that the court used to decide the case. "Standing," the court explained, "is an indispensable doctrine rooted in our constitution and the tripartite system of government it prescribes."<sup>19</sup> That may be. But a competent speaker of English who did not know the doctrine of standing could read the texts of Article III, Section 2, and Article VI, Section 1, many times and never imagine that they ordained a standing doctrine, much less the particular standing doctrine that decided this case.

Imagine, then, what would happen if the Michigan Supreme Court justices said to their media critics, "Yes, we read the statute. But did you read the constitution? Go read Article III, Section 2, and Article VI, Section 1, and then we'll talk." The media critics would go away and read the sections. They would then return and say, quite reasonably, "We read those sections. We read them carefully. There is not a word in them indicating that 'any person' cannot sue under the Michigan Environmental Protection Act."

Perhaps the court was right to deny standing in *Michigan Citizens for Water Conservation*. But the majority justices did not reach their decision by reading the text of Article III or Article VI. Instead, they consulted judicial doctrine, which is to say that they derived the relevant standing requirements largely from what judges have decided through a complex process of

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17. MICH. CONST. art III, § 2.

18. MICH. CONST. art VI, § 1.

19. *Mich. Citizens*, 737 N.W.2d at 453.

reason and experience. In supporting its decision, the majority cited and discussed several prior cases setting out the rules of standing. If the majority justices were to say to their media critics, "Look, we know what the statute says, but you also have to read these eleven court cases," then they would have a good point. But then the authority they claimed would not be that of the constitutional text.

I do not insist on too rigid a distinction between what is and what is not "in" a constitutional text. The meaning of language always depends on more circumstances than the arrangement of letters and words. In our legal system, one circumstance that powerfully shapes how people understand the content of constitutional texts is judicial doctrine. If courts in Michigan regularly call standing an Article VI issue, then judges, lawyers, and law professors in Michigan will come to associate the doctrine of standing with Article VI just as surely as if the text of Article VI contained the words "Only persons who can demonstrate individual, quantifiable, and redressable injury have standing to sue." To the extent that a text means what some relevant community of readers sees in it, one might therefore argue that the text of Article VI *does* contain a rule of limited standing—just as, I suppose, the text of the Due Process Clause of the United States Constitution's Fourteenth Amendment<sup>20</sup> guarantees a pregnant woman's right to have an abortion. But I doubt that Justice Markman means to embrace this line of reasoning, much less that he means to honor it with the name "textualism."

If textualism has a core, it is the proposition that the text of the law has meaning and authority independent of what the judges have said and done.<sup>21</sup> On that understanding, it is very hard to see how Justice Markman could have reached his decision in *Michigan Citizens for Water Conservation* simply by reading the text of Michigan's constitution.

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20. U.S. CONST. amend. XIV, § 1.

21. See, e.g., Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 26–27 (2000) (laying out the contrast between textualist and doctrinalist approaches to constitutional interpretation).

## III. TEXTUALISM AND ORIGINALISM

Recall now that Justice Markman describes himself as an originalist as well as a textualist.<sup>22</sup> Perhaps these two commitments are parts of a single whole. In other words, perhaps interpreting the text means understanding it according to its original meaning. If the meaning of a text is its original meaning, and if an original meaning has fallen out of common use, then a competent speaker of English today might well fail to grasp a meaning that a text legitimately carries. Therefore, if something in the Michigan Constitution originally carried a meaning about standing, then perhaps we can make sense of Justice Markman's claim that the Michigan Supreme Court reached its decision by reading the constitution. Perhaps "reading the constitution" is shorthand for reading the constitution in light of its original meaning.<sup>23</sup>

That resolution would cohere with the argument of the majority in *Michigan Citizens for Water Conservation*, which expressly invoked the authority of originalism. To neglect the principle of standing, the majority wrote, "would imperil the constitutional architecture carefully constructed by its drafters and ratified by the people."<sup>24</sup> But on due consideration, the Michigan court's analysis cannot be understood as originalist any more than it can be understood as textualist. Quite simply, the majority in that case did nothing that should count as identifying the original meaning of Michigan's constitutional text.

The court's argument proceeded as follows: The Constitution of Michigan ordains the separation of powers. Michigan's separation of powers is like the separation of powers that exists in the federal government. In the federal context, the separation of powers entails certain requirements about standing to sue. Therefore, the same requirements apply under the Michigan Constitution.<sup>25</sup>

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22. See Markman, *supra* note 1, at 151.

23. Note, however, that this move sacrifices much of the transparency that is part of textualism's appeal. To whatever extent original meanings differ from the meanings that current competent readers of English understand, giving force to original meanings will sanction law that departs from what ordinary citizens might think the plain text requires.

24. *Mich. Citizens*, 737 N.W.2d at 453 (internal quotation marks omitted).

25. *Id.*

To work out what the federal requirements for standing are, the Michigan Supreme Court discussed several cases decided by the United States Supreme Court between 1972 and 2000. The majority opinion drew on *Sierra Club v. Morton*,<sup>26</sup> *Warth v. Seldin*,<sup>27</sup> *Lujan v. Defenders of Wildlife*,<sup>28</sup> and *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*<sup>29</sup> The Michigan Supreme Court then applied those precedents to the case before them. That is garden-variety judging. But what would it mean to call this process of reasoning *originalist*? In other words, what would a judge have to believe to think that United States Supreme Court cases decided between 1972 and 2000 would reveal the original meaning of the Michigan Constitution of 1963?

Were the Justices of the United States Supreme Court between 1972 and 2000 deeply influenced by the ratification debates surrounding the adoption of the Michigan Constitution of 1963, such that their views of the federal separation of powers are good evidence of ideas prominent in Michigan at the time that the Michigan Constitution was adopted? Alternatively, did the ratifiers of the Michigan Constitution in 1963 understand themselves to be adopting the original understanding of the federal separation of powers, and indeed the *correct* original understanding of the federal separation of powers, rather than the misunderstanding of the federal separation of powers that prevailed in the federal courts in 1963? Was the ratifying public of the State of Michigan in 1963 sufficiently expert in the federal separation of powers to have differentiated between the separation of powers as correctly understood in 1787 and the separation of powers as misunderstood by dominant contemporary professional opinion and then to have chosen the former over the latter? Perhaps less absurdly, might the 1963 Michigan ratifiers have had a general sense about the separation of powers and intended to peg the specifics of the Michigan separation of powers to the developing understanding of the separation of powers among federal judges, then and in the future? Might a reasonable Michigander in 1963 have understood the proposed state constitution in those terms?

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26. 405 U.S. 727 (1972).

27. 422 U.S. 490 (1975).

28. 504 U.S. 555 (1992).

29. 528 U.S. 167 (2000).

I do not know what actual Michiganders or hypothetical reasonable Michiganders thought or would have thought about the separation of powers in 1963. Figuring it out would require a historical account. In *Michigan Citizens for Water Conservation*, the Michigan Supreme Court supplied no such historical account. Without such an account, one cannot claim the authority of originalism.

#### IV. ORIGINALISM AND CONSTRAINT

I do not fault Justice Markman or the Michigan Supreme Court for deciding *Michigan Citizens for Water Conservation* on the basis of judicial doctrine rather than on the basis of original meanings. It is difficult, after all, to figure out what the public of Michigan in 1963 thought about the separation of powers, or, more specifically, what their ideas about the separation of powers would have meant for the question of who can sue under environmental statutes. If the goal is to have a clear rule, it is much easier to follow what judges have said when confronting similar questions in recent cases. And as Justice Markman says, the core of his jurisprudence is the commitment to be governed by rules.

The lesson here is that Justice Markman's desire for a jurisprudence in which judges are constrained by rules is in tension with his characterization of himself as an originalist. The tension is more than incidental. As a general matter, originalism is a poor strategy for establishing clear rules of decision in advance of particular cases.<sup>30</sup> Originalist source material is sometimes scarce and sometimes endless. It often does not specifically address the question that must be decided. When it does address that question, it often does so in many different voices, no one of which has a greater claim to authority than the others.<sup>31</sup> Moreover, judges' understandings of originalist history vary over time. This is not a criticism of judges: Professional historians' understandings of the past are also constantly changing. But if our view of some set of historical materials is never stable,

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30. See, e.g., Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 510 (1995); David A. Strauss, *Originalism, Precedent, and Candor*, 22 CONST. COMMENT. 299, 302 (2005).

31. See, e.g., Jack N. Rakove, *Fidelity Through History (Or to It)*, 65 FORDHAM L. REV. 1587, 1597-99 (1997).



it is hard to understand why we should expect consulting those materials to be a good way of deriving stable rules.<sup>32</sup>

This is not to say that reference to original meaning is never clarifying. In cases that actually arise for judicial decision, however, originalist sources are regularly too open-textured to compel one and only one interpretation of the source of law being considered. Indeed, judges in such cases regularly seem able to support either side of the question with originalist argument. Here is an incomplete list of examples taken just from decisions of the United States Supreme Court during the last few months. In *District of Columbia v. Heller*,<sup>33</sup> the majority and the dissent disagreed about the original meaning of the Second Amendment. In *Giles v. California*,<sup>34</sup> the majority and the dissent disagreed about the original meaning of the Sixth Amendment. In *Boumediene v. Bush*,<sup>35</sup> the majority and the dissent disagreed about the original meaning of the Suspension Clause. In *Medellin v. Texas*,<sup>36</sup> the majority and the dissent disagreed about the original meaning of the Presentment Clause and the Treaty Power. In cases like these, judges invoke original meanings to support the same range of rival outcomes that would otherwise be available.

This does not mean that judges are deliberately manipulating their accounts of original meaning. Each may sincerely believe that original meanings support his or her resolution of the case. Indeed, each judge may authentically believe himself constrained to reach a given result on the basis of original meanings, even if other judges authentically believe themselves constrained to reach the opposite result on the same basis. But in a great many cases, judges seem to conclude that the relevant original meanings support the same results that we suspect they would reach if they had not consulted original meanings. To whatever extent that suspicion is justified, original meanings are not functioning as constraining rules.

Justice Markman's contention is that a judge who pays attention to original meanings will in fact be constrained, and it

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32. See Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1190 (2006).

33. 128 S. Ct. 2783 (2008).

34. 128 S. Ct. 2678 (2008).

35. 128 S. Ct. 2229 (2008).

36. 128 S. Ct. 1346 (2008).

would be fair for him to say that no list of cases in which different judges reached different conclusions based on original meaning can disprove the claim that original meanings do constrain. Such a list could only prove that original meanings do not constrain *perfectly*, and no sensible jurisprudential method can make the result in every case entirely determinate. But supporting the claim that original meanings do constrain would require examples of cases in which attention to original meanings was in fact constraining.<sup>37</sup>

The only example that Justice Markman offers—*Michigan Citizens for Water Conservation*—was decidedly not such a case, because the Michigan Supreme Court did not reach its result in that case by examining the original meaning of the constitutional provisions at issue. The court did examine a series of judicial precedents, and those precedents announced a particular set of legal principles as the official original meaning of certain constitutional provisions. The operative source of the rules that the Michigan Court applied, however, was those judicial precedents rather than any set of originalist sources. Indeed, one common function of judicial decisionmaking is to take a historical record that is too vague or too complex to serve as the source of a legal rule and stamp it with an official meaning determinate enough to bear clearly on legal issues.

Consider, as an example, the question of whether the Second Amendment guarantees an individual right to own firearms. Before 2008, several courts tried to answer this question on the basis of original meanings. They reached different answers, which is to say that the quest for original meanings was of limited utility in producing a clear, stable rule for judges to follow.<sup>38</sup> Then the United States Supreme Court decided *District of Columbia v. Heller*, ruling 5 to 4 that the Second Amendment does confer such a right.<sup>39</sup> The *Heller* Court grounded its argument in original meanings. It does not follow, of course, that originalist reasoning supplied a clear rule for the Justices in

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37. If Justice Markman can say, "Were I to consider all appropriate reasons and authorities other than original meaning, I would vote to affirm, but when original meaning is added, I must vote to reverse," then he has supported his assertion that original meanings constrain his decisionmaking.

38. See, e.g., *Parker v. District of Columbia*, 478 F.3d 370, 389–90 (D.C. Cir. 2007); *Silveira v. Lockyer*, 312 F.3d 1052, 1066 (9th Cir. 2002); *United States v. Emerson*, 270 F.3d 203, 259–60 (5th Cir. 2001).

39. 128 S. Ct. 2783, 2821 (2008).

that case. After all, five Justices believed that original meaning pointed one way, and four Justices believed that it pointed the other way. In the future, however, courts deciding cases raising the question of whether the Second Amendment guarantees an individual right to own firearms will enjoy the benefit of a clear rule.<sup>40</sup> When they act on that rule, they may say that they are following the original meaning of the Second Amendment. But the authority instructing them as to the content of that original meaning will be the Supreme Court's decision in *Heller*. *Heller's* function will be to take a multivocal morass of historical sources and trim it down to particular legal propositions that can be used to decide cases. That kind of clarification and rule-creation is a central virtue of judicial precedent. Without the benefit of that precedent—that is, if judges were perpetually to engage the question of the original meaning of the Second Amendment afresh, rather than adopting the meaning chosen earlier by other judges—we would remain without a stable rule. Thus, originalism here is a source of instability and not of discretion-confining rules.

## V. ORIGINALISM AND TRADITION

Finally, consider the tension between Justice Markman's assertion that he is an originalist and his description of his approach to judging as "traditional."<sup>41</sup> Like originalism, tradition and traditionalism locate authority in the past. But they do so in different ways and for different reasons. As Thomas Merrill puts the point, tradition is Burkean, but originalism is Borkian—and each is one of the other's greatest enemies.<sup>42</sup>

Originalism locates legal authority in some set of facts that existed at a specific prior time when a law came into being. Tradition, in contrast, looks to the whole continuum of time leading up to the present. If the President of the United States has given a State of the Union Address every January for the

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40. I do not mean to say that after *Heller* all Second Amendment issues are clearly settled. As everyone recognizes, *Heller* leaves many questions about the scope of Second Amendment rights to be worked out in future cases. I mean to say only that the threshold issue of whether the Second Amendment guarantees an individual right in the first place is settled by the holding of *Heller*.

41. Markman, *supra* note 1, at 151.

42. See Merrill, *supra* note 30, at 514–15.

last seventy years,<sup>43</sup> then an annual January address is traditional even if the ratifiers of the Constitution in the 1780s did not imagine that Presidents would comply with Article II, Section 3 of the Constitution<sup>44</sup> in that way. If Article II, Section 3 was originally understood to require something else—say, if reasonable people would have known that “from time to time” meant that the President should not address Congress on any regular schedule—then a decision today about whether an annual message complied with Article II, Section 3, would feature a conflict between originalism and tradition.

Such conflicts are not just hypothetical. In the recent case of *Department of Revenue v. Davis*,<sup>45</sup> the United States Supreme Court held that the Dormant Commerce Clause does not bar states from exempting income earned on their own municipal bonds from state income taxation. Writing for the Court, Justice Souter noted that all or nearly all of the states engage in the challenged practice and that they have all done so for generations. That is a traditionalist argument: here’s what we do around here, and what we’ve done around here for quite some time, and that fact about our longstanding practices is entitled to legal weight. In dissent, Justice Kennedy had little regard for these facts about practice. He instead offered a version of the original purposes of the Commerce Clause, rooted in the specific history of the 1780s.<sup>46</sup> On Justice Kennedy’s view, that slice of history is the important one. That is an originalist approach.

Traditionalism is about doing today what was done yesterday and the day before that. Originalism, in stark contrast, is about going back to time zero, whenever time zero was, and throwing out the deviations that have accumulated between then and now. Going back to time zero is not tradition. It can have any of several names, depending on whether the speaker wishes to signal approval or disapproval of the project. We could call it restoration, or reaction, or archaeology, or fundamentalism. Sometimes, it can make sense to sweep away a set of accumulated practices in favor of how things were, or were

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43. He has not, quite. The facts here are stylized for purposes of the illustration.

44. U.S. CONST. art. II, § 3 (“He shall from time to time give to the Congress Information of the State of the Union . . .”).

45. 128 S. Ct. 1801, 1806–09, 1811 (2008).

46. See *id.* at 1823 (Kennedy, J., dissenting).

imagined to be, at a moment of origin. But doing so is not traditionalism. It is one of traditionalism's opposites.

Originalism also has an uneasy relationship with traditionalism as a matter of jurisprudential method. A method of judging is traditional if it calls on judges to decide cases in the ways that were dominant among their predecessors. On that understanding, originalism is less traditional than some of its chief rivals. In America, the most traditional form of jurisprudence—the form that has dominated among judges through the generations, and the form that each new generation of entrants into the legal profession learns as it is inducted into the culture of the guild—is not originalism but rather common-law judging. The leading spokesperson for this point is Justice Scalia, who regards common-law judging as the foil for originalism.<sup>47</sup> Originalism, Scalia explains, requires that judges overcome our common-law traditions, by which the judge is partly a policymaker and not just the agent of the legislature. That overcoming is a departure from tradition, perhaps even a revolutionary one. Originalism may or may not be a better theory of judging than the one the common law provides, but it is not more traditional.

This is not to say that originalist judging is foreign to our traditions. American judges have long included considerations of original meaning among various other kinds of jurisprudential methods when deciding cases, especially when the cases arise under constitutional or statutory authority. Considering original meanings as one of several sources of law is accordingly a traditional practice in constitutional and statutory cases. But traditional jurisprudence in such cases does not rely on original meaning, or on text, to the exclusion of other sources of law. Even in constitutional and statutory cases, judges have also long engaged in many other forms of reasoning, including some to which Justice Markman seems quite opposed. Making arguments about James Madison is indeed a traditional element of American constitutional law, but so is making arguments about justice.

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47. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 7 (Amy Gutmann ed., 1997).

## CONCLUSION

Once upon a time, in the 1970s—during the brief moment when the term “interpretivism” was in vogue—leading originalists like Robert Bork<sup>48</sup> and Raoul Berger<sup>49</sup> believed that originalism was the best way of showing proper respect for constitutional text, keeping to our traditions, constraining judicial discretion with rules, and forcing judges to decide cases based on the law as it is, not as they wished it would be. On reflection, those propositions are dubious. So it is worth asking why many intelligent lawyers might have subscribed to them, and indeed subscribed to them fervently.

There are many possible answers, each of them partial. One such answer is the appeal of certainty. Many people would find it reassuring for each constitutional question to have one clearly correct answer that follows clearly from the text and accords with the understandings of the Founders. In a society that values democratic decisionmaking, it might also be nice if all matters of judgment could be settled by legislatures or constitutional conventions rather than sometimes being decided by judges. All in all, it is therefore appealing to imagine that there exists a sound method of constitutional interpretation that can simply follow the text, respect original meanings, and prevent judges from making decisions of policy or value. No such method exists. But wishful thinking is powerful, and even sophisticated thinkers often overlook problems with theories that seem to render the world as they wish it to be. Accordingly, many people are willing to believe that nontextual principles of constitutional law are actually present in the text, or that originalism fosters a jurisprudence of stable rules, even though those ideas cannot stand up to careful analysis.

Those kinds of wishful thinking distort constitutional discourse in every modern generation. But there are also other factors that are particular to specific moments in history, including the moment that gave us “interpretivism.” Consider, then, this oversimplified but nonetheless instructive account of the emotional-historical context from which 1970s theorists like

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48. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 4 (1971).

49. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 328–29, 403–05 (Liberty Fund 2d ed. 1997) (1977).

Bork and Berger emerged. In the 1950s and 1960s, many people were disgusted by Supreme Court decisions like *Brown v. Board of Education*,<sup>50</sup> *Reynolds v. Sims*,<sup>51</sup> and *Gideon v. Wainwright*.<sup>52</sup> The opponents of these decisions hated what the Court had done, and they charged the Court with many different sins all at once. According to the critics, the Justices of the Supreme Court had ignored the text of the Constitution, abandoned American traditions, betrayed the Founders, and behaved lawlessly by making things up according to their own subjective preferences. Some of the critics—Judge Bork, for example—articulated their responses before *Roe v. Wade*,<sup>53</sup> and *Roe* only infuriated them further. By 1975, when Berger published *Government by Judiciary*, the critics had lots of complaints about the jurisprudence of the Supreme Court. But many of the critics lacked emotional distance from their subject matter. They were angry, and anger is not good for reflection, precision, and self-critical thinking. So rather than producing a reasonable alternative to the jurisprudence they opposed, some 1970s originalists imagined that they had one simple answer that would solve everything.

Constitutional law is not that easy. Originalist decisionmaking has strengths and weaknesses, and so does textualist decisionmaking, and so does traditionalism, and their strengths and weaknesses are not all the same.<sup>54</sup> Often, therefore, judges must choose among them, and among other valid forms of legal reasoning, rather than being able to honor them all at the same time. And when serious judges disagree, it is rarely the case that one side is following the rules and the other side is making things up. Instead, hard cases in constitutional law generally involve more than one way to understand what the sources of the law say, as well as disagreements about what the sources of the law actually are. Attempts to cast one side of such debates as simply ignoring the rules while the other side simply follows them are likely to misrepresent both the practice of judging and the nature of law.

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50. 347 U.S. 483 (1954).

51. 377 U.S. 533 (1964).

52. 372 U.S. 335 (1963).

53. 410 U.S. 113 (1973).

54. See Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165 (2008).





## A RESPONSE TO PROFESSOR PRIMUS

STEPHEN J. MARKMAN\*

Professor Richard Primus and I participated on a panel before the National Federalist Society Student Symposium at the University of Michigan Law School concerning the media's coverage of the judiciary,<sup>1</sup> and my assigned remarks, reprinted in this Issue, were on the subject of *An Interpretivist Judge and the Media*.<sup>2</sup> Professor Primus has responded to the central thrust of my remarks only indirectly, instead focusing on questioning whether I am a participant in any great jurisprudential "struggle,"<sup>3</sup> disputing my nomenclature in characterizing this "struggle,"<sup>4</sup> and suggesting a lack of sincerity in my judicial beliefs, based upon his critique of a single decision of the Michigan Supreme Court.<sup>5</sup> As a result, even accepting the whole of his observations, nothing in them diminishes the thrust of my original remarks; namely that, for a variety of reasons, the media as an institution generally responds more negatively to an interpretivist jurisprudence than to alternative approaches to reading the law.<sup>6</sup> Nevertheless, because this relates to the National Federalist Society Student Symposium, and because discussions of judicial philosophy are never altogether outside the pale at such a venue, I will respond briefly to Professor Primus.

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\* Justice, Michigan Supreme Court; Judge, Michigan Court of Appeals, 1995–99; U.S. Attorney, Eastern District of Michigan, 1989–93; Assistant Attorney General of the United States, 1985–89.

1. Pete Williams was the third participant on this panel because of his long-time experience as an NBC analyst in covering the judiciary.

2. Stephen J. Markman, *An Interpretivist Judge and the Media*, 32 HARV. J.L. & PUB. POL'Y 149 (2009).

3. Richard Primus, *Limits of Interpretivism*, 32 HARV. J.L. & PUB. POL'Y 159, 159 (2009).

4. *Id.* at 160.

5. *Id.* at 164–72.

6. See Markman, *supra* note 2, at 154–55.

## I. TERMS OF THE DEBATE

I do not agree with Professor Primus's assertion that my various characterizations of the majority philosophy of the Michigan Supreme Court are incompatible.<sup>7</sup> There is nothing inconsistent with the terms "interpretivism," "textualism," and "originalism," and each, in my judgment, constitutes an adequate short-hand summary of the judicial philosophy of one of the sides in the contemporary debate.<sup>8</sup> "Interpretivism" summarizes a judicial philosophy in which the words of the law are controlling and generally dispositive as to the meaning of that law,<sup>9</sup> and "textualism" communicates essentially the same concept, although arguably making more explicit what exactly is being interpreted.<sup>10</sup> "Originalism," which is not my preferred term because of its potential ambiguity, is also essentially synonymous so long as it is understood to refer to the original *meaning* of the law and not to the original *intention* of the framers of that law, and so long as it is understood that such meaning is normally communicated by the actual text of the law.<sup>11</sup> The quest of the originalist judge is not to divine James Madison's or Edward Kennedy's hidden state of mind in authoring a provision of law, or even to assess their overtly expressed expectations, but rather to understand in context the language actually set forth in that law.<sup>12</sup>

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7. Primus, *supra* note 3, at 160.

8. See, e.g., Louis W. Hensler III, *The Recurring Constitutional Convention: Therapy for a Democratic Constitutional Republic Paralyzed by Hypocrisy*, 7 TEX. REV. L. & POL. 263, 271 (2003) ("The chief constitutional debate over the past few decades has been between two schools of 'interpretation' called, among other things, originalism, interpretivism, or textualism on the one hand; and 'nonoriginalism,' 'noninterpretivism,' 'pragmatism,' or 'extra-textualism' on the other.").

9. See BLACK'S LAW DICTIONARY 838 (8th ed. 2004) ("[I]nterpretivism. A doctrine of constitutional interpretation holding that judges must follow norms or values expressly stated or implied in the language of the Constitution.").

10. See *id.* at 1462 ("[S]trict constructionism . . . The doctrinal view of judicial construction holding that judges should interpret a document or statute . . . according to its literal terms, without looking to other sources to ascertain the meaning. — Also termed . . . textualism.").

11. But see *id.* at 1133 ("[O]riginalism. . . . The theory that the U.S. Constitution should be interpreted according to the intent of those who drafted and adopted it.").

12. See e.g., Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 67 (1994) ("[S]tatutory text and structure, as opposed to legislative history and intent (actual or imputed), supply the proper foundation for [statutory] meaning.").

To achieve such an understanding is not always an easy task. As Professor Primus recognizes,<sup>13</sup> this process is more than a mechanical or rote exercise, and judges of this jurisprudential bent may often disagree in their conclusions.<sup>14</sup> Nonetheless, to engage in an interpretivist, textualist, or originalist construction of the law is to establish a law's actual language as the lodestar for giving it meaning, assessing the reasonable meanings of its words and phrases, viewing them in their surrounding context, considering the grammar and syntax of legal provisions, comparing the words and phrases of other laws, and applying longstanding judicial presumptions as to how various tensions within the law should be resolved.<sup>15</sup>

## II. "TRADITIONAL" JURISPRUDENCE

Professor Primus seems to misunderstand what I meant by my description of this jurisprudence as "traditional,"<sup>16</sup> concluding I meant that, among the other descriptors, I additionally consider myself an adherent of "traditionalism."<sup>17</sup> Although I agree with his extended discussion of the tension between judicial reasoning grounded in Burkean tradition and interpretation based on the original meaning of the text,<sup>18</sup> this critique does not describe a tension in my own judicial philosophy. I described my jurisprudence as a "traditional judicial philosophy"<sup>19</sup> simply because virtually all judges in the American and Anglo-Saxon traditions historically accepted an interpretivist understanding of their responsibilities prior to the

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13. See Primus, *supra* note 3, at 161.

14. Nevertheless, it is virtually certain that judges whose threshold inquiry focuses upon what would constitute good "public policy," or a "just" result, will tend to disagree on a far more regular basis than judges whose threshold inquiry focuses upon the more mundane question of what is meant by the actual words of the law.

15. Examples include *expressio unius est exclusio alterius* (the expression of one thing suggests the exclusion of others); *noscitur a sociis* (a word or phrase is given meaning by its context or setting); and *eiusdem generis* (where a general term follows a series of specific terms, the general term is interpreted to include only things of the same kind, class, character, or nature as those specifically enumerated).

16. Markman, *supra* note 2, at 149.

17. Primus, *supra* note 3, at 173.

18. See *id.* at 173–75.

19. Markman, *supra* note 2, at 151.

modern era.<sup>20</sup> Specific nomenclature aside, I do not believe, as Professor Primus does,<sup>21</sup> that such an approach to the law was first heralded in 1970s law review articles. Rather, such articles may have been timely only because, until shortly before those years, few judges would have understood that the process of judicial "interpretation" pertained to anything *other* than the text of the law. As Chief Justice Marshall stated in *Marbury v. Madison*<sup>22</sup> in 1803, it is the responsibility of the judge "to say what the law is,"<sup>23</sup> rather than what it ought to be. This directive is as good an encapsulation of the interpretivist or originalist premise as there is.<sup>24</sup> Nevertheless, regardless of the terms one prefers to use in describing the majority philosophy on the Michigan Supreme Court, there is an ongoing debate in this country over the judicial role,<sup>25</sup> and, despite the necessary caveats and clarifications, most observers appear reasonably able to discern the contours of this debate.

### III. INTERPRETIVISM AS A CHECK

As is commonly the case with those who critique interpretivism, there is a great deal more critique in Professor Primus's response than there is articulation of what, in his judgment, constitutes the proper approach to carrying out the judicial power. Professor Primus suggests that it is "misleading," for example, for me to describe my judicial philosophy as "inter-

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20. See, e.g., JOHNATHAN O'NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY* 13–28 (2005) (tracing the "traditional approach" of applying "textual originalism" in interpreting constitutional and statutory text from the writings of Blackstone to the *Lochner* era).

21. See Primus, *supra* note 3, at 161.

22. 5 U.S. (1 Cranch) 137 (1803).

23. *Id.* at 177.

24. See OLIVER WENDELL HOLMES, *The Theory of Legal Interpretation*, in *COLLECTED LEGAL PAPERS* 203, 204 (1920) ("Is this trying to discover the particular intent of the individual, to get into his mind and to bend what he said to what he wanted? . . . We are after a different thing . . . [W]e ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used, and it is to the end of answering this last question that we let in evidence as to what the circumstances were."); JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 135, § 181 (Carolina Academic Press 1987) (1833) ("The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties.").

25. See Markman, *supra* note 2, at 149–50.

pretivist.”<sup>26</sup> Those who have staked out alternative positions, he assures us, are also engaged in interpretation,<sup>27</sup> yet “[t]hey have a different view from most textualists about the set of factors that determine what the law is.”<sup>28</sup> Professor Primus never explains exactly what constitutes these sets of factors, but instead merely supplies several illustrations.<sup>29</sup> Dworkinians, for example, focus on “norms and morals.”<sup>30</sup> Other legal theorists emphasize “deeply [e]mbedded cultural values, . . . the well-being of our society, . . . the settled weight of responsible opinion, . . . [or] the dignity of full membership in society.”<sup>31</sup> What each of these and countless other alternative standards have in common, however, is that they purport to authorize judges to look outside the Constitution, and the processes created by the Constitution, to establish a “law” to be interpreted. As such, they implicitly share a rejection of a belief in popular sovereignty. Under each of these standards, a judge would be authorized to uphold or strike down a law, not because “We the People” so required in our law or Constitution, but because the judge applied some form of “higher law” — a higher law that did not ultimately derive its legitimacy from the consent of the people.<sup>32</sup>

What exactly is it that prevents these factors, these standardless standards, from varying on a case-by-case basis, sometimes invoked and sometimes not? Further, what prevents them from being balanced differently from case to case, trumping or out-

26. Primus, *supra* note 3, at 163.

27. *Id.* at 163–64.

28. *Id.* at 162 (“When they reason about principles of justice, therefore, Dworkinians are interpreting the law as they understand law.”). Needless to say, “principles of justice” are to be sharply distinguished from “principles of justice *under law*.” The former seems largely defined by the predilections of individual judges, the latter by the commands of the written law established by constitutional processes. There are as many “principles of justice” as there are judges and it is the great judicial temptation to confuse these principles with the law that a judge takes an oath to uphold.

29. *Id.*

30. *Id.*

31. *The Performance of the Reagan Administration in Nominating Women and Minorities to the Federal Bench: Hearing Before the S. Comm. on the Judiciary*, 100th Cong. 53 (1988) (statement of Stephen J. Markman, Ass’t Att’y Gen. of the United States).

32. Cf. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005) (advocating interpreting text with an eye toward practical consequences and choosing interpretations that will maximize “active liberty,” the people’s ability to govern themselves and participate in the functioning of their political culture). But Justice Breyer’s approach arguably disregards the *past* will of the people in a presumed effort to enhance its future exercise.

weighing the text of the law and competing factors, as the court arbitrarily deems fit? Are there any interpretivist tools, or "sources of the law," that Professor Primus views as *consistently* relevant and appropriate, or *consistently* irrelevant and inappropriate, to the exercise of the judicial power? Are there any "rules," or consistent standards of interpretation, or do these merely manifest themselves on a case-by-case basis, sporadically to be summoned by the court as the needs of the moment require? As I stated during the Symposium,

[I]t cannot be sufficient for a judge to assert in one case that he is relying on legislative history because whatever is said in a Senate report really ought to be dispositive concerning the meaning of a statute, and in the next case assert that he is following a rule that we do not look to legislative history in those circumstances. [Certainly], you can follow a "rule" in every case, but . . . what is most important is the *consistency* with which a rule is followed. Any judge can concoct a "rule" after the fact.<sup>33</sup>

Under Professor Primus's approach toward interpretation, how are real-world litigants to be assured *before the fact* that they will be accorded equal justice under the law without the judge placing a thumb on the scale because of his predispositions or sympathies? A critical strength of an interpretivist jurisprudence is that a reasonably clear rule of decision making is established before the fact: utilizing traditional tools, including dictionaries, ancient maxims of construction, rules of grammar, and techniques by which ordinary people attempt to make comprehensible what they are reading.<sup>34</sup> Doubtless, it is much easier to divine the "law" when a judge has largely unchecked rein to invoke innovative and creative factors as the case warrants. The virtue of interpretivism is that it sets forth a *standard* for determining the propriety of such outside sources, namely whether they contribute to understanding the original meaning of the legal text in dispute. Professor Primus's standard for interpretation is akin to a "totality of circumstances" test in which the universe of available evidence is defined, but in which the ultimate question to be posed in assessing such evidence is never quite

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33. Stephen J. Markman, Remarks at the Twenty-Seventh Annual National Federalist Society Student Symposium: An Originalist Judge and the Media (Mar. 8, 2008) (transcript on file with the *Harvard Journal of Law & Public Policy*).

34. See Markman, *supra* note 2, at 153–55.

explained. Professor Primus is correct in his recognition that there is good interpretivism and there is bad interpretivism.<sup>35</sup> This is true of any operative judicial philosophy. Yet, with all of its imperfections, interpretivism is the only judicial philosophy that has as its touchstone that which has been enacted by the people's representatives. It is the only judicial philosophy that establishes an unchanging standard for exercising the judicial power.

#### IV. THE SLIPPERY SLOPE

My description of noninterpretivist jurisprudence is only "misleading" if misleading characterizations of what I have said are credited. To be clear, I do not view adherents of noninterpretivist philosophies as "renegade[s],"<sup>36</sup> and I do not say that they "make up" the law.<sup>37</sup> Rather, although employing the words of the law as a starting point, noninterpretivist judges are too often insufficiently disciplined in employing these same words as an ending point. They believe that they have more discretion, more flexibility to "improve" the law, to fill in its "gaps," to render the law more "consistent" and "rational," and generally to produce more "pleasant" results, at least from the judge's own perspective. These judges have increasingly deployed a number of subtle rhetorical crutches to avoid the textual imperatives of the law—broad reliance upon "legislative history," the "balancing" of allegedly competing provisions of the law, invoking the "spirit" of the law, indulging in an unmoored application of "equity," articulating the necessities of "public policy," and prematurely identifying textual "ambiguities," to name a few of the most common.<sup>38</sup> It is indeed the rare decision, however, in which judges simply ignore the law in pursuit of their own policy preferences, although Justice Brennan's opinions in *Weber*<sup>39</sup> and *Furman*<sup>40</sup> come to mind as illustrations to the contrary.<sup>41</sup> Al-

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35. See Primus, *supra* note 3, at 162–63.

36. *Id.* at 161.

37. *Id.* at 163; see also *id.* at 160.

38. See Stephen J. Markman, *Clarifying "Extremism,"* NAT'L REV. ONLINE, Sept. 19, 2005, <http://www.nationalreview.com/comment/markman200509190840.asp>.

39. *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

40. *Furman v. Georgia*, 408 U.S. 238 (1972).

41. During one judicial nomination hearing before the Senate Judiciary Committee, the nominee (subsequently confirmed and still sitting on the bench today) was asked

though my perspective may appear misleading to one who seems uncertain whether there is an ongoing judicial debate at all,<sup>42</sup> to one who believes otherwise, as I do, and who sees the debate as integral to the future of our constitutional system, these descriptions of its lines of division are reasonably measured and nuanced.<sup>43</sup> In any event, Professor Primus does not suggest any alternative characterization of the debate.<sup>44</sup>

## V. DEFENSE OF MICHIGAN CITIZENS

Concerning *Michigan Citizens for Water Conservation v. Nestlé Waters*,<sup>45</sup> an opinion Professor Primus criticizes,<sup>46</sup> there is no question that the opinion represents an appropriate and reasonable exercise in interpretation. The principal question presented was whether the “judicial power” set forth in the Michigan Constitution, like that in the Federal Constitution in connection with “Cases” and “Controversies,”<sup>47</sup> required for its exercise that a plaintiff possess standing—a particularized interest in a dispute distinct from that of citizens generally.<sup>48</sup> Relying heavily upon *National Wildlife Federation v. Cleveland Cliffs*

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by a Senator, “If a decision in a particular case was required by law or statute and yet that offended your conscience, what would you do in that situation?” The nominee answered, “Senator, I have to be honest with you. If I was faced with a situation like that and it ran against my conscience, I would follow my conscience.” The nominee went on to explain the standards with which he would replace the law of the land by his conscience:

I was born and raised in this country, and I believe that I am steeped in its traditions, its mores, its beliefs, and its philosophies: and if I felt strongly in a situation like that, I feel that it would be the product of my very being and upbringing. I would follow my conscience.

*Selection and Confirmation of Federal Judges, Part 4: Confirmation Hearing on Harry Pregerson and Arthur L. Alacorn Before the S. Comm. on the Judiciary, 96th Cong. 450 (1979)* (statements of Sen. Alan Simpson, Member, S. Comm. on the Judiciary, and Harry Pregerson, U.S. Dist. J.). To my mind, for a judge to render decisions according to his or her conscience rather than the law is itself unconscionable.

42. See Primus, *supra* note 3, at 160.

43. See *Rowland v. Washtenaw County Rd. Comm’n*, 731 N.W.2d 41 (Mich. 2007), for a partial listing of cases decided by the Michigan Supreme Court over the past decade in which the clear direction of the text of the law was not followed by the dissenting justices.

44. See Primus, *supra* note 3, at 177.

45. 737 N.W.2d 447 (Mich. 2007).

46. See Primus, *supra* note 3, at 164–72.

47. U.S. CONST. art. III, § 2, cl. 1.

48. See *Mich. Citizens*, 737 N.W.2d at 449.



*Iron Co.*,<sup>49</sup> a case decided several years earlier, the court concluded that Michigan's "judicial power" required standing as a precondition.<sup>50</sup> Between them, *Michigan Citizens* and *National Wildlife Federation* looked to other relevant provisions of the Michigan Constitution,<sup>51</sup> in particular those pertaining to the "separation of powers" and stating that "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided by this constitution."<sup>52</sup> They then assessed the consequences for this separation of powers of allowing the "judicial power" to be invoked absent standing<sup>53</sup> and reviewed constitutional treatises and the Federalist Papers pertaining to the meaning of the "judicial power."<sup>54</sup> In addition, they considered historical practices in Michigan concerning the preconditions for the exercise of the judicial power<sup>55</sup> and compared analogous United States Supreme Court precedents while taking into consideration differences in language between the Michigan and United States Constitutions.<sup>56</sup> Finally, they sought "to understand the intentions of those who ratified" the judicial article of the Michigan Constitution.<sup>57</sup> My point is not that reasonable people could not quarrel with the court's conclusions in *Michigan Citizens* or *National Wildlife Federation*, but merely that it undertook in a reasonably conscientious manner to consider relevant and appropriate evidence in an effort to discern the meaning of Michigan's "judicial power." In contrast, by summarily concluding that broad deference was owed to the state legislature in its nullification of standing,<sup>58</sup> the dissenting justices in these cases did not consider similarly relevant and appropriate evidence as to the meaning of this term.

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49. 684 N.W.2d 800 (Mich. 2004).

50. *Mich. Citizens*, 737 N.W.2d at 453–54.

51. *See id.* at 453; *Nat'l Wildlife Fed'n*, 684 N.W.2d at 806–14.

52. MICH. CONST. art. III, § 2.

53. *Mich. Citizens*, 737 N.W.2d at 453; *Nat'l Wildlife Fed'n*, 684 N.W.2d at 807–10, 814.

54. *See Nat'l Wildlife Fed'n*, 684 N.W.2d at 806–09, 813.

55. *See Mich. Citizens*, 737 N.W.2d at 453–63; *Nat'l Wildlife Fed'n*, 684 N.W.2d at 805–15.

56. *See Mich. Citizens*, 737 N.W.2d at 453–63; *Nat'l Wildlife Fed'n*, 684 N.W.2d at 805–15.

57. *Mich. Citizens*, 737 N.W.2d at 453; *Nat'l Wildlife Fed'n*, 684 N.W.2d at 816–17.

58. *See, e.g., Mich. Citizens*, 737 N.W.2d at 467 (Weaver, J., dissenting).

## VI. COMPLEXITY OF CONSTITUTIONAL INTERPRETATION

That originalism, as Professor Primus suggests, has a particular appeal to those who are "angry"<sup>59</sup> is an analysis about which the less said the better. He also suggests that the basic propositions of originalism are dubious.<sup>60</sup> I observe merely that the Constitution is a document that was written for those in whose name it was cast: "We the People." It is a relatively succinct document and it is in most respects remarkably straightforward. With only a few exceptions, there is an absence of legalese or technical terms. Although the contemporary constitutional debate has focused on several broad phrases of the Constitution such as "due process" and "equal protection," the greater part of this document specifies, for example, that a member of the House of Representatives must be twenty-five years of age, seven years a citizen, and an inhabitant of the state from which he is chosen,<sup>61</sup> or that a bill becomes a law when approved by both Houses and signed by the President.<sup>62</sup> One willing to invest just a bit of time in understanding our Constitution need only read it, or, better yet, peruse the Federalist Papers to see what Madison, Hamilton, and Jay had to say about its provisions to a *popular* audience in the late eighteenth century.

The Constitution was never designed to be the exclusive preserve of judges and constitutional-law professors, seemingly determined to layer its provisions with increasingly "subtle" and "nuanced" interpretations. What most accounts for the "complexity" of our present Constitution is not, by and large, the language of its Framers, but rather the modern judicial penchant for concocting new "sources of the law," for creating out of whole cloth cumbersome multipart "tests," for disregarding the Framers' original understanding as the determinant of the law's meaning, for dismantling traditional barriers and preconditions to the exercise of the judicial power, for deconstructive "interpretations" of relatively straightforward terms and phrases, and for the now commonly accepted vision of judges as the "adult supervisors" for society, empowered generally to engage in the substantive review of legislative enactments. Thus, the complexity in the law

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59. Primus, *supra* note 3, at 177.

60. *Id.* at 176.

61. U.S. CONST. art. 1, § 2, cl. 2.

62. U.S. CONST. art. 1, § 7, cl. 2.

Professor Primus correctly identifies<sup>63</sup> is not the inexorable result of a neutral constitutional jurisprudence, but rather is in significant part a function of the longstanding predominance of one side in the contemporary judicial debate.

## VII. THE DEBATE SUMMARIZED

Finally, it remains unclear what Professor Primus's exact position is concerning the contemporary judicial debate to which I refer in my remarks.<sup>64</sup> Does he not believe there is such a debate? His own remarks suggest that one exists.<sup>65</sup> If so, given his rejection of my own description, how would he define this debate? On the United States Supreme Court, as well as on the Michigan Supreme Court, there are regular divisions among the Justices. What accounts for these? Why are Justices Scalia and Thomas so regularly aligned in opposition to Justices Breyer and Ginsburg? Is this a function of differing interpretivist premises, and, if so, what are these? Are Justices Scalia and Thomas sincere in their interpretations? Or does Professor Primus believe that all judges are merely engaging in "politics by another name," a jurisprudential subterfuge by which they can justify and rationalize their own political preferences? Professor Primus dismisses my characterizations of what I view as a critical public debate, but he does not say what he himself believes.

There is a genuine ongoing debate,<sup>66</sup> and it is important for those engaged in this debate as "interpretivists" or "originalists,"—especially on the state level where judicial elections are a reality—to understand that cases embracing this philosophy will often be viewed askance by the media. As a consequence, "[t]here is simply much that remains to be done by organizations such as the Federalist Society and by interpretivist judges themselves to better and more effectively communicate more effectively the nature of the judicial role and the parameters of the present judicial debate."<sup>67</sup>

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63. See Primus, *supra* note 3, at 160.

64. See Markman, *supra* note 2, at 149.

65. See Primus, *supra* note 3, at 177.

66. See, e.g., Markman, *supra* note 2, at 149.

67. *Id.* at 158.



*The Twenty-Seventh Annual  
National Federalist Society Student Symposium:  
The People & The Courts*

**VI.**

**TRADITION AND THE  
PEOPLE'S CONSTITUTION**

*ESSAYIST*

**WILLIAM N. ESKRIDGE, JR.**



# SODOMY AND GUNS: TRADITION AS DEMOCRATIC DELIBERATION AND CONSTITUTIONAL INTERPRETATION

WILLIAM N. ESKRIDGE, JR.\*

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## INTRODUCTION

The Rehnquist and Roberts Courts have inaugurated a golden age for tradition-based arguments in constitutional law. All of the Justices consider such arguments, and several are amateur historians who have centered their jurisprudence on what constitutional traditions require of us today. Such arguments are the primary legal basis for whole areas of constitutional law, includ-

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\* John A. Graver Professor of Jurisprudence, Yale Law School.

ing presidential powers, state immunity, anti-commandeering limits on congressional authority, and the rights to privacy, to keep and bear arms, to habeas corpus, and to be free of cruel and unusual punishment. Other areas of constitutional law, such as equal protection and free speech, are not dominated by these arguments today but might be in the future.

Arguments from tradition raise a central conundrum. Lawyers and judges tend to interpret "tradition" statically and instrumentally, to mean legal practices or norms that have persevered over a long period of time *and* that provide stable meaning that can be used to resolve a legal issue. The static understanding is related to the instrumental use, because lawyers and judges prefer simplicity to complexity. In contrast, historians approach tradition dynamically and non-instrumentally, to mean legal practices or norms that as a general principle have persevered in some ways and evolved in others. Tradition is rarely simple and univocal; it is multifarious, evolving, and complicated. This understanding creates problems for the judge wielding tradition instrumentally. That tradition is evolving creates risks of anachronism, where the interpreter reads his own values and viewpoint back into the past. That tradition is multifarious creates risks of cherry-picking, where the interpreter (unconsciously) manipulates tradition by focusing on features she finds congenial and ignoring the rest and by interrogating that fragmentary tradition with loaded questions. That tradition is complicated creates risks of illegitimacy, where the interpreter's misinterpretation or manipulation imposes duties or creates rights that obstruct the needed projects and experiments of current legislatures.

This Essay uses case studies of sodomy and gun litigation to explore three values that lawyers and judges find in tradition, and also to understand those values critically, from a historian's point of view. Tradition shall be examined as evidence of original meaning, constitutional adverse possession, and precepts conformed by democratic deliberation. Each of these deployments of tradition is subject to the anachronism, cherry-picking, and illegitimacy problems identified above. In my view, the most problematic use of tradition is the first, tradition as evidence of original meaning. The best legal theory for tradition in constitutional law is the third, tradition as democratic deliberation. The third theory is the one that most respects the historian's dynamic point of view; it can enlighten the inter-



preter and alter his views about contested matters. This theory provides plausible defenses not only for a laudable Supreme Court decision, but also for two other decisions whose outcomes are questionable.

#### I. TRADITION KNOWN TO THE FRAMERS AS EVIDENCE OF ORIGINAL MEANING

The Supreme Court and many commentators believe that a constitutional provision's original meaning is determinative of or relevant to its modern interpretation. If the Constitution is a social contract among Us the People, whose terms dictate the governance structure and some fundamental untrumpable values of our polity, then the shared understanding of what those terms meant is relevant when we are later called upon to apply and interpret the Constitution.<sup>1</sup> Traditions that can be traced back to the framing eras can be a valuable aid in that process of interpretation. Take the Bill of Rights (1791) and the Fourteenth Amendment (1868). The original meaning of their terms can be usefully understood by reference to traditions that would have been known to the Framers, the ratifying legislatures, and the citizens of those eras.

Assume, as the Court has long assumed, that the liberty protection of the Due Process Clauses of the Fifth and Fourteenth Amendments includes a substantive element: There are some liberties for which the state must provide a compelling justification for the deprivation not to be arbitrary (the ultimate "due process" protection).<sup>2</sup> Almost every state action deprives some persons of liberty in the abstract, yet it would be absurd to agonize over all of these liberty deprivations; thus, only the most serious deprivations trigger constitutional concerns. Which liberty deprivations trigger such concerns is a matter of importance. Liberties long understood as important when a constitutional provision was adopted are potentially important clues as to original meaning. There are, however, huge epistemic diffi-

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1. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143–45, 154–55 (1990).

2. Some early sources include *Meyer v. Nebraska*, 262 U.S. 390 (1923), and THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* (Victor H. Lane ed., Little, Brown 1903) (1868).

culties in coming up with the proper list of liberties. First, the Framers and ratifiers debated issues at a high level of generality and did not say much about specific liberty issues. Second, even when a Framer or ratifier said something specific and relevant to the issue, it is hard to generalize that person's stated (and sincere?) views to the population of ratifiers and citizenry. And, third, discussions so long ago (1791 and 1868) operated under very different assumptions about human needs, social policy, science, and so on, and might not be easily transferred to issues today without some interpolation.<sup>3</sup>

Consider Justice White's opinion for the Court in *Bowers v. Hardwick*.<sup>4</sup> The issue was whether Georgia's sodomy law could be applied to oral sex in a private apartment between consenting adults—here, two men—without violating the Fourteenth Amendment's liberty protection. Sodomy never came up in the congressional or state ratifying debates, but Justice White and those Justices who wrote concurring opinions got around this difficulty by reference to tradition: Because Anglo-American law at the time of the Fourteenth Amendment (1868) had long prohibited the "crime against nature,"<sup>5</sup> and because these laws and their moral foundations would have been well-known to the Framers and ratifiers, the *Bowers* majority presumed that homosexual sodomy cannot be a "liberty" given extra protection by the Due Process Clause.<sup>6</sup> That the anti-homosexual tradition embedded in Anglo-American law and society had flourished during the twentieth century also enabled the majority Justices to conclude, without any evidence in the record, that citizens of Georgia intended their gender-neutral sodomy law to reflect an anti-homosexual morality, which was a rational basis to sustain the law.<sup>7</sup> At each stage of analysis, his-

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3. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 214–21, 229–31 (1980); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1073–75, 1087–93 (1990); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 793–804 (1983).

4. 478 U.S. 186 (1986).

5. *Id.* at 197 (Burger, C.J., concurring) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*215).

6. *Id.* at 192–94 (majority opinion).

7. *Id.* at 196 (affirming as a rational basis for the state law "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable"). It should be noted that Georgia *never* had a sodomy law that focused on "homosexual conduct."

torical tradition enabled the Court to resolve matters of uncertainty about language, public intentions, and constitutional purpose.

Tradition also provided a limiting principle for the case-by-case elaboration of the constitutional privacy right that the Court had creatively teased out of the Due Process Clause. Justice White emphasized this, too, in his opinion. Because the specification of due process liberty to provide special protections for people's privacy against state invasion did not have concrete support in the constitutional text or framing discussions, an expansive view of privacy would imperil the Court's legitimacy as the enforcer of a strict rule of law.<sup>8</sup>

Unfortunately, *Bowers*, the exemplar of a tradition-based jurisprudence of original meaning, also illustrates the limitations or pitfalls of such a jurisprudence in the hands of lawyers and judges.<sup>9</sup> Because originalist scholars and judges seek stability and closure from history and tradition, they easily fall prey to criticism that their enterprise is anachronistic, ahistorical "law office history"<sup>10</sup> rather than a genuine historical exploration of the norms, vocabulary, and world of the Framers.<sup>11</sup> "Tradition" is both dynamic and plastic, and that means that its deployment requires a high level of expertise and historicity, scrupulousness, and prudence. *Bowers* is a case where the Justices flunked this standard rather dramatically.

#### A. *Anachronism: The Changed Circumstances Problem*

One problem with using tradition to figure out original meaning is changed circumstances: The practices, laws, and even vocabulary familiar to the Framers often reflect a worldview very different from our own. Has the interpreter under-

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8. *Id.* at 194–95; accord *Washington v. Glucksberg*, 521 U.S. 702 (1997) (upholding assisted suicide ban upon a similar tradition-based theory).

9. Justice White's account is hardly idiosyncratic to that Justice, for it draws heavily from the Brief of Petitioner at 21–26, *Bowers*, 478 U.S. 186 (No. 85-140), and from Judge Bork's opinion in *Dronenburg v. Zech*, 741 F.2d 1388, 1396 (D.C. Cir. 1984) (refusing "to protect from regulation a form of behavior never before protected, and indeed traditionally condemned").

10. Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095, 2098 (1999).

11. See, e.g., Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995).

stood the circumstances of the past and applied its lessons defensively to a modern problem?

The majority opinion in *Bowers v. Hardwick* was a clumsy effort in this respect. Hardwick and another man were arrested for engaging in oral sex, which Justice White treated as the kind of "homosexual sodomy" that the Framers of the Fourteenth Amendment would have understood as a longstanding and notorious crime in 1868. Yet an actual American lawyer in 1868 would have had no idea what "homosexual" meant; the word was not coined until the end of the nineteenth century,<sup>12</sup> and no American sodomy law homed in on "homosexual sodomy" until 1969, fully a century after the Fourteenth Amendment was ratified.<sup>13</sup> If Justice White had explained that homosexual sodomy simply meant oral sex between two persons of the same sex, the 1868 lawyer would have remained somewhat baffled, for sodomy laws did not cover oral sex, another term Justice White might have been required to explain. Not a single American jurisdiction in 1868 identified oral sex as sodomy or a crime against nature, and the English authorities and American treatises all explicitly excluded oral sex from criminal prohibitions.<sup>14</sup> A learned lawyer could have told Justice White what "sodomy" was: It was anal rape by a man against another man, a boy, a woman, a girl, or an animal.<sup>15</sup> Except for a 1656 law in the New Haven Colony, sex of any kind between two women was *never* sodomy or a crime against nature in the pre-1868 Anglo-American tradition.<sup>16</sup>

In the late nineteenth and early twentieth century, sodomy laws were updated in most states to include oral sex (though

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12. See *Lawrence v. Texas*, 539 U.S. 558, 568 (2003).

13. For a survey of state sodomy laws, see WILLIAM N. ESKRIDGE, JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003*, at 387–407 (2008). The first state law limited to same-sex (homosexual) activities was 1969 Kan. Laws ch. 180, § 21-3505.

14. William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631, 655–56, 667 (collecting references to treatises and English case law as to the ambit of sodomy and crime against nature laws); see also ESKRIDGE, *supra* note 13, at 387–407 (appendix identifying when each state expanded its sodomy law to include oral sex).

15. See *R v. Jacobs*, (1817) 168 Eng. Rep. 830 (K.B.); *R v. Wiseman*, (1716) 92 Eng. Rep. 774, 774–75 (K.B.); see also EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES* 59 (London, E. & R. Brooke 1797) (1644).

16. See ESKRIDGE, *supra* note 13, at 16–23.

usually *not* oral sex between two women), and enforcement of new oral sex bans in the twentieth century was overwhelmingly against men seeking or having sex with other men.<sup>17</sup> In a century when huge majorities of heterosexual married couples engaged in oral (and many in anal) sex to spice up their marriages, Americans culturally erased the generalized wording of sodomy laws and assumed that the real targets were homosexuals, people whose characteristic (rather than episodic) sexual activity was “unnatural” (that is, not procreative penile-vaginal sex).<sup>18</sup> Justice White had so thoroughly assimilated this cultural understanding that he assumed it is transhistorical and universal. It is not.

B. *Cherry-Picking Problems: How Is Tradition Interrogated and Weighed?*

*Bowers v. Hardwick* also illustrates the richness and the potential plasticity of tradition. Even if a modern interpreter can truly understand the traditions of the past, “using” them to create constitutional lines raises cherry-picking problems for any but the most scrupulous interpreter. Where a constitutional case raises issues that go to the heart of people’s emotional or cognitive commitments, as homosexuality did in 1986, no interpreter is capable of being entirely scrupulous. With so much richness and detail, using tradition in *Bowers* was like looking out over a crowd and picking out your friends (to borrow from Judge Harold Leventhal).<sup>19</sup>

1. *Multiple Traditions and the Level of Generality Problem*

Tradition is multifarious: Our country enjoys many different traditions, and more than one tradition might be relevant to a constitutional inquiry. Tradition is also amorphous and can be identified and characterized at various levels of generality. To justify protection for Hardwick’s activities as protected “liberty,” Justice White demanded that Hardwick establish a long-standing tradition protecting “homosexual sodomy.”<sup>20</sup> As Jus-

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17. See *id.* at 49–59, 85–99.

18. See *id.* at 76–84.

19. The Leventhal quip was made in connection with the use of legislative history. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 36 (1997).

20. See *Bowers v. Hardwick*, 478 U.S. 186, 191–95 (1986).

tice Blackmun pointed out, that was an unfairly specific inquiry.<sup>21</sup> Does the Fourth Amendment's protection against state wiretaps require the citizen to show a longstanding tradition protecting telephone use? But Justice Blackmun was slanted in the other direction: All Hardwick had to establish was longstanding tradition protecting intimate relations within the home, and his own private activities were protected.<sup>22</sup> Does the right to privacy protect the man who has intimate relations with a female minor, simply because such relations are important to each of those persons and occurred within the home?

## 2. What Counts as Tradition?

In constructing an account of tradition, all the *Bowers* Justices focused just on legal sources. Because there are a lot of sources for guidance on the legal tradition, judgment about what should be consulted and what should be counted is often subjective. And that creates additional cherry-picking problems. For example, Justice White treated crime-against-nature laws as a tradition of illegality for *consensual, private* sodomy; he assumed that generally phrased laws applied to consensual activities.<sup>23</sup> Because such a broad reading cut against the public justification for such laws, I examined their pattern of enforcement during the nineteenth century and found a focus on *non-consensual* or *public* activities, and sometimes both.<sup>24</sup>

This is a more thorough methodology, but is it a better one? That really depends on how the interpreter defines tradition. If it is only the announced, *public* understandings of our society's governing norms, then some of my evidence is irrelevant. If tradition *also* includes the practical application and day-to-day operation of announced norms, then my evidence is relevant but should be supplemented.<sup>25</sup>

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21. See *id.* at 199–200 (Blackmun, J., dissenting).

22. *Id.* at 204–08.

23. *Id.* at 192–94 (majority opinion).

24. Brief of the Cato Institute as *Amicus Curiae* in Support of Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (with appendix listing all reported nineteenth-century American sodomy decisions); see also WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 156–66, 374–75 (1999).

25. Thus, one might examine municipal records describing the exact circumstances for every sodomy arrest in some major cities, to see if sodomy laws were *ever* applied to private relations between consenting adults. Cf. William E. Nelson, *Government by Judiciary: The Growth of Judicial Power in Colonial Pennsylvania*, 59

### 3. Burden of Proof?

In *Lawrence v. Texas*, which overruled *Bowers*, both Justice Kennedy and Justice Scalia relied on my examination of the practical application of sodomy laws to figure out what a tradition-based original meaning might be for “liberty.”<sup>26</sup> The Justices, however, asked different questions of tradition. Writing for the Court, Justice Kennedy asked whether there was a long-standing and well-known tradition excluding gay people’s private intimacies from the liberty assured all other Americans for their intimate relationships: There was not.<sup>27</sup> Writing for the dissenters, Justice Scalia posed a very different question, whether the homosexual defendants had demonstrated an *affirmative* protection for “homosexual sodomy” in nineteenth-century America: assuredly not.<sup>28</sup> Depending on how you phrase the question, the same evidence can support different conclusions.

Underlying Justice Scalia’s interrogation was strong skepticism toward the privacy precedents.<sup>29</sup> Underlying Justice Kennedy’s interrogation was an acceptance of the privacy cases, and a baseline assumption that gay people are decent, normal Americans. Justice Scalia: Have the homosexuals shown me that tradition affirmatively protects them? Justice Kennedy: Why shouldn’t lesbian and gay Americans enjoy the same privacy as straight ones?

### C. Illegitimacy Problems

An early Supreme Court sexual relations precedent is *McLaughlin v. Florida*,<sup>30</sup> which invalidated a statute making it a crime for persons of different races to cohabit openly. Justice White’s opinion for the Court relied on the Equal Protection Clause rather than a due process privacy right to scuttle the

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SMU L. REV. 3, 44 (2006) (finding no convictions for “sodomy” in colonial Pennsylvania’s courthouse records).

26. *Lawrence*, 539 U.S. at 567–72 (Kennedy, J., for the Court) (relying on Eskridge, *Hardwick and Historiography*, *supra* note 14, at 656, and the Cato Amicus Brief, *supra* note 24, at 16–17, and replicating chunks of the amicus brief’s analysis); *id.* at 597–98 (Scalia, J., dissenting) (relying on ESKRIDGE, *supra* note 24, at 159, 375).

27. *See id.* at 567–68, 571–72 (majority opinion).

28. *See id.* at 596–98 (Scalia, J., dissenting).

29. For a biting attack on the privacy right, see *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 983–84 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

30. 379 U.S. 184 (1964).

law, but there were much better tradition-based arguments supporting the Florida cohabitation law than there were for applying Georgia's sodomy law to consensual activities in *Bowers* twenty-three years later. Not only did northern as well as southern states bar different-race marriages and relationships all over the country during Reconstruction, but the supporters of Reconstruction-era civil rights laws and the Fourteenth Amendment repeatedly disavowed any protection for interracial sexuality or marriage.<sup>31</sup> *Pace v. Alabama*<sup>32</sup> enshrined their understanding in binding precedent.

Justice White was aware of these tradition-based arguments, as were colleagues such as Justices Black and Harlan, both historicists guided by tradition in much of their constitutional jurisprudence. Nevertheless, Justice White ignored tradition almost entirely in his opinion interpreting the Equal Protection Clause.<sup>33</sup> No one dissented.<sup>34</sup> Even most strict constructionists have failed to quarrel with *McLaughlin*, because original historical meaning cannot be the end of the inquiry in the race cases. American traditions of race, including slavery and apartheid, were not only morally questionable, but also politically risky. "The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law."<sup>35</sup>

As the foregoing analysis suggests, the legitimacy of constitutional law, even as applied by judges, is not just the application of original meaning or other legal sources to announce a constitutional rule. It also involves the ongoing evolution of our pluralistic society. Notice that society's evolution will also affect tradition itself, which on matters of sexuality as well as race has been evolutive and not static.

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31. See Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624, 656–57; see also Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224 (1966).

32. 106 U.S. 583 (1883).

33. *McLaughlin*, 379 U.S. at 188–90 (discussing *Pace* and dismissing it as "represent[ing] a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court").

34. Two Justices went further than Justice White in disapproving race-based classifications. *Id.* at 198 (Stewart, J., joined by Douglas, J., concurring in the judgment).

35. *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).



## II. POST-ADOPTION TRADITION AS CONSTITUTIONAL ADVERSE POSSESSION

In *District of Columbia v. Heller*,<sup>36</sup> the Supreme Court for the first time in its history struck down a law as inconsistent with the Second Amendment, which states: “A well regulated Militia, being necessary to the security of a free State, *the right of the people to keep and bear Arms, shall not be infringed.*”<sup>37</sup> *Heller* recognized and enforced a right for “law-abiding” citizens to possess and use handguns and perhaps other firearms within the home for self-defense.<sup>38</sup> This holding was in tension with the text of the Second Amendment and precedent. According to professional linguists and historians, in the eighteenth century “bear arms” almost always meant to use weapons in a military context; hence, the Second Amendment’s “original meaning” was to allow citizens to “keep” military weapons insofar as needed to “bear” them in military service.<sup>39</sup> Consistent with that reading of the operative clause’s words (italicized above), the prefatory clause’s emphasis on a citizen militia seems to limit the Second Amendment right “to keep and bear Arms.” The *Heller* Court’s broader construction of the operative clause leaves the prefatory clause as surplusage having no legal consequences, contrary to the canon presuming that *every clause* in the Constitution adds something to its interpretation. The broad reading is also contrary to the Court’s only significant Second Amendment precedent, *Miller v. United States*,<sup>40</sup> where a unanimous Court limited the Second Amendment right by tying it to militia service.<sup>41</sup>

Speaking for the Court, however, Justice Scalia read the Amendment more broadly than the text and precedent would

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36. 128 S. Ct. 2783 (2008).

37. U.S. CONST. amend. II (emphasis added).

38. 128 S. Ct. at 2821–22.

39. Brief for Professors of Linguistics and English Dennis E. Baron, Ph.D., et al. in Support of Petitioners at 18–28, *Heller*, 128 S. Ct. 2783 (No. 07-290); Saul Cornell, *The Original Meaning of Original Understanding: A Neo-Blackstonian Critique*, 67 MD. L. REV. 150, 163–64 (2007) (survey of 115 late-eighteenth-century texts using term “bear arms”); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 618 (2000) (same result for Library of Congress database, 1774–1821). Justice Scalia responded that “keep and bear arms” has a broader meaning than “bear arms.” *Heller*, 128 S. Ct. at 2792–94. *But see id.* at 2827–31 (Stevens, J., dissenting) (responding to Justice Scalia).

40. 307 U.S. 174 (1939).

41. *Id.* at 178.

suggest, and to do so he relied heavily on tradition as evidence of original meaning.<sup>42</sup> He started with England's Declaration of Rights: "That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law."<sup>43</sup> According to Justice Scalia, eighteenth-century Englishmen believed that an armed citizenry, whether presented as a militia or not, was a bulwark against tyranny; the monarchy would think twice before riling a citizenry that could shoot back.<sup>44</sup> The colonists insisted upon this right in the 1760s and 1770s, when George III sought "to disarm the inhabitants of the most rebellious areas. That provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms. A New York article of April 1769 said that '[i]t is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence.'"<sup>45</sup>

Tradition also helped Justice Scalia respond to the textual argument that "bear arms" had a military meaning in the eighteenth century and to the argument that the drafting history of the Second Amendment was focused only on militia service.<sup>46</sup> Justice Scalia used tradition to shift the burden of proof: Unless there is clear evidence otherwise, any text guaranteeing a right to keep and bear arms is presumptively connected to the traditional right. A decisive answer to the District's (and *Miller's*) view that the Second Amendment's right was limited to militia use was that it would "treat the Federal Second Amendment as an odd outlier, protecting a right unknown in state constitutions or at English common law."<sup>47</sup>

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42. *Heller*, 128 S. Ct. at 2788–802 (Scalia, J., for the Court) (original meaning of Second Amendment's text); *id.* at 2797–99 (tradition-based evidence confirming and deepening linguistic evidence of original meaning).

43. 1689, 1 W. & M. sess. 2, c. 2.

44. *Heller*, 128 S. Ct. at 2797–99; see also Brief of Amici Curiae Academics for the Second Amendment in Support of the Respondent [Ratification and Original Public Meaning] at 14–17, *Heller*, 128 S. Ct. 2783 (No. 07-290) (developing this point in greater detail).

45. *Heller*, 128 S. Ct. at 2799. For many other examples, see Respondent's Brief at 9–14, *Heller*, 128 S. Ct. 2783 (No. 07-290); Brief of the Cato Institute and History Professor Joyce Lee Malcolm as Amici Curiae in Support of Respondent [The Right Inherited from England] at 12–16, *Heller*, 128 S. Ct. 2783 (No. 07-290).

46. See *Heller*, 128 S. Ct. at 2827–31 (Stevens, J., dissenting) (original linguistic meaning of "keep and bear arms"); *id.* at 2831–36 (drafting, debating, and ratification history of the Second Amendment).

47. *Id.* at 2803 (majority opinion).

Perhaps recognizing that his account of original meaning was highly controversial (and substantially rejected by professional linguists and historians), Justice Scalia added a discussion of public understanding of the right to keep and bear arms *after* 1791—a period the professional linguists and historians failed to cover in their submissions to the Court. Justice Scalia relied on lower-court interpretations of the Second Amendment, post-1791 state constitutions and their application by state courts, and treatises and commentaries to buttress his reading of the Second Amendment.<sup>48</sup> “[T]he examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification” is, he says, “a critical tool of constitutional interpretation.”<sup>49</sup> This is an important point—but not because subsequent practice is evidence of “original” meaning.<sup>50</sup>

There is a second constitutional value for tradition: It can be a pragmatic source for filling in details left unanswered by the open texture of the Constitution.<sup>51</sup> Assume that the Second Amendment is ambiguous about whether it entails an individual right to possess guns in the home for self-defense. Post-adoption tradition can settle this ambiguity by coming down strongly on one side or the other. Although unpersuaded of the textual ambiguity, I agree with Justice Scalia that this material can have legal bite. Consider an analogy from contract law: If the parties’ practice supports a particular interpretation of an ambiguous contract provision, that practice is legally relevant and usually decisive in fixing the meaning of the contract.<sup>52</sup> Or property law: If one party openly and notoriously occupies another’s property for a long period of time (the traditional rule is 20 years), the other party is deemed to have acquiesced in a formal shift in property rights.<sup>53</sup> These different doctrines point in the same direction for post-adoption constitutional consen-

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48. *Id.* at 2805–12.

49. *Id.* at 2805.

50. *See id.* at 2809–11 (discussing Second Amendment rights of freed slaves in the 1860s, which were “instructive”).

51. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 678–88 (1981) (taking expansive view of Presidential power to suspend lawsuits against foreign states, based on executive practice to which Congress never objected).

52. *See generally* BLACK’S LAW DICTIONARY 378 (8th ed. 2004) (defining “course of performance”).

53. *See generally id.* at 59 (defining “adverse possession”).

sus: It can settle issues left ambiguous by the Framers, and allow citizens and institutions to plan their affairs with reliance on such settled understandings.

Tradition as constitutional adverse possession is subject to some of the same kinds of analytical pitfalls and normative qualms as tradition as evidence of original meaning. Justice Scalia's opinion in *Heller* is a classic example of the pitfalls as well as the appeal of tradition along these lines.

### A. *Anachronism*

Although *Bowers* remains the champion of judicial anachronism, even the better-informed analysis in *Heller* is frequently anachronistic. Anachronism leaps off the early pages of Justice Scalia's opinion, when he relies on the broad meaning of "bear arms" today and imputes that meaning back to the eighteenth century.<sup>54</sup> That the anachronisms come in a well-researched opinion is evidence of the inherent trickiness of tradition as an interpretive source, as judges and lawyers tend to shoehorn complicated, shifting understandings into simpler categories and boxes. And when emotional public policy issues are at stake, normative precommitments drive the shoehorning.<sup>55</sup>

A striking feature of Justice Scalia's opinion is obliviousness to the fact that the United States changed dramatically between 1791 and 2008. When the Second Amendment was adopted, ninety-six percent of Americans lived in small towns or rural areas, often on the frontier between European areas and Native American lands, and there were only six cities with more than 10,000 people.<sup>56</sup> In such an agrarian frontier culture, guns were typically needed for a family's economic success and often their survival against attack; the community protected itself through armed citizen militias. As our country urbanized, the memory of a citizen militia evanesced, and the notion of an

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54. *Heller*, 128 S. Ct. at 2793–94 (citing *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). Justice Scalia was being playful, tweaking Justice Ginsburg for taking a narrower view of "bear arms" in *Heller* than she did in the earlier case. Very clever, but it is still an anachronism.

55. This is what a recent empirical analysis found when it examined the Justices' deployment of sources from the Founding era in constitutional federalism cases. Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217, 282–83 (2004).

56. THOMAS BENDER, *TOWARD AN URBAN VISION: IDEAS AND INSTITUTIONS IN NINETEENTH CENTURY AMERICA* 3 (1975) (data as of 1800).

armed citizenry as the best protection against tyranny became incomprehensible to some. Today, America is an urban society where guns are part of an escalating culture of violence; the community protects itself through armed police forces. There is a fierce public policy debate about the efficacy of gun control laws, especially for urban jurisdictions like the District that are surrounded by states where guns can be easily obtained. Was there consensus in the nineteenth century, as the United States was becoming more urban and industrialized, that the militia-based Second Amendment right ought to be expanded (and contracted) to become a right of self-defense in the home? Was this consensus carried over into the twentieth century? Justice Scalia ignores these questions, whose answers might be "yes" (and therefore supportive of his position), and instead treats the post-adoption materials as simply a continuation of what he thinks (based on slender evidence) all Americans believed during the Founding generation. Such a static understanding is the epitome of anachronism.<sup>57</sup>

### B. Cherry-Picking

Tradition is malleable in the hands of the *Heller* Justices, as suggested by the foregoing analysis, and that leads to cherry-picking charges by both sides of the debate. A big definitional problem for post-adoption tradition is what to do about the abandonment of an earlier tradition? Once the citizen-militia ideal died, the minority notion of an individual's enforceable right to bear arms receded if not disappeared.<sup>58</sup> In 1927, Con-

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57. See, e.g., Saul Cornell, "Don't Know Much About History": *The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 675 (2002). Justice Scalia's majority opinion also contains smaller anachronisms that undermine his argument on its own terms. Observing that nine states adopted constitutional protections for the right to keep and bear arms between 1789 and 1820, he says this evidence confirms a broad original meaning for the Second Amendment: to protect guns for self-defense as well as militia use. *Heller*, 128 S. Ct. at 2803. But seven of the nine state constitutional provisions assured the right to "bear arms in defence of themselves [or himself] and the State," broader language than the Second Amendment's text. *Id.* If the Second Amendment were as broad as Justice Scalia says it is, why did these post-1791 state constitutions not just copy the Second Amendment? Possibly, the states in question wanted a broader protection than the militia-dependent protection of the Second Amendment. As a matter of textual plain meaning, one would expect the Second Amendment to be construed more narrowly than these broader provisions.

58. See *Heller*, 128 S. Ct. at 2842–46 (Stevens, J., dissenting).

gress prohibited mail delivery of "pistols, revolvers, and other firearms capable of being concealed on the person,"<sup>59</sup> and then, in 1934, restricted the possession of sawed-off shotguns and machine guns.<sup>60</sup> Congress "infringed" the individual right "to keep and bear arms" if the latter language is read broadly and unconnected to the militia setting of the prefatory clause. Municipal, state, and federal legislatures have also enacted increasingly-regulatory gun control measures.<sup>61</sup> Under these circumstances, tradition as adverse possession cuts in favor of the *Heller* dissenters as much as the majority: even if nineteenth-century tradition supports a broad reading of the Second Amendment, twentieth-century tradition goes the other way.

An internal analysis of Justice Scalia's opinion illustrates the malleability of tradition. What the "traditional" right to bear arms actually entailed varies dramatically from point to point in his opinion.<sup>62</sup> And few if any of the sources of what the Court considered tradition understood the right in precisely the way the *Heller* Court did. Justice Scalia stated that his reading protected a law-abiding individual's "right to possess and carry weapons in case of confrontation."<sup>63</sup> That is much broader than the 1689 English Declaration of Rights, with its "as allowed by Law" check,<sup>64</sup> and it is narrower than the 1776 Pennsylvania Declaration of Rights, which protected "a right to bear arms for the defence of themselves and the state."<sup>65</sup> Indeed, Justice Scalia's announced right has no connection with the actual text of the Second Amendment, even if the prefatory clause is rendered legally irrelevant. Neither the lower court nor any party to the case had argued for the precise definition of the right rendered by Justice Scalia. This odd rendition suggests that the nation's leading textualist and most ardent traditionalist had to compromise with his more evolutive Brethren in order to secure a Court majority. What was going on?

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59. Act of Feb. 8, 1927, ch. 75, 44 Stat. 1059.

60. National Firearms Act of 1934, ch. 757, 48 Stat. 1236 (codified as amended at 26 U.S.C. § 5861 (2000)).

61. *Amici Curiae* Brief of District Attorneys in Support of Petitioners at 7-9, *Heller*, 128 S. Ct. 2783 (No. 07-290) (discussing firearms-regulating ordinances and statutes in the United States).

62. See *Heller*, 128 S. Ct. at 2792-99.

63. *Id.* at 2797.

64. 1689, 1 W. & M. sess. 2, c. 2.

65. PA. CONST. of 1776, ch. I, § XIII.

### C. Illegitimacy

A legitimacy problem with tradition as constitutional adverse possession is that it potentially clashes with more concrete legal sources—constitutional text and structure, drafting and ratifying history, and binding precedent. The plasticity of tradition in the hands of a skilled jurist or advocate (sometimes the same person) can be deployed not only in a result-oriented way, but also to destabilize what appear to be “harder” sources of law. Thus, Justice Scalia skillfully marginalizes the Second Amendment’s prefatory clause because taking it seriously would render the Second Amendment an “outlier” in that era. But the Second Amendment *was* an outlier if you take its text and drafting history seriously: It reflected the Virginia (George Mason and James Madison) approach to militia insurance.<sup>66</sup> Likewise, Justice Scalia’s deployment of tradition radically revises *Miller*, reducing its holding about the relationships of the prefatory clause to the operative clause to dictum and essentially limiting that precedent to its facts.<sup>67</sup> This is adverse possession with a cutting edge.

For those concerned about “judicial activism,” where judges read their own preferences into constitutional provisions in order to trump democratic regulation, Justice Scalia’s tradition-saturated opinion in *Heller* ought to be a matter of concern. *Heller* rewrote the Constitution. In *Heller*, the Second Amendment not only loses the prefatory clause, but gains new nontextual limitations on the right. The *Heller* Second Amendment effectively now reads: “The right of law-abiding people to keep Arms in their homes, for self-defense purposes, shall not be subjected to unreasonable regulation.”<sup>68</sup> Such a drastic revision requires a lot more explanation than the Court provides.

### III. TRADITION AS DEMOCRATIC DELIBERATION

There is a third way of understanding “tradition” in constitutional interpretation that better reflects the learning of professional historians and engages the Supreme Court in a more productive dialogue with the democratic process. Many Su-

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66. See *Heller*, 128 S. Ct. at 2835 (Stevens, J., dissenting).

67. See *id.* at 2845–46.

68. See *id.* at 2822 (majority opinion).

preme Court opinions explicitly or implicitly comprehend tradition the way historians do—as an evolving interaction among norms, institutions, and practices. The most famous expression is Justice Harlan's dissent in *Poe v. Ullman*,<sup>69</sup> an early privacy case. He was guided by the "balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing."<sup>70</sup> Justice Harlan's understanding of the living and evolving traditions of American law is inspired by the common law methodology itself, and perhaps also by the philosophy of Edmund Burke.<sup>71</sup>

An evolutive approach to tradition in constitutional law ameliorates the anachronism problems examined here but does not solve the cherry-picking or illegitimacy problems. Indeed, this kind of approach drives traditionalists like Justice Scalia absolutely crazy, because they do not see how an evolving or living tradition can have any coherence, and certainly cannot see how it could provide guidance for judges or attorneys. This is a fair point and can be illustrated by reference to both sodomy and guns. The *Lawrence* majority and the *Heller* dissenters would understand tradition as evolving away from old-fashioned agrarian values, the values held by most colonial and post-Independence Americans. The norms dominating early American public law included notions that sexual urges should be channeled into procreative marriages, that a man's home is his castle governed by his directives, and that every man should have guns and other weapons to defend his home and family. That America is long gone, and the norms for a modern, urbanized America include notions that citizens have a wide array of sexual and relationship choices, that a man or woman's condo is a presumptively private space, and that police are the primary source of protection against malefactors, who should be disarmed by the state if possible.

This is not, however, the only story that could be told about an evolving tradition. Another account supports *Bowers* and *Heller*. The United States has changed, and most Americans to-

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69. 367 U.S. 497 (1961).

70. *Id.* at 542 (Harlan, J., dissenting); see also *Washington v. Glucksberg*, 521 U.S. 702, 765 (1997) (Souter, J., concurring in the judgment) (quoting Justice Harlan).

71. See Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994).



day do not follow any of those norms that dominated early American public law: They do not limit their sexual activities to procreative marital sex and they view guns in the home as dangers to children. This is a shift in practices and majority beliefs, but it has not obliterated the old traditions that made this country exceptional and great. For this reason, there has been a vigorous revival of *traditional values*—procreative marriage and guns as the citizen's first line of self-defense—in America.<sup>72</sup> If this country enjoys an "evolving [living] tradition," then Reverend Jerry Falwell and the Moral Majority, Phyllis Schlafly and Stop ERA, and Charlton Heston and the NRA may be just as important leaders and institutions as Margaret Sanger and Planned Parenthood, the women's liberation of Betty Friedan, and the gun-control movement led by Sarah and James Brady.

In short, if academic and judicial critics of a stability-oriented tradition want to insist on a more complicated understanding of tradition as evolutive, they have to grapple with genuine complexity. Once tradition is understood critically and evolutively, cherry-picking problems become even more abundant than before, unfortunately. There is a third way of conceptualizing tradition that helps us answer this question in a more responsible way. This approach to tradition not only avoids most problems of anachronism, but also reduces the illegitimacy problems. The third approach is *tradition as ongoing democratic deliberation*. In our democratic constitutionalism the authoritative value of tradition is greatest when it is recognized and elaborated by legislatures after open and public deliberation. If the institutions of democratic governance, with popular feedback, reaffirm a tradition or rebuff efforts to reform it, that counts as evidence in favor of traditional understandings. If those institutions, on the other hand, question a tradition or reform it in part, then that reform counts as evidence against traditional understandings or (more typically) as evidence that traditional understandings should be recalibrated in some way.

Tradition as democratic deliberation might sound out of place in judicial decisions interpreting the Constitution, but consider

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72. See, e.g., ESKRIDGE, *supra* note 13, at 194–228 (discussing the new "politics of preservation" responding to the freedom of choice and gay-rights social movements); Randy E. Barnett, *Foreword: Guns, Militias, and Oklahoma City*, 62 TENN. L. REV. 443 (1995) (discussing the rise of citizen militias and a new politics of guns responding to ever-expanding governmental regulation).

the following argument. Important institutions and practices of governance as well as many fundamental values in the United States are enshrined not in the Constitution's texts or precedents, but rather in state and federal statutes. Family law and voting rules are two examples. These regimes of governance and norms exist within the framework of the Constitution, of course, but it is not unusual for statutory pressures to influence the Supreme Court's understanding of the Constitution.<sup>73</sup> Should not legislative investigations, reports, statutes, and other actions contribute to the Court's constitutional common law?<sup>74</sup>

Tradition as democratic deliberation helps us appreciate why the *Bowers* Justices were *not* willing to protect "homosexual sodomy" as a privacy right in 1986. Although nineteenth-century sodomy laws had nothing to say about oral sex between two men, between 1879 and 1935 legislatures all over America deliberated the matter and concluded that oral sex was *similar* to traditional sodomy—anal sex—because it was sex for pleasure alone and therefore was morally abominable for the same reason as anal sex.<sup>75</sup> Then, through the middle of the twentieth century, state legislatures and local police departments focused enforcement of updated sodomy laws on a highly disfavored minority, "homosexuals," men whose incapacity for procreative marriage raised suspicions of predatory natures and whose cruising in public places created concerns for nuisance and corruption.<sup>76</sup> Although half the states repealed their consensual sodomy laws between 1961 and 1986, most of the repeals were carried off by sneaking sodomy reform below public radar as part of the Model Penal Code's modernization of criminal

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73. Compare *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53–54 (1959) (rejecting claim that state literacy tests unconstitutionally burden black people's right to vote), with *South Carolina v. Katzenbach*, 383 U.S. 301, 334, 337 (1966) (upholding Congress's authority to enforce the Fifteenth Amendment through suspension of literacy tests in the South).

74. This is the argument of WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, *A REPUBLIC OF STATUTES* (forthcoming 2009).

75. ESKRIDGE, *supra* note 13, at 50–55.

76. *Id.* at 73–108 (the anti-homosexual "Kulturkampf," or campaign of discipline and erasure); John D'Emilio, *The Homosexual Menace: The Politics of Sexuality in Cold War America*, in *PASSION & POWER: SEXUALITY IN HISTORY* 227 (Kathy Peiss & Christina Simmons eds., 1989). See generally DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* (2004).

law.<sup>77</sup> Only in California did the legislature openly debate the pro-gay implications and still opt for sodomy reform (1975); two other states (Idaho, 1972, and Arkansas, 1977) reinstated their consensual sodomy laws when the media alerted them to the gay rights implications.<sup>78</sup> The District of Columbia repealed its consensual sodomy law in 1981, a move that was vetoed by the Democrat-controlled House of Representatives, 281 to 119.<sup>79</sup> AIDS-phobia after 1981 made homosexual sodomy even more indefensible for most Americans. Between the Stonewall riots of 1969 and the peak of the AIDS epidemic, around 1990, nine states revoked criminal sanctions for consensual heterosexual sodomy but left homosexual sodomy a crime, precisely the line that Justice White drew in *Bowers*.<sup>80</sup> In Reagan-era America, the democratic process had, decidedly, *not* embraced the idea that “homosexuals” deserve the same privacy protections as heterosexuals. And neither did the Supreme Court.

Tradition as democratic deliberation, moreover, provides a legal basis for distinguishing *Lawrence* from *Bowers*. Public opinion underwent a sea change between *Bowers* in 1986 and *Lawrence* in 2003, as the sense that AIDS was the homosexuals’ Trojan Horse receded and as many Americans came, instead, to understand lesbians and gay men as ordinary neighbors and coworkers, often with partners and families.<sup>81</sup> Once it became clear that consensual sodomy, like penile-vaginal intercourse, could be the basis for committed family relationships, it was much harder to deny gay people the privacy rights accorded straight people in the contraception, abortion, and interracial-sexuality cases.<sup>82</sup> Twelve states abandoned their consensual

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77. ESKRIDGE, *supra* note 13, at 118–27 (during Illinois’s sodomy repeal, homosexuality was almost completely in the closet); *id.* at 144–47 (sodomy reform in the 1960s failed when legislators detected the pro-homosexual effect); *id.* at 176–84 (substantial progress in repeal of consensual sodomy laws, in large part because the repeal was enveloped in adoption of the Model Penal Code).

78. *See id.* at 197–201 (California repeal); *id.* at 182–84, 388–89 (Idaho and Arkansas reenact consensual sodomy laws after “mistaken” repeals were exposed).

79. *Id.* at 213–18.

80. Arkansas, Kansas, Maryland, Missouri, Montana, Nevada, Oklahoma, Tennessee, and Texas. *See id.* at 387–407 (appendix of state sodomy laws).

81. The most dramatic movement in opinion polls came between 1990 and 1995. *See* Patrick J. Egan et al., *Gay Rights, in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 234, 236–37 (Nathaniel Persily et al. eds., 2008) (surveying public opinion polls); *see also* ESKRIDGE, *supra* note 13, at 267–68 (similar).

82. *See* ESKRIDGE, *supra* note 13, at 269–78.

sodomy laws between 1986 and 2003, as did the District of Columbia in 1994, with nary a peep out of Congress.<sup>83</sup> Although state legislatures and voters were rejecting same-sex marriage all over the country in statutes and some constitutional amendments, there was virtually no public interest in reviving consensual sodomy laws. By the time the issue returned to the Supreme Court, in *Lawrence*, it was all over but the shouting.

How about *Heller*? As Stephen Halbrook has demonstrated, congressional deliberation and action is surprisingly illuminating.<sup>84</sup> In 1892, Congress made it a crime in the District of Columbia (over which Congress has plenary jurisdiction) to carry a concealed pistol, except in one's business and "dwelling house."<sup>85</sup> Permits for carrying concealed weapons in public were available for "necessary self-defense."<sup>86</sup> A brief legislative discussion suggested that Senators were sensitive to citizens' "natural right to carry the arms which are necessary to secure their persons and their lives."<sup>87</sup> In 1906, Congress authorized the District itself to enact "all such usual and reasonable police regulations . . . as they may deem necessary for the regulation of firearms,"<sup>88</sup> but continued to enact its own measures.

In 1932, Congress enacted a comprehensive firearms law for the District.<sup>89</sup> Section 3 of the 1932 Act barred anyone convicted of a violent crime from possessing a pistol in the District.<sup>90</sup> Section 4 prohibited anyone in the District from carrying a concealed pistol without a license, "except in his dwelling house or

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83. See *id.* at 269–74, 289–98 (state-by-state analysis of sodomy law repeal, 1992 to 2000); see also *id.* at 387–407 (appendix).

84. See generally Brief for Amici Curiae 55 Members of the United States Senate, the President of the United States Senate, and 250 Members of United States House of Representatives in Support of Respondent, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290) (authored by Stephen P. Halbrook); Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597 (1995) [hereinafter Halbrook, *Congress Interprets the Second Amendment*].

85. Act of July 13, 1892, ch. 159, 27 Stat. 116.

86. Act of Mar. 3, 1901, ch. 854, § 855, 31 Stat. 1328.

87. 23 CONG. REC. 5788 (1892) (statement of Senator Mills, objecting to the proposed bill); *id.* at 5789 (statement of Senator Wolcott, defending the bill as consistent with "the constitutional right of any citizen who desires to obey the law").

88. Act of June 30, 1906, ch. 3932, § 4, Pub. L. No. 59-401, 34 Stat. 808, 809 (codified as amended at D.C. CODE § 1-303.43 (2001)).

89. Act of July 8, 1932, ch. 465, Pub. L. No. 72-275, 47 Stat. 650.

90. *Id.* § 3, 47 Stat. at 651.

place of business or on other land possessed by him."<sup>91</sup> Section 14 prohibited anyone in the District from possessing a "machine gun, sawed-off shotgun," or other dangerous weapons; there was no dwelling-house exception for that rule.<sup>92</sup> The 1932 Act remains in effect, as amended by Congress and later supplemented by laws enacted by the District of Columbia Council, such as the statutory restrictions invalidated in *Heller*.<sup>93</sup>

Legislators also crafted national firearms legislation in response to a growing problem of dangerous use by criminals and malefactors. Congress in 1927 prohibited mail delivery of "pistols, revolvers, and other firearms capable of being concealed on the person,"<sup>94</sup> and in 1934 prohibited the possession of sawed-off shotguns and machine guns,<sup>95</sup> the law upheld in *Miller*.<sup>96</sup> The Second Amendment was not emphasized in these debates, but neither did Congress regulate possession of handguns for self-defense in the home. At the same time Americans were becoming accustomed to great amounts of government regulation, they were also becoming more jealous of retaining private spaces unregulated by the government. Following both tradition and practicality, the home was the natural situs for such a locational understanding of privacy.

This balance between public safety and private sanctuary was explicit in the Property Requisition Act of 1941,<sup>97</sup> enacted on the eve of Pearl Harbor. The Act authorized the President to requisition private property for national defense purposes, but Congress stipulated that the Act not be construed "to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport" or "to impair or infringe in any manner the right of any

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91. *Id.* § 4, 47 Stat. at 651. A license could be granted to anyone showing "good reason to fear injury to his person or property." *Id.* § 6. The committee reports briefly noted that "[t]he right of an individual to possess a pistol in his home, or on land belonging to him, is not dist[ur]bed by the bill." S. REP. NO. 72-575, at 3 (1932); accord H.R. REP. NO. 72-767, at 2 (1932).

92. Act of July 8, 1932, ch. 465, § 14, 47 Stat. at 654.

93. Congressional amendments include Act of Nov. 4, 1943, ch. 296, Pub. L. No. 78-182, 57 Stat. 586, and Act of June 29, 1953, ch. 159, Pub. L. No. 83-85, 67 Stat. 90, 93-94.

94. Act of Feb. 8, 1927, ch. 75, Pub. L. No. 69-583, 44 Stat. 1059.

95. National Firearms Act of 1934, ch. 757, Pub. L. No. 73-474, 48 Stat. 1236 (codified as amended at 26 U.S.C. § 5861 (2000)).

96. 307 U.S. 174 (1939).

97. Act of Oct. 16, 1941, ch. 445, Pub. L. No. 77-274, 55 Stat. 742.

individual to keep and bear arms."<sup>98</sup> There was a fair amount of debate over requisitioning or registration of firearms, and a number of Representatives and a few Senators from the more rural southern and border states insisted upon these caveats for Second Amendment reasons.<sup>99</sup> Although hunting was repeatedly mentioned, the primary justification was the one made by Representative Hall of New York: A hallmark of totalitarian regimes (Communist Russia and Nazi Germany) was disarming citizens; to distinguish our liberty-protecting constitutionalism from theirs, Congress ought to assure the individual's right to "the private ownership of firearms and the right to use weapons in the protection of his home, and thereby his country."<sup>100</sup>

The Gun Control Act of 1968<sup>101</sup> established what is now our primary national regime for firearm regulation. This is a broad and "infringing" regime, but Congress rejected proposals for nationwide registration of handguns, and the 1968 Act is notable for *not* regulating gun ownership by law-abiding citizens for self-defense. Section 101 of the statute says that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity."<sup>102</sup> Although this is the sort of cheap talk Congress often engages in for political purposes, it does explain the regulatory choices made in the statute Congress enacted. Indeed, in the Firearms Owners' Protection Act of 1986,<sup>103</sup> Congress amended the 1968 Act in minor ways to further protect "the rights of citizens to keep and bear arms under the second amendment."<sup>104</sup>

None of these legislative materials was even cited by Justice Scalia in his *Heller* opinion for the Court, but it is apparent that the precise contours of the constitutional right Justice Scalia

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98. *Id.* § 1, 55 Stat. at 742.

99. See Halbrook, *Congress Interprets the Second Amendment*, *supra* note 84, at 623–31 (collecting quotations from various legislators).

100. 87 CONG. REC. 6778 (1941).

101. Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified at 18 U.S.C. § 921 note).

102. *Id.* § 101, 82 Stat. at 1213–14.

103. Pub. L. No. 99-308, 100 Stat. 449 (1986).

104. *Id.* § 1(b)(1)(A), 100 Stat. at 449; *see also id.* § 107, 100 Stat. at 460 (codified at 18 U.S.C. § 926A) (preempting state laws barring interstate travel with lawful firearms).

says he “discovered” in the original meaning of the Second Amendment came instead from twentieth-century congressional and presidential consensus. Yet Justice Scalia kept these more recent sources in his constitutional closet, suggesting that he was not willing to make any kind of evolving-constitutional-meaning argument. But it is a superior argument to the original-meaning argument Justice Scalia tried to run. The twentieth-century materials suggest the possibility of a rough consensus in American law that Congress (and by extension the District of Columbia) may not bar law-abiding citizens from keeping handguns in their homes for self-defense purposes. This norm is one that Congress has repeatedly followed in legislation for the District and for the nation, that most recent Presidents have endorsed, and that the Supreme Court did not address in *Miller* or its earlier decisions.

In short, if I could be persuaded to read the Second Amendment dynamically to create a right independent of the militia context, I would end up with something very close to Justice Scalia’s limitations on that right. It is also worth noting that a dynamic approach to tradition also suggests a statutory solution to the problem addressed in *Heller*. A superior route to the *Heller* result, from a legal point of view, would be a statutory argument of the following sort: Congress has plenary authority over the District of Columbia. In a 1906 umbrella statute, Congress exercised that authority to allow the District to enact “all such usual and reasonable police regulations . . . as they may deem necessary for the regulation of firearms, projectiles, explosives, or weapons of any kind in the District of Columbia.”<sup>105</sup> In light of Congress’s 1932 Act and other statutes surveyed above, the District’s regulation of home use of firearms is neither “usual” nor “reasonable” under the 1906 statute.<sup>106</sup> This would have resolved the case in a more rigorous legal way, would have protected the norm, and would have respected precedent as well as original meaning.

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105. Act of June 30, 1906, ch. 3932, § 4, Pub. L. No. 59-401, 34 Stat. 808, 809 (codified as amended at D.C. CODE § 1-303.43 (2001)).

106. The Supreme Court has authority to construe both congressional statutes relating to the District and the District’s own statutes.

## CONCLUSION

I have argued that tradition itself has more than one meaning and several plausible methodologies in constitutional cases. My goal is to insist upon historiographical accuracy and nuance—an insistence that undermines the utility of tradition as evidence of original meaning. If tradition itself evolves and if multiple traditions bear on a constitutional issue, my notion of tradition as ongoing democratic deliberation best addresses concerns that unaccountable judges will cherry-pick “tradition” to impose their values onto the Constitution.



# TOOLS AGAINST TERROR: ALL OF THE ABOVE

MICHAEL CHERTOFF\*

With the impending inauguration of a new President, now is an opportune time to assess whether the homeland is safer today than on the morning of September 11, more than seven years ago. It is also a fitting time to discuss the implications of that assessment for our long-term strategy against terrorism. Simply put, if indeed we are safer, then as part of any future legal or policy strategy, we must continue to improve our deployment of the various tools, from law enforcement to the military, which have ably served the country against our foes.

Are we safer today than we were on 9/11? When confronting this question, there are two opposite extremes that must be avoided: on the one hand, hysteria and fear, and on the other hand, complacency and an almost blithe disregard of the threats we face. "Hysteria" refers to rhetoric of the following sort: "Here we are, seven years after 9/11 and lo and behold, al Qaeda still exists, Osama bin Laden remains at large, and terrorists continue to plot and commit atrocities in various places. Nothing we have been doing has worked. Everything is a failure. We are no safer now than we were then." Obviously, such statements glaringly omit that, as of the date of publication, there have been no 9/11-style strikes on the country since the attacks on the World Trade Center and Pentagon were launched on that fateful morning. This fact can hardly be attributed to sheer luck or coincidence.

The United States is indeed safer today, and the reason is clear: Since 9/11, this nation and its overseas friends and allies have acted decisively to enhance their own security and the security of freedom-loving people across the globe. Our armed forces have destroyed al Qaeda's original headquarters and platform in Afghanistan. The United States has dramatically improved its intelligence capabilities abroad. Moreover, the

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\* United States Secretary of Homeland Security.

United States has captured and killed terrorists, both leaders and foot soldiers, on nearly every continent. We have developed exceptionally strong partnerships with allies in sharing information and combining efforts to deal with terrorism. We have built a new Department of Homeland Security to prevent dangerous individuals and items from entering the country and wreaking havoc and destruction upon its people.

Today, al Qaeda no longer has a state sponsor, as it did when the Taliban ruled Afghanistan before September 11. Consequently, al Qaeda neither owns nor has free reign over an entire country anymore. Much of its original leadership has been brought to justice in one way or another.

Al Qaeda is also losing in Iraq, which General David Petraeus has called the "central front" of terrorism.<sup>1</sup> It is losing in part because the Sunni tribes have rejected the al Qaeda fighters and their ideology of extremism, instead partnering with the United States in our "surge" against this terrorist death cult.<sup>2</sup> Additionally, al Qaeda has suffered an overall loss of its reputation, even in the communities it seeks to influence. Its repeated attacks on innocent Muslims have sullied its image across the Islamic world. When al Qaeda blew up a wedding party in Amman, Jordan, more than two years ago, it sparked an intense backlash in that country and elsewhere.<sup>3</sup> Its more recent attacks on Algerian schoolchildren resulted in bin Laden's deputy, Ayman al Zawahiri, actually being confronted in an Internet chat by indignant Muslims and challenged to justify the slaughter of these civilians.<sup>4</sup>

Here at home, because of the founding of the Department of Homeland Security nearly seven years ago, the United States has greatly increased its ability to keep terrorists and other lethal individuals out of the country. Seven years ago, America did not have the biometric or fingerprinting capability, analytical capacity, secure identity documentation regimen, or man-

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1. Press Release, The White House, *Setting the Record Straight: Iraq Is the Central Front of Al Qaeda's Global Campaign* (May 3, 2007), available at <http://www.whitehouse.gov/news/releases/2007/05/20070503-6.html>.

2. See, e.g., Sudarsan Raghavan, *Sunni Factions Split With Al Qaeda Group: Rift Further Blurs Battle Lines in Iraq*, WASH. POST, Apr. 14, 2007, at A1.

3. See, e.g., *Al-Qaeda 'sorry' for Muslim dead*, TIMES (London), Nov. 19, 2005, at 8.

4. See Ian Black, *Al-Qaida deputy goes online to justify attacks*, GUARDIAN, Apr. 4, 2008, at 22.

power it now has at its ports of entry.<sup>5</sup> The same is true regarding America's borders. The nation has dramatically expanded its Border Patrol and has installed new technology and infrastructure, including a border fence, that will further protect the homeland from those seeking to do it harm.<sup>6</sup>

In concert with these efforts, the United States has pushed its security perimeter beyond its borders by working with foreign countries to conduct more analysis and screening overseas. Our country has developed comprehensive security plans and procedures to protect critical infrastructure.<sup>7</sup> It has built nearly two dozen layers of security into its aviation system. It now fuses and shares intelligence at the state, local, and federal levels in a way that was impossible prior to September 11. Finally, it has overhauled the Federal Emergency Management Agency (FEMA), increasing FEMA's ability to deal with national disasters. Taken together, these actions have made the United States a tougher target for terrorists and other violent individuals. The changes do much to explain the failure of America's enemies to carry out another successful attack on the homeland.

Certainly the terrorists' failure is not for lack of trying. Perhaps the most disturbing example of terrorist efforts is the August 2006 airline plot directed at transatlantic flights arriving in North America from the United Kingdom—a plot that, if successful, would have had an impact, in scale and in loss of life, comparable to September 11.<sup>8</sup> The plot, however, along with a number of others in recent years, was disrupted.

In short, the notion of a completely vulnerable and unprepared nation facing an unscathed foe is readily refuted by a veritable arsenal of indisputable facts. It is a denial of all we have learned and accomplished these last seven years. But it is here that Americans need to make a critical distinction: The fact that America is safer does not mean that we are completely safe and the job is done. If Americans believe that they are no

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5. See, e.g., Press Release, U.S. Dep't of Homeland Sec., 9/11 Anniversary Progress and Priorities (Sept. 10, 2008), available at [http://www.dhs.gov/xnews/releases/pr\\_1221078411384.shtm](http://www.dhs.gov/xnews/releases/pr_1221078411384.shtm).

6. See, e.g., *id.*

7. See, e.g., U.S. DEP'T OF HOMELAND SEC., NATIONAL INFRASTRUCTURE PROTECTION PLAN (2006), available at [http://www.dhs.gov/xlibrary/assets/NIPP\\_Plan.pdf](http://www.dhs.gov/xlibrary/assets/NIPP_Plan.pdf).

8. See, e.g., Dan Eggen, *Air Plot Said to Target Cities*, WASH. POST, Nov. 2, 2006, at A7.

longer threatened, they are oblivious to the dynamic nature of the threat and the adaptive capability of the enemy. If we believe that we are completely safe, then we are falling prey to the opposite of hysteria: the peril of complacency.

The voice of complacency sounds something like the following: "Here we are, seven years after 9/11, and because there have been no attacks on our soil, 9/11 must have been some freakish aberration that is unlikely to repeat itself. Al Qaeda's strength has been hyped by the government, which is exaggerating the threat. We have other things to worry about. This problem has gotten boring, and we should move to something else and focus on other elements of the public agenda."

This is clearly a "September 10" mindset. It is an outlook that cannot conceive of a serious and successful attack on American soil. On September 10, 2001, that mindset may have been understandable because a truly momentous assault had yet to occur. It represented a failure to think the unthinkable. But in our post-9/11 world, with the unthinkable having occurred, such a mindset is hard to fathom, let alone justify. Yet in certain circles, the view that the threat we face is exaggerated has rapidly gained currency. It is precisely this attitude of complacency that led to the tragedy of September 11. In their recent book, *America Between the Wars*, Derek Chollet and James Goldgeier chronicle U.S. policy between the close of the Cold War and 9/11. Tellingly, the book pins the blame less on any one Administration and more on a public mindset that hampered Washington in addressing the gathering storm clouds.<sup>9</sup> Charles Krauthammer ironically described this period as a "holiday from history."<sup>10</sup> In reality, it was a *false* holiday from history.

As a response to the threat the nation faces, complacency is at least as wrongheaded as hysteria. In the words of the National Intelligence Estimate issued in the summer of 2007, the United States "will face a persistent and evolving terrorist threat over the next three years."<sup>11</sup> It is a threat the nation has

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9. DEREK CHOLLET & JAMES GOLDGEIER, *AMERICA BETWEEN THE WARS* xvi (2008).

10. Charles Krauthammer, Op-Ed., *History Will Judge*, WASH. POST, Sept. 19, 2008, at A19.

11. OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, NATIONAL INTELLIGENCE ESTIMATE: THE TERRORIST THREAT TO THE U.S. HOMELAND (2007), available at [http://dni.gov/press\\_releases/20070717\\_release.pdf](http://dni.gov/press_releases/20070717_release.pdf).

successfully handled over the past seven years, but because the threat is rapidly evolving, we will fail in the future if we fail to adapt today.

Looking ahead, al Qaeda certainly remains the most salient terrorist threat to this country. Although al Qaeda has suffered setbacks, it has also developed some breathing space in Pakistan and in certain parts of eastern and northern Africa.<sup>12</sup> That does not place al Qaeda in the same position it was in Afghanistan, but it means that al Qaeda now has the opportunity to recruit, plan, train, and potentially launch strikes against Europe or the United States.

Nonetheless, it would be a mistake to conclude that al Qaeda is the only potential long-term security threat our nation faces. There are others on the horizon. Among them is Hezbollah, which has been described by Richard Armitage as "the A-team of terrorism."<sup>13</sup> Long before al Qaeda was formed, Hezbollah pioneered suicide bombing, including the bombing of our Marine peacekeepers in Lebanon a quarter century ago<sup>14</sup> and the 1996 bombing of the Khobar Towers in Saudi Arabia.<sup>15</sup> Hezbollah is a well-armed, well-disciplined paramilitary force capable of taking on Israel and mounting a serious challenge to its armed forces. It remains a major presence in Lebanon's government, the integrity of which it threatens.

Hezbollah also has a presence elsewhere, including in the Western Hemisphere; it launched attacks against Jewish facilities in Argentina in the early 1990s, as if to signal its arrival.<sup>16</sup> In 1992, it bombed the Israeli embassy in Buenos Aires, killing twenty-nine people.<sup>17</sup> Two years later, it murdered ninety-five people by bombing a Jewish community center in that city.<sup>18</sup>

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12. See, e.g., Josh Meyer, *Risk of terror strike grows*, L.A. TIMES, July 12, 2007, at A1, A8.

13. See Nicholas Blanford, *A Lebanese-Israeli Water Conflict Threatens to Boil Over*, CHRISTIAN SCI. MONITOR, Oct. 21, 2002, at 8.

14. See U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2007, at 281 (2008), available at <http://www.state.gov/documents/organization/45323.pdf>.

15. See Press Release, Attorney General Statement on Khobar Towers Indictment (June 21, 2001), available at <http://www.fas.org/irp/news/2001/06/khobar.html>.

16. See, e.g., A.M. Rosenthal, Op-Ed., *On My Mind: The Buenos Aires Massacres*, N.Y. TIMES, Sept. 27, 1994, at A25.

17. See *id.*

18. See *id.*

Beside Hezbollah, the United States must also monitor homegrown groups in the Western Hemisphere. Among them is the Revolutionary Armed Forces of Colombia (FARC), a Marxist terrorist organization that has fought for decades against the Colombian government and raised funds through narcotics trafficking and kidnapping.<sup>19</sup> While the FARC has suffered serious setbacks over the past year at the hands of the Colombian government, it has enablers in the region and must be watched.

From the standpoint of homeland security, the United States must also consider the threats posed by transnational groups that operate purely as criminal enterprises. These include criminal gangs, including MS-13, and some of the organized drug cartels that operate in northern Mexico, which are challenging the authority of the Mexican government and unleashing prodigious violence against law enforcement and civilians there.<sup>20</sup> For now, they are criminal organizations, but there exists the possibility that they may take on a more political coloration in the future.

These and other dangers should spur this nation to reject complacency, replacing it with a firm resolve to confront these evolving threats and adapt to them. They should also encourage the United States to continue to use the tools and approaches that have protected the homeland from further attacks thus far.

Unfortunately, in all too many legal and policy discussions about these tools and approaches, people have tended to divide into two mutually exclusive camps. One camp appears to advocate a military response to every major threat and challenge, while the other insists that the United States and its allies face solely a law-enforcement problem. If the past seven years have taught us anything, it is that both approaches are necessary. Indeed, all approaches, not just these, must be deployed where appropriate. We must use every tool in the security toolbox, and in the coming years we will also have to invent a few tools that do not yet exist.

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19. See U.S. DEP'T OF STATE, *supra* note 14, at 304.

20. See, e.g., *Central America and the Merida Initiative: Hearing Before the Subcomm. on the W. Hemisphere of the H. Comm. on Foreign Affairs*, 110th Cong. 9–13 (2008) (statement of Thomas A. Shannon, Ass't Sec'y of State for W. Hemisphere Affairs), available at <http://www.state.gov/p/wha/rls/rm/2008/q2/104479.htm>.

Clearly, the United States must not eschew the military option. The United States could never have inflicted the operational damage that we did on al Qaeda had we not taken the fight to Afghanistan. At the same time, however, the nation must continue to use nonmilitary or civilian tools and options. Since 9/11, the United States government has deployed intelligence-collection capabilities, including interception of communications. It has harnessed its ability to disrupt the flow of finance using some of our civil-law authorities and has utilized conventional law-enforcement tools, particularly in this country. In recent years, we have arrested and successfully prosecuted a number of people, either directly for terrorist acts or for acts that may not have been terrorist in nature but allowed us to incapacitate those for whom there was reason to believe were terrorists. Taken together, these approaches constitute a layered strategy against terrorism: deterring terrorists from entering the country; capturing or killing them in their home base whenever possible; stopping them in the course of their travel; and bringing them to justice once found here or elsewhere in the world.

Although clearly necessary, these measures are insufficient. None of them strikes at the root cause of terrorism: an extremist, dictatorial ideology that celebrates death and seeks the complete subjugation of hearts, minds, and nations to its totalitarian vision. The ultimate way to fight the terrorists is by engaging them ideologically as well as physically, challenging their destructive and deadly ideas with ideas of freedom and prosperity. We do this by promoting the rule of law, not the rule of man. We do this by advocating democracy, not despotism. We do this by supporting literacy, not ignorance. We do this by empowering people, in the very communities where terrorists seek recruits, to fight back ideologically, unmasking the terrorists as enemies of and strangers to mainstream Islam, the rule of law, and political democracy. In the battle against the terrorist foe, every tool and option belongs on the table. Those who would have us focus on just one to the exclusion of the others, and those who would have us remove any one of these tools, are seriously misguided.

Even so, some argue that deploying the military against al Qaeda elevates its status. That is what Seth G. Jones and Martin

C. Libicki assert in *How Terrorist Groups End*.<sup>21</sup> To renounce or severely restrict the military option against terrorists, however, is to place ourselves back in the same box we were in before September 11, one that relied exclusively on the traditional tools of law enforcement and the courts. Had the United States failed to add military tools to the mix after 9/11, it could not have brought the 9/11 perpetrators to justice. With an outlaw enemy in control of a rogue state thousands of miles away, none of the traditional criminal justice tools—from obtaining search warrants to issuing indictments to seeking extradition—would have had an ounce of relevance against al Qaeda in Afghanistan. Al Qaeda would have continued to use Afghanistan as a platform to launch attacks against America.

At the opposite pole are those who have argued that the law enforcement option is outmoded and have insisted that the government operate entirely on a war footing. Remarkably, the *Washington Post* took this position in an editorial *against* the Bush Administration in its case against Zacarias Moussaoui in 2003.<sup>22</sup> The *Post* argued that by bringing Moussaoui into an American criminal courtroom, the government was repeating the mistakes of the pre-9/11 past, and urged that the government try him before a military tribunal instead.<sup>23</sup> This position was contrary to the *Post*'s initial support for a civilian trial.<sup>24</sup> The *Post* also contradicted itself in a later editorial on October 4, 2003, titled *A Way Out*, where it abandoned its support for a military tribunal.<sup>25</sup> As for the Bush Administration, it stayed the course. Moussaoui was prosecuted in a civilian criminal courtroom and convicted in 2006 for conspiring to kill American citizens as part of the September 11 attacks.<sup>26</sup>

The approach the United States has taken since 9/11 has, contrary to urban legend, not mandated the use of military tools alone. It has utilized the military in concert with all of the other

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21. SETH G. JONES & MARTIN C. LIBICKI, *HOW TERRORIST GROUPS END: LESSONS FOR COUNTERING AL QA'IDA* xvii (2008).

22. See Editorial, *The Moussaoui Mess*, WASH. POST, Sept. 29, 2003, at A18.

23. See *id.*

24. See Editorial, *U.S. v. Zacarias Moussaoui*, WASH. POST, Dec. 12, 2001, at A34 ("The fact that the indictment was filed in U.S. District Court—not before a military commission— . . . is encouraging.").

25. See Editorial, *A Way Out*, WASH. POST, Oct. 4, 2003, at A18.

26. Special Verdict Form, *United States v. Moussaoui*, No. 01cr455 (E.D. Va. 2006).



approaches, including those of law enforcement. In November 2001, as head of the Justice Department's Criminal Division, I testified before Congress and emphasized that the government intended not only to use its military options, but also every law-enforcement tool at its disposal, as well as a full array of other tools, in the fight for the freedom and safety of the American people.<sup>27</sup> It is this comprehensive approach that must continue if the United States is to make further headway in the battle to secure the nation. Those who would insist on elevating or scrapping any of these tools, for political or other reasons, are doing a grave disservice to the nation.

I would go further. Even our full, current array of tools is not sufficient to deal with an ever-evolving threat environment. Today we remain locked into a set of legal authorities and processes that were designed for the prior century, a time when the world was neatly divided between nation-states that waged war and individual groups that committed crimes. Given the current ability of nonstate actors like al Qaeda to wage war, we need to make corresponding changes in how we approach this from a legal standpoint.

This question highlights the challenge: What should a free nation do when it finds someone in its midst who is clearly advocating and recruiting for terrorism but has not yet advanced from advocacy to incitement or actual execution of a criminal plan? If that person has entered the country illegally, one obvious answer would be to send him back to his home country. If he cannot be arrested, prosecuted, or otherwise incapacitated, at least he can be removed and deported.

Under contemporary law regarding migration, however, it is not quite that simple. Under that law, the same open advocacy of terrorism that makes one a threat in a host country allows one to argue that he will not be treated fairly in his home country.<sup>28</sup> Once that argument is raised, Western Civilization's

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27. See *Department of Justice Oversight: Preserving our Freedoms While Defending Against Terrorism: Hearings Before the S. Comm. on the Judiciary*, 107th Cong. 10-15 (2001) (statement of Michael Chertoff, Ass't Att'y Gen., Criminal Div., U.S. Dep't of Justice).

28. See, e.g., *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 U.N.T.S. 221; *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439 (1989) (prohibiting the extradition of a German national from the United Kingdom to the United States for a capital murder trial, holding that such an extradition would violate the prohibition against torture in Article 3 of the Conven-

hands are often tied. The individual cannot be deported, nor can he be held for something he has not yet done. The result is that a person who has no legal right to be in a country and poses a clear danger to its citizens cannot be jailed in that country nor removed from it.

This is no hypothetical case. It is happening today in Great Britain.<sup>29</sup> A radical Islamist Jordanian preacher named Abu Qatada, widely known as an outspoken advocate and supporter of terrorism, is illegally present in the United Kingdom.<sup>30</sup> According to the United Kingdom's Special Immigration Appeals Commission, he is "a truly dangerous individual" who was "heavily involved" in terrorist activities associated with al Qaeda.<sup>31</sup> Even though he is in Great Britain illegally and is a danger to the country, the British cannot imprison him, nor can they deport him to Jordan; indeed, the British Court of Appeals ruled that he could not get a fair trial in Jordan because he was suspected of terrorism.<sup>32</sup> The very fact that he poses a terrorist threat renders authorities powerless to remove him. This kind of challenge is common across Europe and is something the West must address. Either the rules should be modified to allow immigration authorities to balance the risks facing illegally-present terrorism suspects with the risks facing the public, or the law should allow temporary detention of dangerous illegal aliens until they can be safely removed from the country.

In the end, Abu Qatada is the poster child for a key point that must be reiterated: In the battle against terrorism, the challenge of this nation and its democratic allies is not to reduce the number of options or tools we have in this fight, but to expand them. It is my hope that both here and abroad, future Admini-

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tion for the Protection of Human Rights and Fundamental Freedoms in light of possible imposition of the death penalty).

29. Duncan Gardham, *Osama's Right-Hand Man, Abu Qatada, Back on the Streets*, DAILY TELEGRAPH, July 11, 2008, at 11 (describing the release of a terrorism advocate illegally present in the United Kingdom).

30. *Othman v. Sec'y of State*, (2004) No. SC/15/2002 (U.K. Special Immigration Appeals Comm'n), available at <http://www.siac.tribunals.gov.uk/Documents/outcomes/documents/sc152002qatada.pdf>; see also Rosa Prince, *Still Here: 24 Terrorism Suspects Listed for Deportation*, DAILY TELEGRAPH, Aug. 18, 2008, at 10 (noting Abu Qatada's continued presence in the United Kingdom).

31. *Othman*, (2004) No. SC/15/2002.

32. See Richard Ford, *Bin Laden's 'right-hand man' wins deportation fight over torture fears*, TIMES (London), Apr. 10, 2008, at 2.

strations will not only continue to retain and deploy the tools we are using now, but will find new options, fashion new approaches, and adapt our system to the dangers ahead. That is how best to make the United States not only *safer*, but ultimately *safe* in this new century.



PUBLIC DISPLAYS OF AFFECTION . . . FOR GOD:  
RELIGIOUS MONUMENTS AFTER *MCCREARY* AND  
*VAN ORDEN*

EDITH BROWN CLEMENT\*

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INTRODUCTION

On March 2, 2005, the United States Supreme Court heard two cases involving the constitutionality of public displays of the Ten Commandments under the Establishment Clause of the First Amendment: *McCreary County v. ACLU*<sup>1</sup> and *Van Orden v. Perry*.<sup>2</sup> *McCreary* involved a display of nine copies of historically significant documents in identical frames hanging on the walls of two Kentucky courthouses. The documents included the Magna Carta, the Declaration of Independence, and the lyr-

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\* Judge, United States Court of Appeals for the Fifth Circuit. This Article is based on a speech that Judge Clement delivered at the Witherspoon Institute in Princeton, New Jersey on August 12, 2008. Judge Clement thanks Adele H. Auxier and James A. Sonne for their help in preparing the Article.

1. 545 U.S. 844 (2005).

2. 545 U.S. 677 (2005).

ics to *The Star-Spangled Banner*. They also included the text of the Ten Commandments, accompanied by a statement explaining the role of the Commandments in influencing American law. In *Van Orden*, the challenged display was a granite monument—six feet high and three-and-a-half feet wide—whose primary content was the text of the Ten Commandments but which also included two Stars of David and the Greek letters Chi and Rho, an ancient symbol for Jesus Christ. As one commentator predicted at the time, “[T]hese two cases are likely to be resolved in accordance with I Kings 3:16–28[:]. And [O’Connor] said: ‘Fetch me a sword.’ And they brought a sword before [O’Connor]. And [O’Connor] said: ‘Divide the living child in two, and give half to the one, and half to the other.’”<sup>3</sup>

The baby was split, but not by Justice O’Connor. Justice Breyer emerged as the supposed Solomon in both cases, and it was he who wrote the controlling opinion in *Van Orden*. Perhaps to the surprise of some, the Court held in a fragmented opinion that the large granite monument in *Van Orden* was indeed constitutional. And instead of upholding the carefully nuanced historical display in *McCreary*, the Court held that its stormy history, including repeated legal and rhetorical battles concerning both its form and substance, rendered it an unconstitutional establishment of religion.

I respectfully submit that *McCreary* and *Van Orden* imprudently shifted religious monument jurisprudence under the Establishment Clause away from a display-focused analysis and toward an actor-focused analysis. A display-focused approach emphasizes the placement and content of the display itself and is expressed in “bright-line” legal rules that are applicable to all monuments of a particular type. An actor-focused approach, in contrast, uses the historical and physical qualities associated with a display to shed light on the purposes of those who placed it. Under the actor-focused approach, the same monument can be constitutional or unconstitutional depending on the motives of the relevant government

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3. Posting of Eugene Volokh to The Volokh Conspiracy, [http://volokh.com/archives/archive\\_2004\\_10\\_17\\_2004\\_10\\_23.shtml#1098403243](http://volokh.com/archives/archive_2004_10_17_2004_10_23.shtml#1098403243) (Oct. 21, 2004, 20:00 EDT) (quoting Mark Stancil) (name substitution in original).

actors—ultimately, this is a recipe for further confusion and uncertainty over what some have called our “first freedom.”<sup>4</sup>

One example of a display-focused Establishment approach is the 1980 case *Stone v. Graham*.<sup>5</sup> In *Stone*, the Supreme Court held that Kentucky could not post the Ten Commandments on the walls of its public school classrooms.<sup>6</sup> Although *Stone* also held that the legislature did not have a valid secular, or nonreligious, purpose for posting the Ten Commandments, the short opinion relied principally on the content of the display as *prima facie* evidence of the lack of such a purpose.<sup>7</sup>

The strength of a display-focused approach is that it can offer a basis for clear guidelines to public officials because it emphasizes the physical characteristics, placement, and content of the display. The weakness is that adequate guidelines have not been developed to account for the culturally and historically important uses of religious symbols in public spaces, perhaps most notably on the facade of the Supreme Court building itself. The tension in the display-focused approach is one of the factors which led to ten separate opinions and a split decision in the *McCreary* and *Van Orden* sequence.<sup>8</sup>

The actor-focused approach has strengths and weaknesses of its own, which are apparent in the first generation of federal appellate decisions issued after *Van Orden*. On one hand, the actor-focused analysis has given courts greater flexibility to uphold some religious monuments.<sup>9</sup> The courts of appeals, however, have struggled to answer the crucial questions of *who* and *when*: whose motives are relevant and what is the applicable time frame when evaluating the government’s actions? Can

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4. See generally Michael W. McConnell, *Why Is Religious Liberty the “First Freedom”?*, 21 CARDOZO L. REV. 1243 (2000).

5. 449 U.S. 39 (1980).

6. See *id.* at 40.

7. See *id.* at 41 (“The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.”).

8. See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring) (“Neither can this Court’s other tests readily explain the Establishment Clause’s tolerance, for example, of . . . the public references to God on coins, decrees, and buildings . . .”).

9. See, e.g., *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 778 (8th Cir. 2005) (upholding a display identical to the display struck down in *McCreary*, based on its less contentious history).

a later refurbishment of an originally constitutional monument create an unconstitutional establishment where none existed before?<sup>10</sup> Can the religious motivation of nongovernmental actors taint the government's secular purpose and create an unconstitutional endorsement of religion?<sup>11</sup> As one might guess, even leaving aside the question of its jurisprudential value, the time and sensitivity required when applying the actor-focused approach have already had a big impact on Establishment Clause cases in the courts of appeals.<sup>12</sup>

### I. MCCREARY AND VAN ORDEN

To understand the shift from a display-focused approach to an actor-focused approach and its significance, one must first take a closer look at the way the Court decided *McCreary* and *Van Orden*.

#### A. McCreary

Justice Souter wrote the majority opinion in *McCreary*, striking down the Kentucky Ten Commandments display.<sup>13</sup> Justice Souter applied the famous—or infamous, depending on one's point of view—Establishment Clause test from *Lemon v. Kurtzman*, which has three elements.<sup>14</sup> “First, the statute must have a secular legislative purpose; second, its principal or primary ef-

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10. See *Staley v. Harris County*, 461 F.3d 504, 513–14 (5th Cir. 2006) (holding that an originally constitutional memorial erected in the 1950s acquired an unconstitutional purpose when it was refurbished in 1995), *abrogated by* 485 F.3d 305, 314 (5th Cir. 2007).

11. Compare *Buono v. Kempthorne*, 502 F.3d 1069, 1085–86 (9th Cir. 2007) (holding that a cross erected as a war memorial in 1934 was now an unconstitutional establishment of religion even though the government acted to transfer the land to a private organization), with *Access Fund v. U.S. Dep't of Agric.*, 499 F.3d 1036, 1045–46 (9th Cir. 2007) (upholding Forest Service regulations protecting a religiously significant rock formation and stating that just because “a group of religious practitioners benefits in part from the government's policy does not establish endorsement”).

12. See *McCreary County v. ACLU*, 545 U.S. 844, 861–62 (2005) (stating that discerning a display's “purpose” is an important component of Establishment Clause jurisprudence and within the competency of appellate courts); *Selman v. Cobb County Sch. Dist.*, 449 F.3d 1320, 1322 (11th Cir. 2006) (remanding for further fact-finding in light of *McCreary*); *Soc'y of Separationists v. Pleasant Grove City*, 416 F.3d 1239, 1240–41 (10th Cir. 2005).

13. See *McCreary*, 545 U.S. at 850.

14. See *id.* at 859 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)).



fect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."<sup>15</sup> Interestingly, Justice Souter focused on the "secular purpose" element—a rarely invoked prong of the *Lemon* test. In so doing, he rejected Kentucky's argument that the legislature's purpose was "unknowable" and that courts that search for purposes are prone to "act selectively and unpredictably in picking out evidence of subjective intent."<sup>16</sup> Justice Souter asserted that the legislature's purpose was knowable through the normal legal tools of text, history, and implementation, and he pointed out that these tools are used by courts every day to determine government purposes in cases involving Equal Protection claims or statutory interpretation.<sup>17</sup>

After concluding that the government's purpose was knowable, Justice Souter emphasized that the government could not satisfy *Lemon*'s purpose prong by proffering any motive it pleased. The courts must examine the government's allegedly secular motives to make sure that they are not a "sham."<sup>18</sup> Further, according to Justice Souter, the government's secular purpose must also be the preeminent purpose, not just secondary to a primarily religious intent.<sup>19</sup>

Justice Scalia's dissent sharply criticized the preeminent purpose principle. Justice Scalia noted that "[i]n all but one of the five cases in which this Court has invalidated a government practice on the basis of its purpose to benefit religion, it has first declared that the statute was motivated entirely by the desire to advance religion."<sup>20</sup> In the one case where the Supreme Court said that the "state action was invalid because its 'primary' or 'preeminent' purpose was to advance a particular religious belief," that statement was "unnecessary to the result, since the Court rejected the State's only proffered secular purpose as a sham."<sup>21</sup> Justice Scalia predicted that the majority opinion in *McCreary* would dramatically affect future Establishment Clause litigation "[b]y shifting the focus of *Lemon*'s

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15. *Lemon*, 403 U.S. at 612–13 (citation and quotation marks omitted).

16. *McCreary*, 545 U.S. at 861.

17. *See id.* at 861–62.

18. *Id.* at 864.

19. *See id.*

20. *Id.* at 901–02 (Scalia, J., dissenting).

21. *Id.* at 902 (citing *Edwards v. Aguillard*, 482 U.S. 578, 589 (1987)).

purpose prong from the search for a genuine, secular motivation to the hunt for a predominantly religious purpose."<sup>22</sup> Such a search would require a "rigorous review of the full record"<sup>23</sup>—a laborious and potentially risky task. As described below, the courts of appeals have seemingly fulfilled Justice Scalia's predictions, remanding several Establishment Clause cases for additional fact finding in light of *McCreary*.<sup>24</sup>

Justice Souter then moved from discussing the need for a genuine, preeminent secular purpose to instructing courts on how to determine that purpose. He said that the government's purpose is to be measured from the perspective of an objective observer who is presumed unfamiliar with the context and history of the government's actions in each case.<sup>25</sup> Justice Scalia argued in dissent that this method of determining purpose resulted in *hostility* to religion, because "even if a government could show that its actual purpose was not to advance religion, it would presumably violate the Constitution as long as the Court's objective observer would think otherwise."<sup>26</sup> Justice Scalia asserted that, under the majority's approach, "the legitimacy of a government action with a wholly secular effect [c]ould turn on the *misperception* of an imaginary observer that the government officials behind the action had the intent to advance religion."<sup>27</sup> Justice Souter concluded his discussion of the *Lemon* test's purpose element by asserting that "the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage."<sup>28</sup> The courts of appeals have taken Justice Souter at his word, and at least one court has upheld a display of the Ten Commandments that was identical to the *McCreary* display but which lacked its stormy history.<sup>29</sup>

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22. *Id.* at 902.

23. *Id.*

24. *See, e.g.,* *Selman v. Cobb County Sch. Dist.*, 449 F.3d 1320, 1322 (11th Cir. 2006) (citing *McCreary*); *Soc'y of Separationists v. Pleasant Grove City*, 416 F.3d 1239, 1240–41 (10th Cir. 2005) (citing *McCreary* and *Van Orden v. Perry*, 545 U.S. 677 (2005)).

25. *McCreary*, 545 U.S. at 862.

26. *Id.* at 900–01 (Scalia, J., dissenting).

27. *Id.* at 901.

28. *Id.* at 866 n.14 (majority opinion).

29. *See* *ACLU v. Mercer County*, 432 F.3d 624, 626 (6th Cir. 2005).

Justice Souter's reasons for defending and elaborating on the purpose element of the *Lemon* test in such detail become clear in the next part of the *McCreary* opinion. The nine historical documents collectively titled the "Foundations of American Law and Government" were parts of the third Ten Commandments display posted by McCreary County.<sup>30</sup> Justice Souter relied on the broad definition of legislative history he laid out in the first part of the opinion to examine not just the display hanging in the county courthouse when the case reached the Supreme Court, but also the two previous displays the county had posted.<sup>31</sup>

The first display, installed in 1999, included only the Ten Commandments and reproduced their text in an abridged format.<sup>32</sup> Justice Souter distinguished the first display from what he termed "symbolic" representations of the Ten Commandments, such as a sculpture of two stone tablets with ten roman numerals.<sup>33</sup> This is perhaps an odd distinction for those who practice one of the many religions in this country that are rich with symbolism. In any event, according to Justice Souter, a "symbolic" representation is one that "could be seen as alluding to a general notion of law."<sup>34</sup> The actual text of the Ten Commandments, however, was "an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction."<sup>35</sup> In Justice Souter's view, "[w]hen the government initiates an effort" to place the *text* of the Ten Commandments "alone in public view, a religious object is unmistakable."<sup>36</sup>

Under Justice Souter's analysis of the first display in *McCreary*, an unconstitutional display is one that is government-initiated, includes the text of the Ten Commandments, and stands alone in public view. Thus far, Justice Souter's analysis is decidedly display-focused. In the next two sections of his opinion, however, the actor-focused approach moves to the foreground as his analysis shifts from the display itself to the motives of the actors who put it in place.

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30. See *McCreary*, 545 U.S. at 851–57.

31. See *id.* at 868–73.

32. See *id.* at 851–52.

33. *Id.* at 868.

34. *Id.*

35. *Id.* at 869.

36. *Id.*

After the ACLU filed suit against McCreary County, the county constructed a modified display which it subsequently exhibited for approximately six months.<sup>37</sup> The county legislature passed a resolution noting the theistic and religious references in numerous American historical documents and authorized that several of these documents be posted alongside the Ten Commandments in the county courthouse.<sup>38</sup> The resolution stated that

the "County Judge and . . . magistrates agree with the arguments set out by Judge [Roy] Moore" in defense of his "display [of] the Ten Commandments in his courtroom"; and that the "Founding Father[s] [had an] explicit understanding of the duty of elected officials to publicly acknowledge God as the source of America's strength and direction."<sup>39</sup>

This display avoided the "sin" of exposing the text of the Ten Commandments in isolation, but Justice Souter found that the surrounding historical documents actually *enhanced* the impermissible religious message of the display because the "sole common element" among the documents was "highlighted references to God."<sup>40</sup> This display stood for only six months and the county explicitly disavowed it in its briefs, but Justice Souter stated that "the reasonable observer could not forget it."<sup>41</sup>

The third and final incarnation of the *McCreary* display was entitled "Foundations of American Law and Government."<sup>42</sup> Justice Souter noted that although the county proposed several new secular purposes for the third display, both the district court and the Sixth Circuit held that there was no "legitimizing secular purpose" in the third display.<sup>43</sup> Justice Souter agreed with the courts below and found that the third display failed to remedy the constitutional violations of the first two displays for four reasons.<sup>44</sup> First, he observed that the new purposes were only proposed as a litigating position and had not been

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37. *See id.*

38. *See id.* at 869–70.

39. *Id.* at 853 (alterations in original) (citation omitted).

40. *Id.* at 870.

41. *Id.*

42. *Id.* at 870–71.

43. *Id.* at 871.

44. *See id.* at 871–72.

enacted through legislation.<sup>45</sup> Second, the legislative resolution authorizing the *second* display was not repealed until after the Justices raised it in oral argument.<sup>46</sup> Third, the third display quoted even more explicitly religious language of the Ten Commandments than the second display did.<sup>47</sup> Finally, Justice Souter found that nothing in the third display communicated "a clear theme that might prevail over evidence of the continuing religious object."<sup>48</sup>

Justice Souter also engaged in a detailed critique of the display's historical claims as part of his analysis of the government's purpose. He found the display's statement that the Ten Commandments' "influence is clearly seen in the Declaration [of Independence]" to be particularly dubious.<sup>49</sup> He noted that "the Commandments are sanctioned as divine imperatives, while the Declaration of Independence holds that the authority of government to enforce the law derives 'from the consent of the governed.'"<sup>50</sup> Some may find Justice Souter's skepticism about the Ten Commandments' formative influence on American law puzzling considering the religious views of the Founding generation and how they influenced the lawmaking of that era.<sup>51</sup>

Justice Souter concluded his analysis by noting that a change in legislative purpose is possible, but it must be believable.<sup>52</sup> He found that it was improbable that the county in this case changed its purpose between the second and third displays.<sup>53</sup> Justice Souter did note, though, that it was theoretically possible for the Ten Commandments to be integrated into a display on United States history so long as the overall display did not violate the constitutional principle of neutrality.<sup>54</sup>

In short, the Court in *McCreary* used an actor-focused approach to the Establishment Clause when it relied heavily on assumptions about the lawmakers' motives. Although Justice

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45. *See id.* at 871.

46. *See id.* at 871 & n.19, 872.

47. *See id.* at 872.

48. *Id.*

49. *Id.* at 873 (internal quotation marks omitted).

50. *Id.*

51. *See generally* GERARD V. BRADLEY, *RELIGIOUS LIBERTY IN THE AMERICAN REPUBLIC* (2008).

52. *See McCreary*, 545 U.S. at 873–74.

53. *See id.* at 873.

54. *See id.* at 874.

Souter seemingly kept the display-focused approach alive throughout his discussion of the first display in *McCreary*, *Van Orden*'s conclusion that the historical and political context of a monument could be dispositive threw into question even this limited appreciation of the display-focused approach.

### B. Van Orden

*Van Orden* affirmed a decision of the Fifth Circuit upholding the inclusion of a Ten Commandments monument in a display located on the twenty-two acres surrounding the Texas State Capitol.<sup>55</sup> The display consists of seventeen monuments and twenty-one historical markers.<sup>56</sup> According to the Texas legislature, the display commemorates "the people, ideals, and events that compose Texan identity."<sup>57</sup> The Ten Commandments monument was placed on the Texas State Capitol grounds in 1961 by the Fraternal Order of Eagles,<sup>58</sup> and is identical to at least one hundred other Ten Commandments monuments that the Eagles placed on government property over the course of several decades.<sup>59</sup> The program began when a Minnesota juvenile justice judge first thought of posting the Commandments in courthouses nationwide after encountering a "juvenile offender who had never heard of the Ten Commandments."<sup>60</sup> After a committee selected a nonsectarian text, Hollywood mogul Cecil B. DeMille, who produced the movie *The Ten Commandments*, learned of the plan and teamed up with the Eagles to distribute the granite monuments and paper replicas throughout the country.<sup>61</sup> According to their Supreme Court briefs, the Eagles distributed the monuments in hopes of "inspir[ing] the youth to live law-abiding and productive lives."<sup>62</sup> Before Thomas Van Orden filed his suit against the State of Texas in 2001, the Texas monument had never been the subject of a complaint.<sup>63</sup>

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55. *Van Orden v. Perry*, 545 U.S. 677, 681 (2005).

56. *Id.* at 681.

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

58. *See id.* at 681–82.

59. *See id.* at 712–13 (Stevens, J., dissenting).

60. *Id.* at 713.

61. *See id.* at 701 (Breyer, J., concurring in the judgment); *id.* at 713 (Stevens, J., dissenting).

62. Brief for Fraternal Order of Eagles as Amicus Curiae Supporting Respondents at 4, *Van Orden*, 545 U.S. 677 (No. 03-1500).

63. *See Van Orden*, 545 U.S. at 682 (Breyer, J., concurring in the judgment).

These relatively straightforward facts yielded a fragmented opinion. Chief Justice Rehnquist wrote the plurality opinion, joined by Justices Scalia, Kennedy, and Thomas.<sup>64</sup> Justices Scalia and Thomas also wrote separate concurrences.<sup>65</sup> Justice Breyer concurred in the judgment and wrote a lengthy separate opinion.<sup>66</sup> Among the dissenting Justices—Justices Stevens, O'Connor, Souter, and Ginsburg—there were three separate opinions.<sup>67</sup> In total, seven Justices wrote separately in *Van Orden*.

Because no opinion commanded a majority, Justice Breyer's concurring opinion is the law of the case. Justice Breyer started his analysis by discussing the "purposes" of the First Amendment's Religion Clauses, identifying three: "assur[ing] . . . religious liberty and tolerance for all,"<sup>68</sup> avoiding "divisiveness based upon religion,"<sup>69</sup> and "maintain[ing] [the] 'separation of church and state.'"<sup>70</sup> Although scholars such as Professor Philip Hamburger have made a compelling case questioning the historical accuracy of this last "separation" purpose, it nevertheless has been incorporated into the Court's jurisprudence.<sup>71</sup>

In any event, Justice Breyer reviewed the limits that these three purposes place on government action. He stated that the

64. *Id.* at 681 (Rehnquist, C.J., plurality opinion).

65. *Id.* at 692 (Scalia, J., concurring); *id.* at 692 (Thomas, J., concurring).

66. *Id.* at 698 (Breyer, J., concurring in the judgment).

67. *Id.* at 707 (Stevens, J., dissenting); *id.* at 737 (O'Connor, J., dissenting); *id.* (Souter, J., dissenting).

68. *Id.* at 698 (quoting *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring)).

69. *Id.* (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 717–29 (2002) (Breyer, J., dissenting)).

70. *Id.* (citing ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 282–83 (H. Mansfield & D. Winthrop trans. & eds., 2000) (1835)).

71. See PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 481 (2002) (arguing that "the constitutional authority for separation is without historical foundation"). Professor Hamburger observes that the concept of "separation between church and state" arose not from any authoritative constitutional source, but rather from an 1802 letter from Thomas Jefferson to the Danbury, Connecticut Baptist Association. See *id.* at 1–3. Though cited in the federal polygamy-law case of *Reynolds v. United States*, 98 U.S. 145, 164 (1878), the phrase did not become the clear basis for a Supreme Court Establishment Clause decision until Justice Black famously wrote in *Everson v. Board of Education*, 330 U.S. 1 (1947)—a case that, interestingly enough, approved public aid for busing to religious schools—that "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." *Id.* at 18; see HAMBURGER, *supra*, at 454–55; see also *Wallace v. Jaffree*, 472 U.S. 38, 91–114 (1985) (Rehnquist, J., dissenting) (offering a similar critique).

government could not show favoritism between religion and nonreligion, but also noted that "the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious."<sup>72</sup> A religious purge would be inconsistent with our national traditions and would in fact "promote the kind of social conflict the Establishment Clause seeks to avoid."<sup>73</sup>

Justice Breyer next turned to the Supreme Court's then-existing Establishment Clause tests. In *McCreary*, Justice Breyer had opined that "[t]he touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion.'"<sup>74</sup> In *Van Orden*, however, Justice Breyer emphasized that the Supreme Court has not consistently embraced the concept of neutrality.<sup>75</sup> More important, he recognized *why* past Justices were wary of this principle by quoting Justice Goldberg:

[U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.<sup>76</sup>

Justice Breyer also rejected the *Lemon* test<sup>77</sup> as well as the "endorsement" test used in Justice O'Connor's concurrence in *Lynch v. Donnelly*, a test that emphasizes the effect of the governmental action at issue on non-adherents of a particular religion.<sup>78</sup> According to Justice Breyer, these tests are inadequate because they cannot explain why we still have "In God We Trust" on our currency, why our state and national legislatures

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72. See *Van Orden*, 545 U.S. at 698–99 (Breyer, J., concurring in the judgment).

73. *Id.* at 699.

74. *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

75. See *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment).

76. *Id.* (quoting *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring)).

77. *Id.* at 699–700 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)).

78. *Id.* (citing *Lynch v. Donnelly*, 465 U.S. 668, 687–88, 692, 694 (O'Connor, J., concurring)).



open with prayer, and why we recognize the religious dimensions of holidays like Thanksgiving.<sup>79</sup>

Justice Breyer thus proposed that in borderline cases, such as those involving displays like the Texas Ten Commandments monument, judges must rely instead on their "legal judgment."<sup>80</sup> In Justice Breyer's view, legal judgment should reflect three things: the *purposes* of the Religion Clauses, the *context* of the issue at hand, and the *consequences* of the court's decision.<sup>81</sup> Like Justice Souter's "purpose" inquiry, Justice Breyer's contextual analysis is still clearly actor-focused.

Justice Breyer emphasized three aspects of the Texas monument's context in upholding that display. First, the circumstances of the monument's erection "suggest[ed] that the State itself intended the . . . nonreligious aspects of the tablets' message to predominate."<sup>82</sup> In particular, the monument had been donated by the Fraternal Order of Eagles, "a private civic (and primarily secular) organization" that had wished to "shap[e] civic morality as part of [its] efforts to combat juvenile delinquency."<sup>83</sup> Second, the monument's physical setting on the capitol grounds, among dozens of other historical monuments, communicated to visitors that "the State intended the display's moral message—[which] reflect[ed] the historical 'ideals' of Texans—to predominate."<sup>84</sup> Finally, Justice Breyer found that the complete lack of controversy surrounding the monument for the past forty years was ultimately "determinative":

[T]hose 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect [or engage in any other activity prohibited by the First Amendment].<sup>85</sup>

The actor-focused approach is evident here, as Justice Breyer used even the physical characteristics of the monument to discern the motives of those who placed it. Whereas the "short

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79. See *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment).

80. *Id.* at 700.

81. See *id.*

82. *Id.* at 701.

83. *Id.*

84. *Id.* at 702.

85. *Id.*

(and stormy) history" of the *McCreary* display revealed "the substantially religious objectives of those who mounted" it and the effects of these religious objectives upon its observers,<sup>86</sup> the Texas monument's history and physical characteristics, in Justice Breyer's view, reflected positively—from a constitutional perspective—on the motives of those who installed it.

Interestingly, Justice Breyer went on to speculate about whether any contemporary display of the Ten Commandments could be constitutional. He opined, "in today's world, in a Nation of so many different religious and comparable nonreligious fundamental beliefs, a more contemporary state effort to focus attention upon a religious text is certainly likely to prove divisive in a way that [the] longstanding, pre-existing [Texas] monument has not."<sup>87</sup> This statement marks a strong departure from the display-focused approach and explicitly rejects the idea that a particular kind of display could be constitutional in all times and all places.

Curiously enough, in voting to uphold the Texas display, Justice Breyer acknowledged that removing the monument could also have divisive consequences. Such removal, he argued, "might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation,"<sup>88</sup> which in turn could "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid"<sup>89</sup>—albeit in the nonreligious direction.

Justice Breyer's use of the "divisiveness" argument to *preserve* the Texas monument is unusual. Historically, the Supreme Court has invoked the divisiveness rationale to *expel* religious symbolism from the public square.<sup>90</sup> Professor Richard Garnett has challenged "the assumption that the Constitution authorizes courts to protect our 'normal political process' from a *particular kind* of strife and to purge a *particular kind* of dis-

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86. *Id.* at 703.

87. *Id.*

88. *Id.* at 704.

89. *Id.*

90. In *Lemon*, for example, Chief Justice Burger asserted that the school subsidies at issue were an excessive entanglement in part because of their "divisive political potential." *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971). For a thorough discussion of the history of the divisiveness argument, see Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1705–07 (2006).

agreement from politics and public conversation about how best to achieve the common good.”<sup>91</sup> Professor Garnett’s compelling critique argues instead that “[i]t is . . . misguided . . . to employ the First Amendment to smooth out the bumps and divisions that are an unavoidable part of the political life of a diverse and free people.”<sup>92</sup> Justice Breyer nods in Garnett’s direction when he argues that deciding to remove the Texas monument solely because of “the religious nature of the tablets’ text would . . . lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions.”<sup>93</sup> But his reliance on divisiveness in the rest of his opinion indicates that he does not fully agree with Professor Garnett’s argument that division over religious matters is no more a threat to civil society than division over politics or economics.

The divisiveness argument has other weaknesses as well. Although the Texas monument was not the subject of litigation before *Van Orden*, at least one identical monument placed by the Eagles in Salt Lake City, Utah was the target of lawsuits in the 1970s.<sup>94</sup> If divisiveness truly is dispositive, then the Utah monument could be unconstitutional even though its substance and genesis are indistinguishable from the Texas monument in *Van Orden*. Would the divisiveness argument require the development of an Establishment Clause analogue to the “community standards” test used in obscenity cases under the Free Speech Clause?<sup>95</sup> These unresolved issues raise questions about the validity and usefulness of a divisiveness test in Establishment Clause jurisprudence.

Because he considered the Texas monument a “borderline case,”<sup>96</sup> Justice Breyer concurred on deliberately narrow grounds. In the closing paragraphs of his opinion, he suggested that the

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91. Garnett, *supra* note 90, at 1668.

92. *Id.* at 1670.

93. *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in the judgment).

94. See *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 30 (10th Cir. 1973), *superseceded by Van Orden*, 545 U.S. 677, and *McCreary County v. ACLU*, 545 U.S. 844 (2005), *as recognized in Soc’y of Separationists v. Pleasant Grove City*, 416 F.3d 1239, 1291 n.1 (10th Cir. 2005).

95. Cf. *Miller v. California*, 413 U.S. 15, 24 (1973) (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)) (including “community standards” in the test for determining whether a particular expression is obscene and, thus, unprotected by the First Amendment).

96. *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in the judgment).

Texas monument "might [also] satisfy this Court's more formal Establishment Clause tests."<sup>97</sup> He expressed agreement with the principles that Justice O'Connor laid out in her *McCreary* concurrence—in which she concurred in striking down the Kentucky display largely on "endorsement" grounds—and stated that he only differed with Justice O'Connor on her "evaluation of the evidence."<sup>98</sup> Justice Breyer's opinion was therefore narrow in two ways: It both preserved the forty-year-old status quo with regard to the Texas monument and sought to do so without disturbing what he regarded as Establishment Clause orthodoxy. Nevertheless, by upholding a monument that featured the text of the Ten Commandments essentially alone, Justice Breyer came very close to rejecting Justice Souter's evaluation of the first display in *McCreary*, albeit on a similar actor-focused theory. Indeed, Justice Breyer's analysis undermined what was left of the display-focused approach after *McCreary* even in upholding the monument at issue in *Van Orden*.

## II. REFLECTIONS ON *MCCREARY* AND *VAN ORDEN*

Most courts of appeals have concluded that the *Lemon* tripartite test of purpose, effect, and entanglement still stands after *Van Orden*, yet this conclusion has not come without a struggle. As one

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97. *Id.* at 703.

98. *Id.* at 704–05 (citing *McCreary*, 545 U.S. at 881–83 (O'Connor, J., concurring)). Justice O'Connor made three points in her *McCreary* concurrence. First, she stated that religion is a matter of individual conscience. See *McCreary*, 545 U.S. at 882 (O'Connor, J., concurring). Second, she stated that government endorsement of religion fosters religious division and threatens liberty. See *id.* at 883. Third, she argued that the broad acceptance of the Ten Commandments is irrelevant in determining the constitutionality of a particular Ten Commandments display because religious minorities are also protected by the First Amendment. See *id.* at 884.

Justice O'Connor's very short *Van Orden* dissent stated her agreement with Justice Souter's dissenting opinion, which Justice Ginsburg also joined. See *Van Orden*, 545 U.S. at 737 (O'Connor, J., dissenting). Justice Souter emphasized that a "government display of an obviously religious text" such as the Ten Commandments is not neutral when it appears in a context where the government's "predominant purpose" is "to adopt the religious message or urge its acceptance by others." *Id.* at 737–38 (Souter, J., dissenting). Justice Souter disagreed with Justice Breyer that the monument's placement on the capitol grounds distinguished this case from *Stone*, in which the Court struck down the display of the Ten Commandments in Kentucky public schools. See *id.* at 744–45. He also did not find it constitutionally significant that the first lawsuit challenging the Texas monument came forty years after its installation. See *id.* at 746. Justice Souter acknowledged, however, that reasonable minds could differ on these issues. See *id.*

Ninth Circuit panel commented, “[c]onfounded by the ten individual opinions in the two cases, and perhaps inspired by the Biblical milieu, courts have described the current state of the law as both ‘Establishment Clause purgatory,’ and ‘Limbo.’”<sup>99</sup>

Out of the ten-plus religious monuments cases actually decided by the courts of appeals since *Van Orden*,<sup>100</sup> only two have expressly declined to apply *Lemon*,<sup>101</sup> and both did so on extremely narrow grounds. In *ACLU Nebraska Foundation v. City of Plattsmouth*, the Eighth Circuit, sitting en banc, held that a Ten Commandments monument identical to the Texas monument in *Van Orden* also did not violate the Establishment Clause,<sup>102</sup> concluding that the monument was not “different in any constitutionally significant way” from the monument in *Van Orden*.<sup>103</sup> The Eighth Circuit declined to apply the *Lemon* test because neither Chief Justice Rehnquist nor Justice Breyer applied it in *Van Orden*.<sup>104</sup> At the same time, the Eighth Circuit stated that “were we to apply the *Lemon* test, we would conclude, essentially for the reasons set out in the dissent to the panel decision in the present case, that the City’s display of the monument passes that test.”<sup>105</sup> Even *Plattsmouth*’s small departure from *Lemon* has been limited to its facts in other Eighth Circuit cases.<sup>106</sup>

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99. *Card v. City of Everett*, 520 F.3d 1009, 1016 (9th Cir. 2008) (citations omitted).

100. As of this writing, post-*Van Orden* courts of appeals cases include: *Weinbaum v. City of Las Cruces*, Nos. 06-2355, 07-2012, 2008 WL 4182390 (10th Cir. Sept. 12, 2008); *Card*, 520 F.3d 1009; *Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007); *Access Fund v. U.S. Dep’t of Agric.*, 499 F.3d 1036 (9th Cir. 2007); *Staley v. Harris County*, 461 F.3d 504 (5th Cir. 2006), *abrogated by* 485 F.3d 305 (5th Cir. 2007) (en banc); *Selman v. Cobb County Sch. Dist.*, 449 F.3d 1320 (11th Cir. 2006); *Skoros v. City of New York*, 437 F.3d 1 (2d Cir. 2006); *ACLU of Ky. v. Mercer County*, 432 F.3d 624 (6th Cir. 2005); *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) (en banc); *Soc’y of Separationists v. Pleasant Grove City*, 416 F.3d 1239 (10th Cir. 2005); *O’Connor v. Washburn Univ.*, 416 F.3d 1216 (10th Cir. 2005).

101. *See Card*, 520 F.3d at 1016; *Plattsmouth*, 419 F.3d at 778 n.8.

102. *Plattsmouth*, 419 F.3d at 773–74.

103. *Id.* at 778.

104. *See id.* at 778 n.8.

105. *Id.* (citation omitted).

106. The Eighth Circuit has continued to apply *Lemon* in other Establishment Clause cases. *See, e.g., Americans United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 423 (8th Cir. 2007) (affirming the district court’s permanent injunction forbidding two Christian organizations from receiving state funding to operate inmate rehabilitation programs in Iowa state prisons).

In *Card v. City of Everett*, yet another case evaluating a monument identical to the one in *Van Orden*,<sup>107</sup> a Ninth Circuit panel reached two conclusions:

First, . . . the three-part test set forth in *Lemon* . . . remains the general rule for evaluating whether an Establishment Clause violation exists.

Second, . . . we do not use the *Lemon* test to determine the constitutionality of some longstanding plainly religious displays that convey a historical or secular message in a non-religious context.<sup>108</sup>

*Card*'s interpretation of when *Lemon* applies seems slightly narrower than *Plattsmouth*'s, but other Ninth Circuit panels have continued to apply *Lemon* in religious monument cases.

The next interesting question is how the courts of appeals have altered their analyses in response to the expanded purpose inquiry in *McCreary*. Recall that in his *McCreary* dissent, Justice Scalia warned that "[b]y shifting the focus of *Lemon*'s purpose prong from the search for a genuine, secular motivation to the hunt for a predominantly religious purpose, the Court converts what has in the past been a fairly limited inquiry into a rigorous review of the full record."<sup>109</sup> Moreover, as noted above, both *Plattsmouth* and *Card* considered monuments similar to the display in *Van Orden*. In fact, the Eagles distributed more than one hundred Ten Commandments monuments.<sup>110</sup> Yet under *McCreary*'s fact-intensive and actor-focused approach, whenever litigation arises, the courts of appeals must examine the history of each monument anew.

The Tenth Circuit case *Society of Separationists v. Pleasant Grove City*<sup>111</sup> is a good example of the complication. In *Separationists*, the monument at issue was once again provided by the Eagles.<sup>112</sup> Before the Supreme Court decided *McCreary* and *Van Orden*, the Society of Separationists asked the Tenth Circuit to overturn *Anderson v. Salt Lake City Corp.*, the 1973 case noted

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107. *Card v. City of Everett*, 520 F.3d 1009, 1010 (9th Cir. 2008).

108. *Id.* at 1016 (citations omitted).

109. *McCreary County v. ACLU*, 545 U.S. 844, 902 (2005) (Scalia, J., dissenting).

110. *See Van Orden v. Perry*, 545 U.S. 677, 713 (2005) (Stevens, J., dissenting).

111. 416 F.3d 1239 (10th Cir. 2005).

112. *See Reply Brief of the Defendants-Appellees at 7-8 & n. 3, Separationists*, 416 F.3d 1239 (No. 04-4136).

above that had held a Salt Lake City Eagles monument to be constitutional.<sup>113</sup> But the Tenth Circuit decided to wait until the Court handed down *Van Orden* and *McCreary* before ruling on the Separationists' appeal.<sup>114</sup> After the opinions' release, the Tenth Circuit—fulfilling Justice Scalia's prophecy and, according to Professor Douglas Smith, embodying one of *McCreary*'s potential harms<sup>115</sup>—found itself obliged to remand *Separationists* to the district court because the record on appeal did not include enough data to satisfy the “fact-intensive analysis” of *McCreary* and *Van Orden*.<sup>116</sup>

In *Staley v. Harris County*, the Fifth Circuit also found that the record on appeal did not permit “the fact-intensive and context-specific analysis required by *McCreary* and *Van Orden*.”<sup>117</sup> In the original appeal, the panel majority held a memorial monument to civic leader William Mosher, which featured a Bible, unconstitutional under *McCreary* and *Van Orden*.<sup>118</sup> The original three-judge panel's opinion strikingly exemplifies the actor-focused approach. The majority acknowledged the absence of a predominantly religious purpose when the monument was placed on the grounds of the Harris County Civil Courthouse in Texas in the 1950s.<sup>119</sup> Rather, it was clearly intended to honor Mosher, and the religious symbolism in the

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113. See *Separationists*, 416 F.3d at 1241 n.1 (citing *Anderson v. Salt Lake City Corp.*, 975 F.2d 29 (10th Cir. 1973)).

114. See *id.* at 1240.

115. See Douglas G. Smith, *The Constitutionality of Religious Symbolism After McCreary and Van Orden*, 12 TEX. REV. L. & POL. 93, 119 (2007) (“Another potentially negative effect of the *McCreary* decision is to prolong and complicate Establishment Clause litigation.”).

116. *Separationists*, 416 F.3d at 1240–41. *Separationists* involved a motion for judgment on the pleadings, so it is perhaps not surprising that the Tenth Circuit needed more information before it could make a well-supported decision. But Professor Smith has noted that the Eleventh Circuit also engaged in heavy reliance on facts when it cited *McCreary* in remanding a case involving procreationism stickers on biology textbooks for further fact finding on the motives of the legislators. See Smith, *supra* note 115, at 119–20 (discussing *Selman v. Cobb County Sch. Dist.*, 449 F.3d 1320, 1322–23 (11th Cir. 2006)). The record in *Selman* had been partly lost, however, so *McCreary* probably was not determinative of the decision to remand. See *Selman*, 449 F.3d at 1322. At a minimum, Professor Smith is likely correct that *McCreary* has had the effect of making Establishment Clause litigation slower and more complicated.

117. *Staley v. Harris County (Staley II)*, 485 F.3d 305, 309 (5th Cir. 2007) (en banc).

118. *Staley v. Harris County (Staley I)*, 461 F.3d 504, 506, 508–09, 515 (5th Cir. 2006).

119. See *id.* at 505–06, 513.

monument reflected his faith.<sup>120</sup> Citing *McCreary*, however, the panel found that the purpose of the memorial changed in 1995, when a local judge who ran for election on a platform of “putting Christianity back in government” refurbished the memorial.<sup>121</sup> The majority concluded that the judge and his staff displayed an “almost exclusively religious purpose” for their actions in restoring the monument.<sup>122</sup> In an expansive reading of *McCreary*, the panel majority stated: “*McCreary County* makes clear that the entire history surrounding the monument is relevant . . . . An original religious purpose may not be concealed by later acts, nor may a newfound religious purpose be shielded by reference to an original purpose.”<sup>123</sup>

This holding was abrogated when the Fifth Circuit took the case en banc. Though a majority of the en banc court held that the controversy was moot because Harris County had removed the monument to make way for renovations, the court also cited *McCreary* and *Van Orden*, finding that “any dispute over a probable redisplay [of the memorial] is not ripe because there are no facts before us to determine whether such a redisplay might violate the Establishment Clause.”<sup>124</sup>

The *Staley* opinions highlight two of the ways that *McCreary* has affected the courts of appeals. The original panel opinion is an example of an almost exclusively actor-focused analysis. The panel held that a monument that was constitutional when it was installed later became unconstitutional because of the suspect motives of the government officials who maintained it. The en banc opinion confirms Justice Scalia’s concern and Professor Smith’s prediction that *McCreary* and *Van Orden* will make religious monument litigation slower and more complicated because they require such a thoroughly developed factual record.<sup>125</sup>

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120. *See id.* at 513.

121. *Id.* at 507, 513–14.

122. *Id.* at 514.

123. *Id.* at 513.

124. *Staley v. Harris County (Staley II)*, 485 F.3d 305, 309 (5th Cir. 2007) (en banc).

125. *See Smith, supra* note 115, at 119–20.



### III. TWO "PURPOSE" APPROACHES AFTER MCCREARY AND VAN ORDEN

One of the most troubling aspects for public officials of McCreary's actor-focused approach is that it can make it extremely difficult to take action to preserve potentially constitutional religious monuments once they have been challenged by an individual or advocacy group seeking their removal. Although courts are generally deferential to a government body's statements about its purposes, courts generally will not defer to interpretations which they view as "convenient litigating positions" adopted after suit has been filed.<sup>126</sup> Because of the cloudy state of religious monument jurisprudence, the rules have the potential to penalize government actors for good-faith efforts to conform their actions to the Establishment Clause while litigation is in progress.

This point is well illustrated by comparing two Ninth Circuit monument cases. In the first case, *Buono v. Kempthorne* (*Buono IV*), the court was skeptical of the government's asserted purposes for taking action to preserve a challenged monument.<sup>127</sup> In the second case, *Access Group v. U.S. Department of Agriculture*, the court was much more sensitive to the broad range of motives that the government could have for taking action to protect a religious monument that was sacred to a particular religion.<sup>128</sup>

#### A. *Skeptical Approach: Buono I-IV*

In his concurrence in *Van Orden*, Justice Thomas commented that "[i]f a cross in the middle of a desert establishes a religion, then no religious observance is safe from challenge."<sup>129</sup> Justice Thomas was referring to *Buono v. Norton* (*Buono I*),<sup>130</sup> an earlier incarnation of *Buono IV*. The *Buono* series of cases began with a district court decision holding that a cross erected on a rock in

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126. Compare *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000) (giving weight to the Department of Transportation's interpretation of its own regulations because the interpretation has been "consistent[] over time"), with *In re GWI PCS 1 Inc.*, 230 F.3d 788, 807 (5th Cir. 2000) ("[W]here an agency's interpretation occurs at such a time and in such a manner as to provide a convenient litigation position for the agency, we have declined to defer to the interpretation.").

127. See *Buono v. Kempthorne* (*Buono IV*), 502 F.3d 1069, 1085 (9th Cir. 2007).

128. See *Access Fund v. U.S. Dep't of Agric.*, 499 F.3d 1036, 1039 (9th Cir. 2007).

129. *Van Orden v. Perry*, 545 U.S. 677, 695 (2005) (Thomas, J., concurring).

130. *Buono v. Norton* (*Buono I*), 212 F. Supp. 2d 1202 (C.D. Cal. 2002).

the Mojave Desert Preserve to honor World War I veterans violated the Establishment Clause.<sup>131</sup> In 2007, after a series of intermediate appeals, the Ninth Circuit ultimately affirmed the district court, citing *McCreary* and *Van Orden*.<sup>132</sup>

The procedural history of this case is a bit complicated, as there are four different *Buono* opinions. To summarize, *Buono I* and *II* evaluated whether the desert cross violated the Establishment Clause, and both cases were decided before *McCreary* and *Van Orden*.<sup>133</sup> In *Buono I*, the district court struck down the display. In *Buono II*, the Ninth Circuit affirmed the district court's holding. *Buono III* and *IV* evaluated whether Congress's actions to cure the Establishment Clause violation by transferring the memorial to a private veteran's group were valid.<sup>134</sup> *Buono III* was the district court opinion and *Buono IV* was the Ninth Circuit opinion. *Buono IV* was decided after *McCreary* and *Van Orden*, cited those cases, and held that the land transfer was invalid and that the cross violated the Establishment Clause, even though it was in the process of becoming a privately-maintained war memorial.<sup>135</sup>

*Buono II* was issued before *McCreary* and *Van Orden* were decided, but the Ninth Circuit seemed to anticipate the impending changes in Establishment Clause jurisprudence when it conducted an expansive and actor-focused review of the record.<sup>136</sup> The Ninth Circuit held that the war memorial was unconstitutional, stating that:

defendants suggest that a reasonable observer aware of the history of the cross—such as its placement by private individuals—would believe that the government is not endorsing Christianity by allowing the cross to remain at the site. However, a reasonable observer who is *that* well-informed would know the full history of the cross: that Congress has

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131. See *id.* at 1217.

132. See *Buono IV*, 502 F.3d at 1082 n.13, 1086.

133. See *Buono v. Norton (Buono II)*, 371 F.3d 543, 544 (9th Cir. 2004); *Buono I*, 212 F. Supp. 2d at 1204–05.

134. *Buono IV*, 502 F.3d at 1071; *Buono v. Norton (Buono III)*, 364 F. Supp. 2d 1175, 1177 (C.D. Cal. 2005).

135. See *Buono IV*, 502 F.3d at 1069.

136. See *Buono II*, 371 F.3d at 550.

designated the cross as a war memorial and prohibited the use of funds to remove it . . . .<sup>137</sup>

The Ninth Circuit appeared to consider Congress's actions to preserve the cross as *per se* evidence of an intent to violate the Establishment Clause. Under another view, Congress's purpose in designating the cross as a war memorial was *because it was one*. The original cross was erected by the Veterans of Foreign Wars in 1934 with a plaque in memory of "the Dead of All Wars."<sup>138</sup> In *Buono II*, the Ninth Circuit seemingly foreshadowed Justice Scalia's prediction in *McCreary* that the "reasonable observer" test would swallow actual government purposes.<sup>139</sup>

For the Ninth Circuit in *Buono II*, the most damning aspect of the government's actions to preserve the cross seemed to be that "the [National] Park Service . . . denied similar access for expression by an adherent of the . . . Buddhist faith."<sup>140</sup> The court stated that acting to save the cross while denying permission for a Buddhist shrine in the same area showed a preference for Christianity in violation of the Establishment Clause.<sup>141</sup> Yet this conclusion ignores some facts. Although it was a monuments case, *Buono* also involved a power struggle between the Park Service and Congress. The Park Service denied permission for construction of a Buddhist shrine near Sunset Rock on the grounds that a regulation prohibited the "installation of a memorial without authorization" while also indicating that the Park Service intended to remove the cross.<sup>142</sup> Only after the Park Service stated its intention to remove the cross after sixty-five years at the site did Congress step in to preserve it.<sup>143</sup> The Ninth Circuit presumed in *Buono II* that a reasonable observer would be aware of all the actions taken by both the Park Service and Congress<sup>144</sup> but does not mention their power struggle, even though that conflict is central to the story.

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137. *Id.*

138. *Buono IV*, 502 F.3d at 1072–73.

139. See *McCreary County v. ACLU*, 545 U.S. 844, 901 (2005) (Scalia, J., dissenting).

140. *Buono II*, 371 F.3d at 550.

141. See *id.*

142. See *Buono IV*, 502 F.3d at 1072.

143. See *id.* at 1073.

144. See *Buono II*, 371 F.3d at 550. Given the history of the conflict between Congress and the Park Service, the court's observation that the plaintiff is a retired Park Service official and former Assistant Superintendent of the Mojave Desert Preserve is interesting. See *Buono IV*, 502 F.3d at 1073 n.4.

The Ninth Circuit's inference that the cross's display constituted the establishment of Christianity also ignored many secular reasons Congress may have had in seeking to preserve the decades-old private war memorial, while at the same time not objecting to the Park Service's determination that new memorials on the same site were inappropriate. Even under Justice Breyer's concurrence in *Van Orden*, the context of the memorial and the reasons for which it was originally placed are potentially dispositive.<sup>145</sup> As such, the court gives insufficient weight to important historical and contextual factors in concluding that permitting the existing war memorial but prohibiting a new religious monument constituted per se evidence of an Establishment Clause violation.

The Ninth Circuit's purpose analysis in *Buono II* is not completely unsurprising given that the court also concluded that, under circuit precedent, the cross violated Justice O'Connor's "endorsement" test in *Lynch v. Donnelly*.<sup>146</sup> The role that the purpose analysis played in the subsequent appeal, *Buono IV*, however, is significant.<sup>147</sup> *Buono IV* evaluated whether Congress's action in trading the land on which the war memorial sat to a private veterans group was merely an attempt to "evade" the *Buono I* injunction against government display.<sup>148</sup> In *Buono IV*, the Ninth Circuit emphasized Congress's previous actions to preserve the cross—each of which had an arguably secular purpose—to conclude that the land transfer was merely another attempt to preserve the war memorial without curing the Establishment Clause violation.<sup>149</sup> The court held that a "reasonable observer aware of the history of the cross" would perceive the land transfer as an endorsement of religion.<sup>150</sup> A critic might argue that the Ninth Circuit was so determined to see this cross removed from a rock in the middle of the desert that it held that the government could not even *give* it away. As

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145. See *Van Orden v. Perry*, 545 U.S. 677, 701–03 (2005) (Breyer, J., concurring in the judgment).

146. See *Buono II*, 371 F.3d at 548 (citing *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984)).

147. See *Buono IV*, 502 F.3d at 1085.

148. See *id.* at 1076.

149. See *id.* at 1085. In a dissent from the refusal to grant en banc review in *Buono IV*, Judge O'Scannlain offered a critique of the panel's treatment of the property-transfer issue. *Buono v. Kempthorne*, 527 F.3d 758, 760–68 (9th Cir. 2008) (O'Scannlain, J., dissenting from denial of en banc review).

150. *Buono IV*, 502 F.3d at 1086.

such, Justice Thomas's observation in *Van Orden* that "no religious observance is safe from challenge"<sup>151</sup> would be even more true of *Buono IV* than it was of *Buono I*.

B. *Purpose-Sensitive Approach: Access Fund*

Contrasting the Ninth Circuit's purpose analysis in the *Buono* cases with its discussion of government purpose in *Access Fund v. U.S. Department of Agriculture*<sup>152</sup> proves interesting. Their respective holdings can be compared and contrasted on a number of grounds.<sup>153</sup> The way that the court treated the government's asserted purposes for protecting the respective religious monuments is a particularly illuminating difference.

In *Access Fund*, the United States Forest Service prohibited climbing on Cave Rock, a site near Lake Tahoe that is sacred to the Washoe Tribe.<sup>154</sup> Many Washoe consider the "intimate sustained contact with the rock that is inherent in climbing" objectionable, and view "the placement of a single climbing bolt as a defacement" of the sacred site.<sup>155</sup> Cave Rock was also used for hiking, picnicking, and as a path for area transportation, but it was not alleged that rock climbing interfered with any of the nonreligious activities at the rock.<sup>156</sup> The Forest Service banned climbing after it found that climbing was inconsistent with the period of Cave Rock's history it wished to preserve—an historical period defined with reference to the life span of a famous Washoe shaman who frequented Cave Rock until the

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151. *Van Orden v. Perry*, 545 U.S. 677, 695 (2005) (Thomas, J., concurring).

152. 499 F.3d 1036 (9th Cir. 2007).

153. For example, the monument in *Access Fund* was eligible for inclusion on the National Register of Historic Places, while the war memorial in *Buono* was not. *Buono IV*, 502 F.3d at 1073; *Access Fund*, 499 F.3d at 1040. *Buono IV* noted that:

[The Park Service] determined that neither the [Sunset Rock] cross nor the property on which it is situated qualifies for inclusion in the National Register of Historic Places. Specifically, [the Park Service] recognized that the cross itself "has been replaced many times and the plaque that once accompanied it (even though it is not known if it is original) has been removed." Also, the property does not qualify as an historical site because, among other things, "the site is used for religious purposes as well as commemoration."

*Buono IV*, 502 F.3d at 1073.

154. *Access Fund*, 499 F.3d at 1039.

155. *Id.* at 1040.

156. *See id.* at 1041.

1960s.<sup>157</sup> A group of climbers sued and alleged that the Forest Service climbing ban violated the Establishment Clause.<sup>158</sup>

The Ninth Circuit applied *Lemon*, *Van Orden*, and *McCreary* to hold that the climbing ban was not an establishment of the Washoe religion.<sup>159</sup> The court held that the government's predominant purpose in prohibiting rock climbing was to preserve an "historic cultural area."<sup>160</sup> The court noted that in 1996 the Forest Service had feared rock climbing might affect the eligibility of Cave Rock for inclusion in the National Register of Historic Places.<sup>161</sup> The court credited this concern as a secular purpose for the Forest Service's climbing ban, even though the Forest Service's fear was apparently unfounded—Cave Rock was confirmed eligible for inclusion on the National Register in 1998, well before the ban was enacted in 2003.<sup>162</sup>

According to the Ninth Circuit, the Forest Service's goal of protecting the "cultural, historical and archeological features of Cave Rock" was permissible even though Cave Rock "derives its historical and cultural force in part from its role in Washoe religious belief and practice."<sup>163</sup> The Ninth Circuit stated that the sacred status of Cave Rock to the Washoe did not change its analysis because "[h]istorical and cultural considerations motivate the preservation of national monuments that may have religious significance to many or even most visitors."<sup>164</sup> The court went further, observing that:

even if the ban on climbing were enacted in part to mitigate interference with the Washoe's religious practices, this objective alone would not give rise to a finding of an impermissible religious motivation. The fact that Cave Rock is a sacred site to the Washoe does not diminish its importance as a national cultural resource.<sup>165</sup>

The Ninth Circuit also held that the climbing ban did not violate Justice O'Connor's "endorsement" test. The court stated that

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157. *See id.* at 1042.

158. *See id.*

159. *See id.* at 1042–43, 1046.

160. *Id.* at 1043.

161. *See id.* at 1040.

162. *See id.*

163. *Id.* at 1044.

164. *Id.*

165. *Id.*

"the climbing ban cannot be fairly perceived as an endorsement of Washoe religious practices" because, although the ban accommodated part of such practices, it did not ban all recreational use of Cave Rock, as the Washoe Tribe requested.<sup>166</sup> The Ninth Circuit emphasized that the mere fact "[t]hat a group of religious practitioners benefits in part from the government's policy does not establish endorsement."<sup>167</sup> Overall, by focusing on the motivation of the Forest Service rather than the physical characteristics of the site, the Ninth Circuit took the lead of *McCreary* and *Van Orden* with an analysis that focused on the actor rather than the display.

In *Access Group*, the Forest Service prevailed because the court separated the religious motivation of a non-governmental third actor (the Washoe Tribe) from the Forest Service's motivation to protect a culturally and historically important site. The Washoe actively lobbied the Forest Service to protect their sacred site, but the Ninth Circuit declined to conclude that the Forest Service acted with an improper motive when it partially accommodated their request by banning climbing.<sup>168</sup> Instead, the court held that "the Establishment Clause does not bar the government from protecting an historically and culturally important site simply because the site's importance derives at least in part from its sacredness to certain groups."<sup>169</sup>

*Access Group* succeeded where *Buono* failed in avoiding Justice Scalia's prediction that the expanded purpose analysis in *McCreary* would lead courts to ignore the actual motives of government actors in favor of the potential misperceptions of outside observers.<sup>170</sup> It will be interesting to see how the Ninth Circuit handles a pending appeal from a California district court's July 2008 approval of a famous cross at a public veterans memorial in San Diego, particularly because the district court engaged in both *Lemon* and *Van Orden* analyses.<sup>171</sup>

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166. *Id.* at 1045.

167. *Id.* at 1045–46.

168. *See id.* at 1041.

169. *Id.* at 1046 (internal quotation marks omitted).

170. *See McCreary County v. ACLU*, 545 U.S. 844, 901 (2005) (Scalia, J., dissenting).

171. *Trunk v. City of San Diego*, 568 F. Supp. 2d 1199 (S.D. Cal. 2008), *appeal docketed*, No. 08-56436 (9th Cir. Sept. 3, 2008).

## IV. FUTURE QUESTIONS

*McCreary* and *Van Orden* have changed purpose analysis under the Establishment Clause, marking a shift away from display-focused analysis with an emphasis on the physical characteristics of religious monuments and the tendency to produce rules applicable to large categories of monuments installed at different times by different actors. Instead, these two cases, and in particular *McCreary*, show the Court engaging in an actor-focused analysis that emphasizes the motives and actions of the government officials who placed and defended the monuments. The shift is further evident in the cases decided by the courts of appeals after *McCreary* and *Van Orden*, and for appellate courts there are practical consequences that accompany it.

Whether the government may favor religion over nonreligion will likely prove a further area of tension in purpose analysis. This question has the potential to cause yet another dramatic shift in Supreme Court Establishment Clause jurisprudence. The *McCreary* majority emphasized that the government must be neutral as between religion and nonreligion.<sup>172</sup> Justice Scalia responded in his dissent:

Those responsible for the adoption of the Religion Clauses would surely regard it as a bitter irony that the religious values they designed those Clauses to *protect* have now become so distasteful to this Court that if they constitute anything more than a subordinate motive for government action they will invalidate it.<sup>173</sup>

In contrast to the *McCreary* majority, the *Van Orden* four-Justice plurality argued that “[o]ur institutions presuppose a Supreme Being” and that the government may acknowledge this without violating the Establishment Clause.<sup>174</sup> Evidence in the case law and in American history supports both positions. Now that Justice O’Connor, who sided with the majority in *McCreary*, has been replaced by Justice Alito, the Court may take the opportunity to revisit this question.

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172. See *McCreary*, 545 U.S. at 860.

173. *Id.* at 902–03 (Scalia, J., dissenting).

174. *Van Orden v. Perry*, 545 U.S. 677, 683–84 (2005) (Rehnquist, C.J., plurality opinion).



If the Court does revisit this issue, it may conclude, like Justice Stevens, that the Framers intended the term "religion" in the Establishment Clause to refer only to various denominations of Christianity.<sup>175</sup> In *Van Orden*, Justice Stevens argued in his dissent that, in light of the alleged narrowness of the Framers' views, the Court should not be bound by their interpretation and should instead rely on the broad principle of neutrality that, in his view, includes neutrality between religion and nonreligion.<sup>176</sup>

On the other hand, many scholars have argued that a principle that permits the government to favor religion generally is the only principle that can make sense of longstanding practices, including legislative prayers and the reference to God in the Pledge of Allegiance. This view has taken many forms. Professor Andrew Koppelman makes a case that the Constitution permits the government to favor religion over nonreligion and defines religion broadly to include atheism, agnosticism, and non-theistic religions such as Buddhism.<sup>177</sup> Professors Robert George and Gerard Bradley argue that the Framers understood the Constitution to permit favorable treatment of "biblical ethical monotheism," which they define as the idea that "the objective moral law [is] the effect or deliverance of God."<sup>178</sup> In their view, government-sponsored religious displays, such as the Ten Commandments, do not establish any one religion, but merely underscore America's historic national dependence on "God's continuing care."<sup>179</sup> If Professors George and Bradley are correct, then the current Establishment Clause jurisprudence is depriving this generation of important historical, and perhaps even spiritual, resources.

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175. See *id.* at 726–27 (Stevens, J., dissenting). Beyond neutrality under the Establishment Clause, a collateral dilemma has also arisen in challenges by those wishing to add their own displays to settings with existing religious monuments. One such challenge was argued before the Supreme Court on November 12, 2008 in a case in which a religious group sought to add its own monument to a park that already contained an Eagles' Ten Commandments display. See *Pleasant Grove City v. Summum*, No. 07-665 (U.S. argued Nov. 12, 2008). A decision is expected by June 2009.

176. See *Van Orden*, 545 U.S. at 733–34 (Stevens, J., dissenting).

177. See Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 90 (2002).

178. Brief for The Family Research Council, Inc. and Focus on the Family as Amici Curiae Supporting Petitioners at 6, *McCreary County v. ACLU*, 545 U.S. 844 (2005) (No. 03-1693), 2004 WL 2851013.

179. *Id.* at 5.

The late Chief Justice Rehnquist observed in *Van Orden* that “[o]ur cases, Januslike, point in two directions in applying the Establishment Clause.”<sup>180</sup> He continued:

Our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens. One face looks to the past in acknowledgment of our Nation’s heritage, while the other looks to the present in demanding a separation between church and state. Reconciling these two faces requires that we neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage.<sup>181</sup>

It is too early to tell if the actor-focused approach to analyzing religious monuments will be applied with enough sensitivity and flexibility to respect both faces of the Establishment Clause, or if we have yet another sea change in Establishment jurisprudence awaiting us in the years to come.

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180. *Van Orden*, 545 U.S. at 683 (plurality opinion).

181. *Id.* at 683–84.

# MANLINESS AND THE CONSTITUTION

JOHN M. KANG\*

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## INTRODUCTION

Men as a group are saddled with at least three broad, and not necessarily baseless, caricatures: the hypermasculine brute, the dutiful gentleman, and the independent thinker who is his

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\* Assistant Professor of Law, St. Thomas University School of Law. I would like to thank Mark Brandon, Laura Gomez, Tom Joo, and Lenora Ledwon for conversation and, for comments on the Article, Keith Bybee, Nancy Ehrenreich, Jamie Fox, Lauren Gilbert, David Law, Athena Matua, and Ann McGinley. Andrea Luedecker and Adam Gersten provided research assistance. A version of this Article was presented at Lat Crit XII in Miami, the Miami-Florida State-Stetson Junior Faculty Forum, the Association for the Study of Law, Culture and Humanities conference at the University of California at Berkeley, the Conference of Asian Pacific American Law Faculty at the University of Denver, and the 2008 meeting in West Palm Beach of the Southeastern Association of Law Schools.

This Article is for Peter H. Kang, Esq., tireless Public Defender and, in the best sense, a gentleman of the Constitution.

"own man." These portraits do more than populate our culture; they inform the Supreme Court's constitutional jurisprudence.

First, let us consider the image of men as hypermasculine brutes who are consumed by a propensity for atavism, violence, and domination.<sup>1</sup> A characteristic of hypermasculine men is the desire to avenge violently perceived wrongs done to them, including wrongs in the form of public slights.<sup>2</sup> This description may call to mind the rabid Miami Dolphins fan who feels compelled to punch the loudmouth at the other end of the sports bar who has dishonored the reputation of Dan Marino. We may also think of the enraged husband who beats his wife for publicly humiliating him. Mindful of insult's role in hypermasculinity, the Supreme Court has sought to preempt conditions where it can provoke violence. A stark example is

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1. See Mary Ellen Gale, *Calling in the Girl Scouts: Feminist Legal Theory and Police Misconduct*, 34 LOY. L.A. L. REV. 691, 746 (2001) (explaining that "the hypermasculine gendering of police work has led to corruption, excessive force, and extreme violence"); Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 785 (2000) (describing hypermasculinity as "the exaggerated exhibition of physical strength and personal aggression"); James E. Robertson, *A Punk's Song about Prison Reform*, 24 PACE L. REV. 527, 534 (2004) (defining hypermasculinity as "the magnification of masculinity as expressed through radical individualism, violence, and the will to dominate"). My use of the term "hypermasculinity" means essentially the same thing as "machismo" as used by Donald Mosher and Silvan Tomkins. Mosher and Tomkins defined the "ideology of machismo" as "a system of ideas forming a worldview that chauvinistically exalts male dominance by assuming masculinity, virility, and physicality to be the ideal essence of real men who are adversarial warriors competing for scarce resources (including women as chattel) in a dangerous world." Donald L. Mosher & Silvan S. Tomkins, *Scripting the Macho Man: Hypermasculine Socialization and Enculturation*, 25 J. SEX RES. 60, 64 (1988) (emphasis removed).

2. According to Mosher and Sirkin, a "macho" man "must defend his masculine identity from any assault on his masculine status or sexual potency. Interpersonally . . . with men, he must display a cool and aloof self-confidence as he is ever ready to respond to veiled insults during verbal dueling with verbal or physical aggressive action." Donald L. Mosher & Mark Sirkin, *Measuring a Macho Personality Constellation*, 18 J. RES. PERSONALITY 150, 150 (1984); see also Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 479 (2008) (discussing how some men who self-identify as heterosexual violently attack gay men who make unwanted sexual advances toward them); James E. Robertson, *Closing the Circle: When Prior Imprisonment Ought to Mitigate Capital Murder*, 11 KAN. J.L. & PUB. POL'Y 415, 421 (2002) ("Many male inmates respond by exaggerated displays of manhood, in which even minor slights by others become direct challenges to their masculine status."); Frank Rudy Cooper, "Who's the Man?": *Masculinities and Police Stops* (Suffolk University Law School, Research Paper No. 08-23, 2008), available at <http://ssrn.com/abstract=1257183> (arguing that police frisks may be prompted by a desire by police officers to assert their hypermasculine identities); *infra* Part I.

the fighting words doctrine, created by the Court in *Chaplinsky v. New Hampshire*.<sup>3</sup> The Court allowed a prohibition on fighting words when construed as those that “men of common intelligence would understand would be words likely to cause an average addressee to fight.”<sup>4</sup> Fighting words can be “threatening, profane or obscene revilings,” especially when uttered “face-to-face.”<sup>5</sup> Fighting words, the Court declared, should not receive constitutional protection because “by their very utterance, [they] inflict injury or tend to incite an immediate breach of the peace.”<sup>6</sup> The Court elaborated:

It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.<sup>7</sup>

Notice that the fighting words doctrine targets men and draws from a gendered worldview. “[M]en of common intelligence” and “ordinary men”<sup>8</sup> are the touchstone and, although women theoretically can also retaliate with violence against men or women, the *Chaplinsky* Court never refers to the female perspective. For the Court, only men threaten the public peace with their anger and, thus, only men must not be needlessly aggravated.

Against this image of hypermasculinity stands the ideal of the gentleman: civil, dutiful, gracious, and protective of the weak.<sup>9</sup> Here is the man who unfailingly absorbs the casual parade of daily slights with stoic politeness and, in his old-fashioned and perhaps vaguely chauvinistic way, always opens doors for women. The gentleman also differs from the hyper-

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3. 315 U.S. 568 (1942).

4. *Id.* at 573.

5. *Id.*; see also *Cantwell v. Connecticut*, 310 U.S. 296, 309–10 (1940) (“Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.”).

6. *Chaplinsky*, 315 U.S. at 572.

7. *Id.*

8. *Id.* at 573 (emphasis added).

9. See THOMAS L. SHAFFER WITH MARY M. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION* 43, 86, 93 (1991) (arguing that a gentleman possesses, among other things, civility, duty, kindness, and a desire to protect the weak).

masculine brute by being mindful of his civic responsibilities.<sup>10</sup> In 1996, the Virginia Military Institute (VMI) case afforded the Supreme Court an opportunity to ponder the meaning of being a gentleman.<sup>11</sup> The Court rejected VMI's policy of denying admission to women applicants, because the policy violated the Equal Protection Clause and, more specifically, VMI's policy stood as an obstacle to the Court's advancement of gender neutrality.<sup>12</sup> For Justice Scalia, who dissented, the Court's vindication of gender neutrality defeated a public sanctuary where young men could develop virtues as gentlemen. Justice Scalia found "powerfully impressive" the school's requirement that its students abide by a list of rules for good behavior known as the "Code of Honor."<sup>13</sup> The Code insisted, among other things, that a gentleman:

Does not go to a lady's house if he is affected by alcohol. He is temperate in the use of alcohol.

Does not lose his temper; nor exhibit anger, fear, hate, embarrassment, ardor or hilarity in public.

[N]ever discusses the merits or demerits of a lady.

Does not put his manners on and off, whether in the club or in a ballroom. He treats people with courtesy, no matter what their social position may be.

Does not "lick the boots of those above" nor "kick the face of those below him on the social ladder."<sup>14</sup>

These responsibilities are surely arduous for many men, especially of college age, but VMI formally expected its recruits to embrace opportunities to fulfill the Code's tenets. To be a gentleman at VMI was to attain a lustrous nobility, a premise that finds expression in the Code's preface:

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10. *See id.* There is perhaps no better exemplar of these traits in fiction than the lawyer Atticus Finch. *See* HARPER LEE, *TO KILL A MOCKINGBIRD* (1960). *See also* SHAFFER WITH SHAFFER, *supra* note 9, at 43, 45–46 (discussing Atticus Finch as a quintessential gentleman).

11. *United States v. Virginia*, 518 U.S. 515 (1996).

12. *See id.* at 534, 557.

13. *Id.* at 602–03 (Scalia, J., dissenting).

14. *Id.*

Without a strict observance of the fundamental Code of Honor, no man, no matter how "polished," can be considered a gentleman. The honor of a gentleman demands the inviolability of his word, and the incorruptibility of his principles. He is the descendant of the knight, the crusader; he is the defender of the defenseless and the champion of justice . . . or he is not a Gentleman.<sup>15</sup>

Somewhat complementary to the image of the gentleman is the ideal of men as independent and, especially in the political realm, as independent thinkers.<sup>16</sup> No judge articulated the latter view with more poignancy than Justice Brandeis in his famous concurrence in *Whitney v. California*.<sup>17</sup> Conventionally lauded for its bracing support of free speech, Justice Brandeis's opinion is partly a discourse about male identity. He argued that men must possess a stout courage to exercise their constitutional rights. The Framers, Justice Brandeis asserted, "believed liberty to be the secret of happiness and courage to be the secret of liberty."<sup>18</sup> Unfortunately, Justice Brandeis provided little direct explanation for the statement's meaning. He simply announced that courage must counteract the pathology of fear because "fear breeds repression . . . repression breeds hate . . . hate menaces stable government" and "the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies."<sup>19</sup> Courage is not exclusive to men, but its etymology in Greek, Latin, and Hebrew derives from the word for "man," as if to be courageous is necessarily to be manly and vice versa.<sup>20</sup> This correlation was not lost on Justice Brandeis. Although the *Whitney* case concerned Charlotte Anita Whitney, a woman, and probably a courageous

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15. *Id.* at 602.

16. See Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988), reprinted in *FEMINIST LEGAL THEORY: FOUNDATIONS* 58 (D. Kelly Weisberg ed., 1993) (arguing that men desire independence whereas women desire community); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 6-12 (1988) (arguing that liberal theory envisions men as independent beings).

17. 274 U.S. 357, 372 (1927) (Brandeis, J., concurring), overruled by *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

18. *Id.* at 375; see also Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653 (1988).

19. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

20. See *infra* notes 356-57 and accompanying text.

one,<sup>21</sup> Justice Brandeis's only reference to women as a gender in *Whitney* hardly rendered them courageous: "Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears."<sup>22</sup> Justice Brandeis depicted women as passive objects of men's superstition or enlightenment; for him, men were the sole political actors, and that is why he urged men, and not women, to be courageous.

The American constitutional enterprise, according to Justice Brandeis, invested its hopes in men, but, on the other hand, the fighting words doctrine and the Supreme Court's decision in the *VMI* case imply that men can present threats to it. The tension may cause us to wonder how to make sense of male identity in the American constitutional order. This Article examines the tension by delving into the historical origins of male identity and its relation to the American Constitution.

This examination begins in the sixteenth and seventeenth centuries of early modern England, for the American colonists would eventually have to grapple with ideas that arose from this period. Two of the most prominent conceptions of male identity in early modern England made constitutional democracy, as the Americans understood it, philosophically unrealistic. Thomas Hobbes represents one conception, and Robert Filmer the other.

Part I presents a picture of early modern England where the spectacle of men engaged in public brawls over issues of honor was common. Reacting to this public violence, the seventeenth-century philosopher Hobbes bemoaned that men's hypermasculinity made them ineligible for the disciplined and mature enterprise of self-government. Only an absolute monarch, Hobbes insisted, could control men for purposes of collective peace.

Part II shows that Filmer, another prominent seventeenth-century English philosopher, also believed that men were generally incompetent for self-government. Unlike Hobbes, Filmer argued that men were psychologically infantile and thus lacked the manly independence for self-government. Only the king, wrote Filmer, had the requisite manliness of a powerful father, and men required the father's love and guidance while owing him

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21. See generally Ashutosh A. Bhagwat, *The Story of Whitney v. California: The Power of Ideas*, in CONSTITUTIONAL LAW STORIES 407, 409–12 (Michael C. Dorf ed., 2004).

22. *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring).



complete obedience. By the late seventeenth century, however, philosophers like John Locke began to challenge absolute monarchy in a manner that would influence how the American colonists thought about male identity and its relationship with political authority. Part III outlines this shift.

Although the American colonists were not the first to challenge absolute monarchy, they were the first to create a government that completely did away with a king. This radically democratic move, in turn, required the colonists to imagine conceptions of male identity that would help to underwrite their change in governance. The colonists first had to parry Hobbes's and Filmer's arguments for the king's authority. Instead of bestowing upon the king the mantle of indispensable referee or loving patriarch, the Americans, as illustrated in Part IV, ridiculed him as a hypermasculine brute. By delegitimizing the king, the colonists cleared a philosophical path for a new government where all authority formally resided with the people themselves. That move in turn prompted the colonists to develop an account of public virtue that expected men to behave in a manner that would demonstrate their competence for self-government. Against Hobbes, the colonists pressed American men to embrace civility, including civility toward social inferiors, rather than allowing American men to be driven by a violent hypermasculinity. Against Filmer, the colonists urged American men to evince their manly independence by deliberating political truths instead of deferring to social betters. For these reasons, the political imperatives of the Constitution helped to create a model of an independent-minded American gentleman. The ideal of manliness as conceived by the Founders, however, presently occupies an ambivalent place in our constitutional culture. Part V reflects on this condition.

This Article seeks to offer a unique contribution to the existing legal scholarship on male identity. Much of that scholarship is written by feminist professors who are principally concerned with the study of female identity, and male identity only figures in the analysis to the extent it can illuminate the former.<sup>23</sup>

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23. See Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Male-ness*, 43 UCLA L. REV. 1037, 1038 (1996) ("[I]n several important respects, apart from the crucial role of culprit, men have been largely omitted from feminism."). Other articles have looked at the construction of male identity. See Nancy Levit, *Male Prisoners: Privacy, Suffering, and the Legal Construction of Masculinity*, in PRISON MASCU-

Such a focus is understandable given that feminist scholarship seeks to empower women by exposing gender bias.<sup>24</sup> This Article focuses squarely on male identity as deserving its own analysis. Furthermore, the articles that do focus on male identity tend to dwell on issues pertaining to statutory interpretation or the Equal Protection Clause, such as employment discrimination,<sup>25</sup> single-sex education,<sup>26</sup> and prisons.<sup>27</sup> This Article explores male identity as it relates to general notions of political authority, the arrangement of institutional power, and civic ethos—in short, some of the fundamental aspects of constitutional enterprise.

# I. THOMAS HOBBS: HOW HYPERMASCULINITY NECESSITATES ABSOLUTE MONARCHY

The most quoted line from Thomas Hobbes's lengthy book *Leviathan* declares that the "life of man," when "there is no common power to keep them all in awe," is "poor, nasty, brutish, and short."<sup>28</sup> With this weirdly bleak introduction, Hobbes prepared the reader for perhaps the most famous argument against a limited government such as that created by the U.S.

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LINITIES 93–102 (Don Sabo et al. eds., 2001) [hereinafter Levit, *Male Prisoners*]; Ann C. McGinley, *Harassing "Girls" at the Hard Rock: Masculinities in Sexualized Environments*, 2007 U. ILL. L. REV. 1229 [hereinafter McGinley, *Harassing*]; Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359 (2004) [hereinafter McGinley, *Masculinities*]; see also Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995). For other examples of scholars who have defined manhood by juxtaposing it with womanhood, see MARK E. KANN, *A REPUBLIC OF MEN: THE AMERICAN FOUNDERS, GENDERED LANGUAGE, AND PATRIARCHAL POLITICS* 16–19 (1998).

24. Professor Weisberg explained: "Feminist legal theorists, despite differences in schools of thought, are united in their basic belief that society is patriarchal—shaped by and dominated by men. Feminist jurisprudence, then, provides an analysis and critique of women's position in patriarchal society and examines the nature and extent of women's subordination." D. Kelly Weisberg, *Introduction to FEMINIST LEGAL THEORY: FOUNDATIONS*, *supra* note 16, at xv, xvii.

25. See, e.g., McGinley, *Harassing*, *supra* note 23; McGinley, *Masculinities*, *supra* note 23.

26. See, e.g., William Henry Hurd, *Gone with the Wind? VMI's Loss and the Future of Single-Sex Public Education*, 4 DUKE J. GENDER L. & POL'Y 27 (1997); Jon A. Soderberg, *The "Constitutional" Assault on the Virginia Military Institute*, 53 WASH. & LEE L. REV. 429 (1996).

27. See, e.g., Levit, *Male Prisoners*, *supra* note 23; Robertson, *supra* note 1.

28. THOMAS HOBBS, *LEVIATHAN: WITH SELECTED VARIANTS FROM THE LATIN EDITION OF 1668*, at 76 (Edwin Curley ed., Hackett 1994) (1651).

Constitution. Hobbes asserted in seventeenth-century England that men were consumed by a violent hypermasculinity that was problematic to even basic efforts at societal peace.<sup>29</sup> Note that Hobbes was indicting men as a sex, not "men" in the universalist sense that subsumes women.<sup>30</sup> Men, on his account, obsessively devoted themselves to the protection of their honor, and even the mildest social slights would set them off.<sup>31</sup> Worse, Hobbes believed that for men violence was not simply a means to an end, but that men actually relished opportunities to inflict it and did not flinch from those moments when they had to endure it. Belligerent and touchy, men lacked the dispassion necessary for the pacific and disciplined business of constitutional democracy.<sup>32</sup> For Hobbes, the only type of government suitable for men was an absolute monarchy that was strong enough to clamp down on their hypermasculine passions.<sup>33</sup>

What led Hobbes to make such grim assessments about men as hypermasculine? He was thinking about man's life in early modern England, an astonishingly violent society even by our contemporary American standards. It is telling, for example, that Lawrence Stone, a revered historian of the period, announced that early modern England was at least "five times more violence-prone" than England in the late twentieth century.<sup>34</sup> Much of the violence was propelled by a desire to preempt or avenge assaults on one's honor, and a glimmer of disrespect could provoke a fight.<sup>35</sup> As Cambridge historian Mervyn James commented, "[s]illy quarrels escalated into battles in the streets."<sup>36</sup> Further, "[c]onflicts were rapidly translated into the language of

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29. See *infra* notes 80–89 and accompanying text.

30. Hobbes made fleeting references to women, but these references highlight his ascribed gender differences. He declared that "men are naturally fitter than women for actions of labour and danger," and that "there is allowance to be made for natural timorousness, not only to women (of whom no such dangerous duty is expected), but also to men of feminine courage." HOBBS, *supra* note 28, at 126, 142.

31. See *infra* notes 82–89 and accompanying text.

32. See *infra* notes 80–89 and accompanying text.

33. See *infra* notes 90–92 and accompanying text.

34. Lawrence Stone, *Interpersonal Violence in English Society 1300–1980*, in 101 PAST & PRESENT 22, 32 (1983).

35. See MERVYN JAMES, SOCIETY, POLITICS AND CULTURE: STUDIES IN EARLY MODERN ENGLAND 308 (1986); LAWRENCE STONE, THE CRISIS OF THE ARISTOCRACY: 1588–1641, at 223 (1965) (arguing that in the fifteenth and sixteenth century, men "fought over prestige and property, in that order").

36. JAMES, *supra* note 35, at 308.

the sword," and this was especially so when they concerned politics or religion, topics that aroused pride, and hence involved issues of honor.<sup>37</sup> Often, the only method of expression for dissidence appeared to be violent threats, as if the social demands of tolerating another's competing opinion weighed unbearably on one's honor.<sup>38</sup> In this atmosphere, the gentry fought to get the best pew in the church,<sup>39</sup> nobility dueled over who would get the most honored seats in court,<sup>40</sup> squires clashed over election as knights and for membership on commissions,<sup>41</sup> and nobility fought for the prestige of the monarch's attention.<sup>42</sup> According to Professor Stone, "[i]n a society that was even more obsessed with status than with money, intangibles of this sort aroused passions which often could only be appeased in blood."<sup>43</sup>

To exacerbate matters, the local government had little success in maintaining peace.<sup>44</sup> Witness the following catalogue of lawlessness, made all the more appalling by having been perpetrated, usually in the open, by the most prominent members

37. *Id.*

38. See STONE, *supra* note 35, at 223–24.

39. See *id.* at 223.

40. See A.J. Fletcher, *Honour, Reputation and Local Offending in Elizabethan and Stuart England*, in ORDER AND DISORDER IN EARLY MODERN ENGLAND 92, 98 (Anthony Fletcher & John Stevenson eds., 1985).

41. See STONE, *supra* note 35, at 223.

42. See *id.* Historian A.J. Fletcher also remarked that there were "numerous opportunities for battles over precedence." Fletcher, *supra* note 40, at 97. He offered this catalogue:

In Elizabethan Norfolk factional politics became so fraught that several gentlemen intrigued at court to have their name placed above a local rival at the next renewal of the commission of the peace. . . . Deeply entrenched quarrels could splutter into violence when the tensions of appearance in the public arena focused men's minds on questions of pre-eminence. At the Norwich sessions in 1582, Sir Arthur Heveningham, faced with charges of misconduct by Edward Flowerdew, 'burst out into a great and vehement kind of railing speech' against him. A brawl with their fists between Sir Thomas Reresby and William Wentworth at the Rotherham quarter sessions in the 1590s turned into a scuffle with swords involving the two men's followers. Arguments over seating arrangements on the bench were not uncommon. When the Tory Lord Cheyne and the Whig Lord Wharton appeared together on the Buckinghamshire bench in 1699, Cheyne objected to his rival sitting on the chairman's right hand and after the business they retired to duel.

*Id.* at 97–98.

43. STONE, *supra* note 35, at 223.

44. See *id.* at 230 ("Attempts by the local administration to deal with feuds between nobles and squires usually ended in failure.").

of the community. Thomas Hutchinson, also known as Lord Radcliffe, had assaulted Sir Germaine Poole, and "getting him downe he bit a goode part of his nose and carried yt away in his pocket."<sup>45</sup> The 14th Lord Grey of Wilton snuck up to Sir John Fortescue and repeatedly struck him with a crab-tree truncheon "as he lay senseless on the ground, until the latter's servants came to the rescue."<sup>46</sup> The nobility also employed the services of retainers who were often no better than thugs.<sup>47</sup> For example, "Henry, Earl of Lincoln always attacked with fifteen or sixteen bullies."<sup>48</sup> A group from the Talbot and Cavendish clans ambushed and attacked with swords Sir John Stanhope and four men.<sup>49</sup> The feud between two noble families, the Markhams and the Holles, reached a climax as both engaged their respective retainers in battle. Gervase Markham was wounded and, on the excuse that he was unfairly attacked while on the ground, planned to shoot John Holles while Holles was not looking.<sup>50</sup> The 2nd Lord Rich sent twenty-five retainers to attack Edward Windham in broad daylight on Fleet Street, and accompanied the attack with cries of "Drawe vil-lens, drawe," "Cutt off his legges," and "Kyll him."<sup>51</sup> A group of men pummeled a servant of the Earl of Leicester, "presumably under orders of some noble enemy of the Earl."<sup>52</sup> Thomas, Lord Burgh, tried to murder a man in his bed.<sup>53</sup> Ralph, Lord

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45. *Id.* at 225.

46. *Id.* at 226. Less spontaneously, scheduled duels were also a common practice. Historian Philip Jenkins has remarked on their prevalence even in the late seventeenth century:

The defence of honour or self-interest often implied a resort to violence, and if the offending party was of too high birth to be merely beaten or mobbed, then a duel could result. Gentlemen wore swords, were portrayed with them in paintings, and were expected to use them in affairs of honour . . . Duels were frequent when the code of honour was so sensitive, and the situation was exacerbated by the political bitterness of the later seventeenth century, when partisan rivalries caused many fights involving some of the greatest families of Wales.

PHILIP JENKINS, *THE MAKING OF A RULING CLASS: THE GLAMORGAN GENTRY: 1640-1790*, at 200 (1983).

47. See STONE, *supra* note 35, at 227.

48. *Id.* at 225.

49. See *id.* at 225-26.

50. See *id.* at 226.

51. *Id.*

52. *Id.*

53. See *id.*

Eure, first hired assassins to kill the Recorder of Berwick and, when unsuccessful, hired an expert to try to poison him.<sup>54</sup> Professor Stone concluded that "[s]tories of this kind, which could be indefinitely repeated, prove beyond possibility of doubt that up to the end of the sixteenth century men saw nothing dishonourable in attacking by surprise with superior forces, and nothing in hitting a man when he was down."<sup>55</sup>

Even in a court of law, hypermasculine men foreboded violence. There was the common habit of nobles bringing armed retainers to quarter sessions and assizes, the equivalent of court proceedings, to threaten judges and opposing parties.<sup>56</sup> The seventeenth-century writer John Aubrey recounted that "[i]n those days . . . noblemen (and also great knights as the Longs) when they went to the assizes or [quarter] sessions at Salisbury, etc. had a great number of retainers following them; and there were (you have heard) feudes (i.e. quarrells and animosities) between great neighbours."<sup>57</sup> The feuding noble families of the Russells and the Berkeleys arrived collectively with five hundred armed men to the Worcester quarter sessions; fortunately, peace was brokered at the court.<sup>58</sup> A bloodier outcome involved Lord Morley's and Lord Strange's entourages, who were brought to the Lancaster assizes.<sup>59</sup> Wonderfully telling is an incident involving Sir Edward Dymock. When the judge accused him of bringing armed men to the court, Dymock sneered that his men were not "otherwise armed but with such ordinary weapons as men usually carry."<sup>60</sup> The Earl of Sussex tried to obey the rules to leave his retainers behind, but his rival, the Earl of Leicester, did not reciprocate.<sup>61</sup> The former complained to the Queen.<sup>62</sup> He also worried a few years later that another enemy, Lord North, would bring armed men to court, in which case, he warned, "I

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54. *See id.*

55. *Id.*

56. *See id.* at 231.

57. *Id.*

58. *See id.*

59. *See id.*

60. *Id.*

61. *See id.* at 232.

62. *Id.* at 232–33.

will come in suche sort as I wyll not fere pertakers ageynst me."<sup>63</sup>

Hypermasculine violence was hardly the exclusive domain of nobles. In 1594, John Durant, a tanner, and Henry Elwood, a waterman, became involved in a quarrel at Cambridge.<sup>64</sup> Elwood, in his additional capacity as a constable, had tried to arrest Durant's friend, provoking Durant to call Elwood a "flapte mouthe boye."<sup>65</sup> Elwood retorted that he was "as good a man as" Durant and "yf thy knyfe were awaye thowe shouldest see what I would do by & bye."<sup>66</sup> A fight ensued and witnesses reported that all of Durant's "face was beblodied."<sup>67</sup> Also consider an episode from 1604 between a group of Cambridge "gentlemen students."<sup>68</sup> Charles Garth and George Ward protested that Samuel Woodley, while deputy proctor at the university, had no right to confiscate their rapiers and daggers.<sup>69</sup> Feeling slighted, Garth and Ward told the townspeople that Woodley "was but some cowardly fellow & not the mann that he was reported or taken to be," and also called Woodley's brother a coward.<sup>70</sup> A fight ensued, and Garth greeted Samuel with a dagger, warning, "Gods wounds keepe backe or I will let out yor gutts."<sup>71</sup> In another instance, a group of "gentlemen scholars" were indignant that a stable boy had carelessly blocked their path with his horse.<sup>72</sup> The scholars, in an act that would bid defiance to the modern stereotype of the shy and gentle academic, "box[ed]" the boy's ears and beat the horse.<sup>73</sup> The boy resented his ill-treatment and threw a bone at the gentlemen scholars as he scurried away.<sup>74</sup> One of the scholars repaid the boy's insolence by stabbing the horse. In another example, a Cambridge innkeeper complained that some scholars,

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63. *Id.* at 233.

64. See ALEXANDRA SHEPARD, MEANINGS OF MANHOOD IN EARLY MODERN ENGLAND 127 (2003).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 141.

69. *See id.*

70. *Id.* at 142.

71. *Id.*

72. *Id.*

73. *Id.*

74. *See id.*

feeling that the innkeeper had insulted their honor, had "mis-used & injured [the innkeeper] by pulling him by the beard & kicking & offering to strike upp [his] heles."<sup>75</sup>

Hypermasculine violence was not limited to nobles or scholars. William Maphew and John Trott, two Cambridge cordwainers, came to blows after the former showed off his boots to his friend at an alehouse.<sup>76</sup> Trott found the act impudent and threw one of the boots to the ground, thereby causing Maphew to say that the boot was "as good worke as you make," and then a fight ensued.<sup>77</sup> After the cordwainer John Dod called him a liar, the gentleman Henry Beston reminded the former that "he Beston did come of a better stock & kynn, then [Dod] or any of his kynn did," and, for punctuation, slapped him on the face.<sup>78</sup> These were hardly isolated incidents as "[n]early one-third of the assault cases heard by the Cambridge university courts cited insults as provocation, and defendants frequently justified violent responses as understandable if not appropriate reactions."<sup>79</sup> Men in early modern England, then, did not shun unlawful public violence as dishonorable; they saw it as the enactment of an exalted code of hypermasculinity.

Such was life in early modern England, and it certainly provided ample justification for Hobbes's curious comment that the life of man is poor, nasty, brutish, and short. Hobbes had worried that the men of early modern England were beset by a hypermasculinity that made constitutional democracy, let alone societal peace, impossible. He set out his arguments by positing a hypothetical "natural condition of mankind" prior to government,<sup>80</sup> whose unsettling details were intended to exaggerate the public violence in early modern England.<sup>81</sup> In this natural condition, one of the chief causes of quarrel among men is "glory."<sup>82</sup> Quarrels over glory occur "for trifles, as a word, a smile, a different opinion, and any other sign of undervalue, either direct in their persons, or by reflection in their kindred,

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75. *Id.* at 146.

76. *See id.* at 143.

77. *Id.*

78. *Id.*

79. *Id.*

80. HOBBS, *supra* note 28, at 74.

81. *See id.* at 76–77.

82. *Id.* at 76.



their friends, their nation, their profession, or their name."<sup>83</sup> Hobbes did not believe that intolerance for difference necessarily leads to strife. What leads to it is the apparent contemnor's intolerant "sign of undervalue"—his show of disrespect—that stirs the contemned's intolerant resentment and sometimes rage.<sup>84</sup> Pride, Hobbes declared, provokes "a man to anger, the excess whereof is the madness called RAGE and FURY."<sup>85</sup> To Hobbes, pride seemed the most hypersensitive passion of all, for it cannot tolerate others' contradictory opinions or social slights. Unable to tolerate others' slights, it succumbs to "excessive desire of revenge."<sup>86</sup> Pride can become "excessive love" which, when confronted with one recognized as more honorable, can become jealous rage.<sup>87</sup> Men also fight each other, according to Hobbes, "for reputation."<sup>88</sup> That is, they "use violence to make themselves masters of other men's persons, wives, children, and cattle."<sup>89</sup> The natural condition of man thus provides additional argument, if more was necessary during the seventeenth century, that the hypermasculinity of men preempts possibilities for collective peace.

Hobbes accordingly asserted that to establish societal peace, men must obey a king wielding absolute power over his subjects. He warned that "justice, equity, modesty, mercy, and (in sum) doing to others as we would be done to[,] of themselves, without the terror of some power to cause them to be observed, are contrary to our natural passions, that carry us to partiality, pride, revenge, and the like."<sup>90</sup> Hobbes proposed that men au-

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83. *Id.*

84. *Id.* at 75–76.

85. *Id.* at 41.

86. *Id.*

87. *Id.* Hobbes stated that "[h]onourable is whatsoever possession, action, or quality is an argument and sign of power." *Id.* at 53.

88. *Id.* at 76.

89. *Id.*

90. *Id.* at 106 (emphasis removed). Professor Harvey Mansfield wrote:

Hobbes pointedly omits courage, the virtue of manliness in premodern thought, from a list of the virtues. What is manliness, essentially, for Hobbes? It is not a virtue but a passion, a passion for preeminence that he calls vain-glory, or vanity. It is appetite but not for any particular thing, thus a generalized appetite that compels men to aggression.

HARVEY C. MANSFIELD, *MANLINESS* 166 (2006) (footnote omitted). The view summarized here conflates hypermasculinity with manliness. By contrast, the American colonists took pains to differentiate them. See *infra* Part IV.

thorize a single man as a sovereign monarch to act on their behalf for their collective peace and safety.<sup>91</sup> Under this procedure, men cannot withdraw their consent should they become dissatisfied with the sovereign.<sup>92</sup> That Hobbes would require all men to give up their rights to govern themselves forever reflects Hobbes's dour cynicism regarding the capacity of hypermasculine men to reform their antisocial tendencies.

Hobbes's support for absolute monarchy was traditional, but his reliance on authorization was not. In a world of rigid social hierarchy, he was unusual for his time in positing an account of authorization whereby men individually elected to establish a political society, and thus were treated as free and equal. More traditional justifications for monarchical authority appealed to tropes of social deference in the contexts of affect and religion.<sup>93</sup> But like Hobbes's argument from authorization, these arguments, as Part II will show, also relied indispensably on conceptions of male identity.

## II. ROBERT FILMER: THE AUTHORITY OF THE FATHER AND THE MANLY MONARCH

Hobbes argued that the king's authority was consciously crafted by men who had collectively consented to authorize a single man as the sovereign to represent them all. But Hobbes's authorization theory was not the only—or, in its time, even the prevalent—means to justify the king's absolute power. The fa-

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91. Hobbes wrote:

The only way to erect such a common power as may be able to defend them from the invasion of foreigners and the injuries of one another . . . is to confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will, which is as much as to say, to appoint one man or assembly of men to bear their person, and every one to own and acknowledge himself to be author of whatsoever he that so beareth their person shall act, or cause to be acted, in those things which concern the common peace and safety, and therein to submit their wills, every one to his will, and their judgments, to his judgment.

HOBBS, *supra* note 28, at 109.

92. *Id.* ("This is more than consent, or concord; it is a real unity of them all, in one and the same person, made by covenant of every man with every man, in such manner as if every man should say to every man *I authorise and give up my right of governing myself to this man . . . on this condition, that thou give up thy right to him, and authorize all his actions in like manner.*").

93. See *infra* Part II.

vored alternative was patriarchalism, and its heralded text was Sir Robert Filmer's *Patriarcha*.<sup>94</sup> The king, Filmer urged, was and should be treated as a powerful and divine father entitled to absolute obedience from his subjects.<sup>95</sup> The subjects, in turn, were politically helpless children who required the guidance of a patriarchal king.<sup>96</sup>

Patriarchalism's conception of male identity differed from that in Hobbes's authorization theory. Hobbes's arguments always derived from a no-nonsense desire to establish societal peace. An omnipotent king might be irresponsible, but Hobbes insisted that even an irresponsible king was better than the "dissolute condition of masterless men, without subjection to laws and a coercive power to tie their hands from rapine and revenge."<sup>97</sup> Filmer's thesis is not so spare in its expectations. Men, on Filmer's account, need and crave the love of a powerful patriarch, and, like reverential sons, they desire to submit themselves to his commands without question. According to this logic, the kind of constitutional democracy the colonists advocated would prove unwise for at least two reasons: One, men would lack the mature competence to reason for themselves as autonomous citizens, and two, they would lack a king who would furnish fatherly guidance and upon whom they would want to bestow loving obedience.

Filmer's normative perspective was not eccentric for its time. Patriarchalism came to institutional realization in England under King James I in the late sixteenth century.<sup>98</sup> Contra Hobbes's impersonal diction of authorization, King James gave us the idiom of familial affect:

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94. ROBERT FILMER, *PATRIARCHA AND OTHER WRITINGS* (Johann P. Sommerville ed., Cambridge Univ. Press 1991) (1680).

95. *Id.* at 12 ("If we compare the natural duties of a father with those of a king, we find them to be all one, without any difference at all but only in the latitude or extent of them. As the father over one family, so the king, as father over many families, extends his care to preserve, feed, clothe, instruct and defend the whole commonwealth. His wars, his peace, his courts of justice and all his acts of sovereignty tend only to preserve and distribute to every subordinate and inferior father, and to their children, their rights and privileges, so that all the duties of a king are summed up in an universal fatherly care of his people.").

96. *See id.*

97. HOBBS, *supra* note 28, at 117.

98. *See* GORDON J. SCHOCHET, *PATRIARCHALISM IN POLITICAL THOUGHT: THE AUTHORITARIAN FAMILY AND POLITICAL SPECULATION AND ATTITUDES ESPECIALLY IN SEVENTEENTH-CENTURY ENGLAND* 86 (1975).

A good King, thinking his highest honour to consist in the due discharge of his calling, emploieeth all his studie and paines, to procure and maintaine, by the making and execution of good Lawes, the well-fare and peace of his people; and as their naturall father and kindly Master, thinketh his greatest contentment standeth in their prosperitie, and his greatest suretie in hauing their hearts, subiecting his owne priuate affections and appetites to the weale and standing of his Subiects.<sup>99</sup>

King James echoed these views elsewhere: "[A]s the Father by his fatherly duty is bound to care for the nourishing, education, and vertuous government of his children; even so is the king bound to care for all his subjects."<sup>100</sup>

Yet if the king was morally expected to care for his subjects, the subjects owed him unconditional obedience:

[I]f the children may upon any pretext that can be imagined, lawfully rise up against their Father, cut him off, & choose any other whom they please in his roome; and if the body for the weale of it, may for any infirmitie that can be in the head, strike it off, then I cannot deny that the people may rebell, controll, and displace, or cut off their king at their owne pleasure, and upon respects moving them.<sup>101</sup>

Overthrowing a king, a justifiable act from our present perspective, is made unthinkable by equating it with the taboo of patricide. Filmer also wrote that "[t]he father of a family governs by no other law than by his own will, not by the laws or wills of his sons or servants," and that "[t]here is no nation that allows children any action or remedy for being unjustly governed."<sup>102</sup> According to patriarchalism, if any legal limits were to be set on the king, they were to be, like the social limits on the father, entirely self-imposed.<sup>103</sup> "Patriarchalism, at its base, treated status as natural and supported authority and duty without reciprocity."<sup>104</sup> Patriarchalism thus denies masculin-

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99. KING JAMES, *THE POLITICAL WORKS OF JAMES I 18-19* (Charles Howard McIlwain ed., Harvard Univ. Press 1918) (1616).

100. SCHOCHET, *supra* note 98, at 87.

101. *Id.*

102. FILMER, *supra* note 94, at 35.

103. *See id.* ("For as kingly power is by the law of God, so it hath no inferior law to limit it.").

104. SCHOCHET, *supra* note 98, at 83. This was all the more so because, on Filmer's account, the king's authority as the father of his people derived from God. Although Hobbes had identified ordinary men as the source by which the sover-

ity's constituent properties in power, strength, and independence to everyone save the king; as figurative children, male subjects are infantilized and their manhood preempted.

The endorsements of absolute monarchy will seem odd to democratic minds, but just as Hobbes's condemnation of hypermasculinity resonated with those who bore the violent disruptions of an honor culture, Filmer's political position found adherents under King James in Stuart England. In contemporary America the critique of patriarchy has converged on its disempowerment of women;<sup>105</sup> patriarchy in the seventeenth century was also the chief justification for subordinating socially inferior men.<sup>106</sup>

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eign could derive his authority, Filmer located the same in God. See FILMER, *supra* note 94, at 7–8. Kings in seventeenth-century England, Filmer argued, could trace their lineage to Adam, to whom God had first bestowed the right of complete authority. See *id.* at 7. "It may seem absurd," he conceded, "to maintain that kings now are the fathers of their people, since experience shows the contrary." *Id.* at 10. But Filmer continued to insist on the analogy:

It is true, all kings be not the natural parents of their subjects, yet they all either are, or are to be reputed as the next heirs to those progenitors who were at first the natural parents of the whole people, and in their right succeed to the exercise of supreme jurisdiction. And such heirs are not only lords of their own children, but also of their brethren, and all others that were subject to their fathers.

*Id.* at 10. In any case, on Filmer's terms people could not choose their leaders because divine sanction underwrites the authority of male leaders. See *id.* at 10–11. This was manly authority that was divinely sanctioned. Accordingly, there was no room for constitutional limits under patriarchal government.

105. See, e.g., Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21; Nikolaus Benke, *Women in the Courts: An Old Thorn in Men's Sides*, 3 MICH. J. GENDER & L. 195 (1995); Barbara Katz Rothman, *Daddy Plants a Seed: Personhood Under Patriarchy*, 47 HASTINGS L.J. 1241 (1996); Gila Stopler, *Gender Construction and the Limits of Liberal Equality*, 15 TEX. J. WOMEN & L. 43 (2005).

106. Professor Schochet explained:

Before a man achieved social status—if he ever did—he would have spent a great many years in various positions of patriarchal subordination, passing successively from the rule of his father to that of a master, an employer, a landlord, and perhaps a magistrate. If he were high enough in the social scale to receive a formal education, he was also subject to the control of his teacher. The authority of ministers, which touched everyone in the population, was a further part of this same larger pattern. There is nothing particularly striking about these various forms of subordination in themselves. What is significant is that the relationships they comprised—master and servant, teacher and student, employer and worker, landlord and tenant, clergyman and congregant, and magistrate and subject—were all understood as identical to the relationship of father and children.

SCHOCHET, *supra* note 98, at 66.

A number of factors contributed to the widespread acceptance of this social arrangement. For example, it was one that ordered a man's life from his birth.<sup>107</sup> Most important, though, patriarchy was propped up by religious leaders. The article of faith, as it were, derived from the Old Testament—specifically, the Fifth Commandment injunction to obey one's parents. The Anglican Church formulated a theory of patriarchy based on the Fifth Commandment's injunction to "Honour thy father and thy mother."<sup>108</sup> As political theorist Gordon Schochet wrote, "There should be no question that Englishmen of all backgrounds were taught very early in their lives that they had to obey the king because God ordered it when He gave the Fifth Commandment to Moses."<sup>109</sup> It is safe to assume that nearly everyone had learned the Church's catechism and was required to recite during services the religious duty "to honour and obey the King and all that are put in authority under him: to submit myself to all my governors, teachers, spiritual pastors and masters: to order myself lowly and reverently to all my betters."<sup>110</sup> Consider also the *Shorter Catechism* of the Westminster Assembly:

Q[uestion] 64. What is required in the fifth Commandment?

A[nswer]. The fifth Commandment requireth the preserving the honour, and performing the duties, belonging to every one in their severall places and relations, as Superiors, Inferiors, or Equals.

Q. 65. What is forbidden in the fifth Commandment?

A. The fifth Commandment forbiddeth the neglecting of, or doing anything against, the honour and duty which belongeth in their severall places and relations.<sup>111</sup>

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107. *Id.* at 73 ("[The] individual was confronted with a patriarchally ruled family and society from birth; until a man became the head of his own household, he was successively in the status of a filial inferior to his father, his master, and his employer. . . . These familial experiences must have played a central role in the political socialization process in Stuart England . . .").

108. *Id.*

109. *Id.* at 81.

110. *Id.* at 78 (quoting CATECHISM OF THE CHURCH OF ENGLAND (1549), reprinted in PHILLIP SCHAFF, 3 A HISTORY OF THE CREEDS OF CHRISTENDOM 519–20 (London 1878)).

111. *Id.* at 79 (alteration in original) (emphasis removed) (quoting WESTMINSTER ASSEMBLY OF DIVINES, THE SHORTER CATECHISM (1644), reprinted in CATECHISMS OF THE SECOND REFORMATION 22–23 (London 1886)).

Similarly, John Poynt's *Catechismus Brevis*, a book prescribed by the king to be used in all schools, interpreted the Fifth Commandment as ordering students to "love, feare, and reverence" their natural parents and stated that the Commandment "byndeth us also most humbly, and with most natural affection to obei the magistrate: to reverence the Minyesters of the church, oure Scholemasters, with al oure elders, and betters."<sup>112</sup> An anonymous catechism from 1614 referred to the father and mother of the Fifth Commandment as "[o]ur naturall Parentes, the fathers of our Countrie, or of our houses, the aged, and our fathers in Christ."<sup>113</sup> Robert Ram observed in 1655 that obedience was due to "1. Our naturall Parentes, Fathers and Mothers in the flesh. 2. Our Civil Parents, Magistrates, Governours, and all in Authority. [and] 3. Our spiritual Parents, Pastors, Ministers, and Teachers."<sup>114</sup> In interpreting the Fifth Commandment, clergyman Richard Allestree clarified that there were three Parents to whom obedience was due: the civil, the spiritual, and the natural.<sup>115</sup> Allestree continued: "[t]he Civil Parent is he whom God hath established the Supreme Magistrate, who by a just right possesses the Throne of a nation," and he is a "common father of all those that are under his authority."<sup>116</sup>

Likewise, clergyman Humphrey Brailsford expounded the rights of inferiors in a manner more revealing about the depth of dependency on superiors. His interpretation of the Fifth Commandment's exhortation to honor one's parents demonstrates his view:

These words, Father and Mother, include all superiours, as well as a Civil Parent (the King and His Magistrates, a Master, a Mistress, or an Husband) and an Ecclesiastical Parent (the Bishop and Ministers) as the natural Parent that begat and bore thee: to all these I owe Reverence and Obediance, Service and Maintenance, Love and Honour.

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112. *Id.* at 79–80 (quoting JOHN POYNET, A SHORT CATECHISM, OR PLAYNE INSTRUCTION fol. vi. (London 1553) (a translation of *Catechismus Brevis*)).

113. *Id.* at 80 (quoting SHORT QUESTIONS AND ANSWERS, CONTAYNING THE SUMME OF CHRISTIAN RELIGION sigs. B2–B3 (London 1614)).

114. *Id.* (alteration in original) (quoting ROBERT RAM, THE COUNTRYMENS CATECHISME: OR, A HELPE FOR HOUSEHOLDERS 39 (London 1655)).

115. *See id.*

116. *Id.* (quoting RICHARD ALLESTREE, THE WHOLE DUTY OF MAN LAID DOWN IN A PLAIN AND FAMILIAR WAY, at xxvii (London 1842) (1658)).

... And I must have from my Natural Father, Maintenance, Education, Instruction, Correcting and Blessing: From my King, Justice, Reforming Abuses in Religions, Encouragement to the Good, Punishment to the Bad . . . From my Master (or Mistress) Instruction, Food, Correction, Wages: From my Minister, a Good Example and wholesome Administration of Spiritual Things.<sup>117</sup>

Obedience to the king was simply the highest rung in a pervasive hierarchy that was seen as natural and divinely ordered. On this view, men required a strict social and political hierarchy so that they could find persons to whom they could owe obedience, and from whom they could receive love and direction.

In light of Filmer's statements, one may wonder how to make sense of Hobbes's depiction of the life of man as poor, nasty, brutish, and short. This Article's discussion of Filmer suggests that a structure of patriarchal relationships effectively regulated men and preserved the semblance of peace, but Hobbes had conjured a scene of unruly masculinity and societal disorder. Given that Filmer and Hobbes were describing roughly the same period of early modern England, what should one make of these seemingly incongruous narratives? One reading is that the fights over manly honor coexisted uneasily with patriarchy's story of social cohesion.<sup>118</sup> Another reading is that the fights, instead of undermining the hierarchical order presupposed by patriarchy, were evidence of its appeal, as men jockeyed violently for a higher social position. Violence in early modern England was "a vital tool in men's maintenance of hierarchy and reputation, routinely used to articulate subtle status distinctions between men."<sup>119</sup> Still another explanation is that what Hobbes solemnly delivered as sociological truth was deliberately exaggerated to strengthen the appeal of his political propositions.<sup>120</sup>

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117. *Id.* at 80–81 (alteration in original) (quoting HUMPRHEY BRAILSFORD, *THE POOR MAN'S HELP* 40 (London 1692)).

118. See SHEPARD, *supra* note 64, at 151 ("Patriarchal expectations of orderly comportment in men were therefore directly contravened by codes of conduct which seem to have governed men's interaction in the streets and fields of early modern England.").

119. *Id.* at 140.

120. Consider how Hobbes misrepresented Aristotle's thoughts about the inherently social nature of human beings. See DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* 77 (1989).



What is clear is that the accounts of men as infantile and dependent, in Filmer's terms, or as hypermasculine and violent, in Hobbes's, were critical in bolstering the case for absolute monarchy. Yet critics of absolute monarchy existed as well. Even before Thomas Paine compared the king to an "ass,"<sup>121</sup> English advocates for limited government made themselves heard. Writing nearly one hundred years before Paine, none was more prominent than John Locke.

### III. LOCKE'S ATTACK ON PATRIARCHALISM AND ABSOLUTE MONARCHY

A contemporary of Sir Robert Filmer, John Locke used his *Two Treatises of Government* to skewer Filmer's ideas, which Locke referred to as "glib Nonsense put together in well sounding English."<sup>122</sup> Filmer had argued that the king properly exercised absolute right over his subjects as a father did over his children.<sup>123</sup> The normative force of Filmer's argument hung on a particular—if by our lights peculiar—reading of the account of Adam in the Old Testament. It was a reading that Locke would not suffer.

First, Filmer argued there was never a time when men enjoyed natural freedom, because Adam was the first patriarchal king, in a long line of kings, to be granted a right by God to rule over others.<sup>124</sup> Locke incredulously retorted, "Whatever God gave by the words of this Grant [in the Book of Genesis], it was not to Adam in particular, exclusive of all other Men: whatever Dominion he had thereby, it was not a Private Dominion, but a Dominion in common with the rest of Mankind."<sup>125</sup> The Bible, Locke explained, declared that God had given all men, not just Adam, a right of dominion.<sup>126</sup> Mischievously, Locke also pointed out that God had given the power of domain to them only *after* He had created Eve, thus suggest-

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121. THOMAS PAINE, *COMMON SENSE*, reprinted in THOMAS PAINE, *COLLECTED WRITINGS* 5, 16 (Eric Foner ed., 1995) (1776) [hereinafter PAINE COLLECTION].

122. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 137–38 (Peter Laslett ed., Cambridge Univ. Press 1988) (1691).

123. See FILMER, *supra* note 94, at 10–12.

124. See *id.* at 7.

125. JOHN LOCKE, *The First Treatise on Government*, in LOCKE, *supra* note 122, at 141, 161 (emphasis removed).

126. See *id.*

ing in a mood of proto-feminism that God had given Eve an equal right to rule.<sup>127</sup> Besides, he jeered, why would God want to reward with kingship a fool as insolent as Adam, who disobeyed His orders and fell to sin?<sup>128</sup> "This was not a time, when *Adam* could expect any Favours, any grant of Priviledges, from his offended Maker."<sup>129</sup>

Next, Locke tackled Filmer's argument that Adam embodied and introduced the inviolable principle that fathers may rule their children, and that, by extension, kings may rule their subjects. "For as Adam was lord of his children," Filmer had declared, "so his children under him had a command and power over their own children, but still with subordination to the first parent, who is lord paramount over his children's children to all generations, as being the grandfather of his people."<sup>130</sup> Putting aside the curious absence of any recognition by Filmer that Adam is conventionally accepted as the father of all peoples after him, what is Locke's response? Locke suggested that Filmer believed fathers have "Power over the Lives of their Children, because they give them Life and Being."<sup>131</sup> This argument presupposes that "*exposing or selling their Children*" is a "Proof of their Power over them."<sup>132</sup> But Locke snapped back that the "Dens of Lions and Nurseries of Wolves know no such Cruelty as this."<sup>133</sup> "[D]oes [God] permit us," Locke asked, "to destroy those he has given us the Charge and Care of, and by the dictates of Nature and Reason, as well as his Reveal'd Command, requires us to preserve?"<sup>134</sup>

After criticizing Filmer, Locke offered his own account of the origins of society. Whereas Filmer began with God's appointment of Adam as the first king on earth, Locke began his narrative with a state of nature preceding government where all men possessed the same rights and obligations.<sup>135</sup> A state of nature

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127. *See id.*

128. *See id.* at 172.

129. *Id.*

130. FILMER, *supra* note 94, at 6–7.

131. LOCKE, *supra* note 125, at 178 (emphasis removed).

132. *Id.* at 180.

133. *Id.* at 181.

134. *Id.*

135. JOHN LOCKE, *The Second Treatise of Government*, in LOCKE, *supra* note 122, at 265, 269.

is a "State of perfect Freedom" in which men may "order their Actions, and dispose of their Possessions, and Persons as they think fit . . . without asking leave, or depending upon the Will of any other Man."<sup>136</sup> The only moral limit is the "Law of Nature."<sup>137</sup> Locke explained that "Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions."<sup>138</sup> The description offered here may be more mysterious than we would wish, but its political uses were palpable. Locke's pronouncement that men possess reason and that, theoretically, anyone could use reason to comprehend the law of nature refuted the guardians of absolute monarchy like Hobbes, who argued that men were too hypermasculine for self-government, and Filmer, who believed that men were too infantile. Furthermore, Locke's conception of the state of nature, by acknowledging the equal freedom of all to do "as they think fit," rejected the notion that any one man, including Adam, had unlimited power over another by virtue of divine right or good birth. Locke tried to fortify his account of the law of nature by dubbing it a "measure God has set to the actions of Men,"<sup>139</sup> a characterization that also functioned as an indirect jab against Filmer's relentless invocation of divine authority.

Alas, problems arise in Locke's state of nature. Some men willfully violate the law of nature<sup>140</sup> while others disagree violently over its ambiguous meaning as applied to their cases.<sup>141</sup> Locke lamented that "nothing but Confusion and Disorder will follow" in the state of nature.<sup>142</sup> "Self-love will make Men partial to themselves and their Friends"<sup>143</sup> while "Ill Nature, Passion and Revenge will carry them too far in punishing others."<sup>144</sup> This

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136. *Id.* (emphasis removed).

137. *Id.*

138. *Id.* at 271.

139. *Id.* at 272.

140. *See id.* at 275–76, 280, 351.

141. *See id.* at 351.

142. *Id.* at 275.

143. *Id.*

144. *Id.*

situation imperils person and property.<sup>145</sup> What began as a placid state of nature degenerates into a state of war where men seek to subdue each other.<sup>146</sup> To leave this state of war, Locke argued, men must consent with each other to enter civil society, for it is only in civil society that men can establish indifferent judges with powers of enforcement.<sup>147</sup> According to Locke, civil society is formed when men come together and agree to abstain from exercising their individual natural rights to enforce the law of nature.<sup>148</sup> After such an agreement, men may create a government that will seek to protect their safety and property.<sup>149</sup>

But this government is not without legal limits. Locke announced that "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."<sup>150</sup> "[S]uch Revolutions," Locke qualified, "happen not upon every little mismanagement in publick affairs."<sup>151</sup> For him, "[g]reat mistakes in the ruling part, many wrong and inconvenient Laws, and all the slips of humane frailty will be born by the People, without mutiny or murmur."<sup>152</sup> Revolution is justified, however, if people have some "manifest evidence" regarding the "evil intention of their Governors."<sup>153</sup> In these statements, Locke distinguished himself from Hobbes.<sup>154</sup> Hobbes had argued that in the absence of a state, there is violent anarchy.<sup>155</sup> Locke, by contrast, believed that civil society can survive the dismantling of a tyrannical state. By thus dis-

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145. See *id.* at 350–51. Locke folded a person's right to his bodily safety into the right of property. He wrote that "every Man has a *Property* in his own *Person*. This no Body has any Right to but himself." *Id.* at 287.

146. See *id.* at 278–79.

147. See *id.* at 276, 352.

148. See *id.* at 330–31.

149. See *id.* at 331–32.

150. *Id.* at 412 (emphasis removed). Professor Mansfield remarked that Locke "encourages a manly vigilance in politics . . . that has endured to our time." MANSFIELD, *supra* note 90, at 176.

151. LOCKE, *supra* note 135, at 415 (emphasis removed).

152. *Id.* at 415 (emphasis removed).

153. *Id.* at 418.

154. See MANSFIELD, *supra* note 90, at 177 ("For the sake of freedom [Locke] allowed more to manliness than did Hobbes: free and manly go together like soul and body, mutually supportive and fit for each other.")

155. See HOBBS, *supra* note 30, at 76.

tinguishing civil society from the state, Locke added another conceptual prop against unlimited monarchy.

Notwithstanding these positions, Locke never advocated the abolishment of the monarchy; he only wanted restrictions on its rule.<sup>156</sup> The general sentiments behind Locke's arguments, however, began to intensify in America and to manifest themselves through more democratic arrangements in government that relied on conceptions of male identity different from those of Filmer and Hobbes.

#### IV. THE AUTHORITY OF THE PEOPLE

As Locke demonstrated, the Americans were not the first to criticize the king's absolute authority. What set them apart was that their political vision entirely rejected the need for any king. Partly for this reason, the historian Gordon S. Wood has called the American Revolution "as radical and social as any revolution in history."<sup>157</sup>

With their rejection of patriarchy, the colonists prepared for the formal empowerment of the common people. The greatest expression of this democratic ethos was the Declaration of Independence. Here are the oft-quoted words:

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.<sup>158</sup>

Though familiar, the words are startling when juxtaposed against the arguments of Hobbes and Filmer. Hobbes had ar-

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156. LOCKE, *supra* note 135, at 402–03. Note here that Locke's justification for writing his most famous work, *The Second Treatise of Government*, is "to establish the Throne of our Great Restorer, Our present King William; to make good his Title, in the Consent of the People." LOCKE, *supra* note 122, at 137.

157. GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 5 (1992).

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

gued that men, being violently hypermasculine, could secure collective peace only by consenting with each other to obey almost any command by the sovereign. According to the Declaration, men consent not with each other but with their political leaders such that whenever government becomes "destructive" of the ends of "Life, Liberty, and the pursuit of Happiness," men may "alter or . . . abolish" it. And whereas Hobbes would permit resistance only when the sovereign threatened death, the Declaration states that such resistance is warranted when the government threatens a man's right to liberty or even happiness. The Declaration also challenges Filmer's account of political authority. Although Filmer had invoked God as a source of the king's absolute authority, the Declaration invokes God as the source for the people's right to depose such authority. So too, Filmer had posited that the privileged few were selected by God to rule over others; the Declaration proclaims that "all men are created equal" insofar as all possess rights to revolution. The closest English analogue to the Declaration of Independence is Parliament's Declaration of Rights in 1689.<sup>159</sup> Yet the latter did not refer to those things that defined the American Declaration of Independence: the universal equality of men and the people's right of revolution.<sup>160</sup>

The Federal Constitution also locates its authority in the People. Its Preamble reads:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common Defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>161</sup>

There is no mention of kings. The Constitution is created by the "People of the United States" and for "ourselves and our Posterity."<sup>162</sup> Likewise, the Ninth Amendment states that "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the peo-

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159. See MICHAEL P. ZUCKERT, *NATURAL RIGHTS AND THE NEW REPUBLICANISM* 5, 7 (1994).

160. See *id.* at 6–14.

161. U.S. CONST. pmbl.

162. See *id.*

ple.”<sup>163</sup> The Tenth Amendment similarly identifies certain rights owned by the people that theoretically can be used against the government: “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.”<sup>164</sup>

Animating these institutional commitments is the philosophy of republicanism.<sup>165</sup> Although ambiguous, the term does find reference in the Constitution: “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion.”<sup>166</sup> James Madison insisted that the new American government must be “strictly republican” and that “no other form would be reconcileable with the genius of the people of America.”<sup>167</sup> “What then are the distinctive characters of the republican form?” asked Madison.<sup>168</sup> He answered:

[W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour. It is *essential* to such a government, that it be derived from the great body of the society, not from an inconsiderable proportion, or a favoured class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their

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163. U.S. CONST. amend. IX.

164. U.S. CONST. amend. X. Note also that “Article V’s mechanisms for constitutional amending may be understood as endorsing participation by ‘the people’ and their immediate representatives in constitutional revision.” WAYNE D. MOORE, *CONSTITUTIONAL RIGHTS AND POWERS OF THE PEOPLE* 5 (1996). Chief Justice John Marshall echoed this view: “The government of the Union . . . is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 159, 199 (1819).

165. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993); Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131 (1995); Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988). See generally M.N.S. SELLERS, *AMERICAN REPUBLICANISM: ROMAN IDEOLOGY IN THE UNITED STATES CONSTITUTION* (1994). Professor Laura Kalman argues that some prominent left-wing professors have mangled republicanism’s historical character in their zeal to conscript it as a philosophical banner. See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996).

166. U.S. CONST. art. IV, § 4.

167. *THE FEDERALIST* NO. 39, at 194 (James Madison) (George W. Carey & James McClellan eds., 2001).

168. *Id.*

powers, might aspire to the rank of republicans, and claim for their government the honourable title of republic.<sup>169</sup>

Madison explained that America alone had a truly republican government. Even England, with its constitution and its separation of powers, was not republican in his view because its government was partly controlled by "a hereditary aristocracy and monarchy."<sup>170</sup> No wonder the generally low-key Madison declared that the colonists "accomplished a revolution which has no parallel in the annals of human society."<sup>171</sup>

Yet, because the republicanism articulated by the Constitution lacked precedent, anxiety about its success abounded. Alexander Hamilton at once acknowledged the authority of the people and the dangers of giving them untrammelled discretion. For him, the project of republican government could be interpreted as a test to determine "the important question" of "whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force."<sup>172</sup> It is entirely possible for Americans to make "a wrong election,"<sup>173</sup> as history shows that even small republics floundered. "It is impossible," Hamilton wrote, "to read the history of the petty republics of Greece and Italy, without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolutions, by which they were kept perpetually vibrating between the extremes of tyranny and anarchy."<sup>174</sup>

Even if the references to "tyranny" and "anarchy" do not exactly map onto what Hobbes had called, respectively, absolute

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169. *Id.* See also *id.* NO. 49, at 261 (James Madison) ("[T]he people are the only legitimate fountain of power."). On the other hand, the Federalist Papers were not in favor of direct democracy. See *id.* NO. 10, at 46 (James Madison) ("[A] pure democracy, by which I mean, a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction.").

170. *Id.* NO. 39, at 194 (James Madison).

171. *Id.* NO. 14, at 67 (James Madison).

172. *Id.* NO. 1, at 1 (Alexander Hamilton). John Jay offered a related invitation: "When the people of America reflect, that the question now submitted to their determination, is one of the most important that has engaged, or can well engage, their attention, the propriety of their taking a very comprehensive, as well as a very serious, view of it, must be evident." *Id.* NO. 2, at 5 (John Jay).

173. *Id.* NO. 1, at 1 (Alexander Hamilton).

174. *Id.* NO. 9, at 37 (Alexander Hamilton).



monarchy and the state of nature, Hamilton, like Hobbes, appeared to recognize that man's inherent flaws can sabotage self-government. "Happy will it be," Hamilton mused, "if our choice should be directed by a judicious estimate of our true interests, uninfluenced by considerations foreign to the public good."<sup>175</sup> "But," he lamented, "this is more ardently to be wished for, than seriously to be expected."<sup>176</sup> For the plan of the Federal Constitution "affects too many particular interests [and] innovates upon too many local institutions, not to involve in its discussion a variety of objects extraneous to its merits, and of views, passions and prejudices little favourable to the discovery of truth."<sup>177</sup>

Madison also voiced these worries, especially with regard to factions. He defined a faction as "a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."<sup>178</sup> To extinguish the causes of factions would be impossible, for the "latent causes of faction" are "sown in the nature of man."<sup>179</sup> First, there is man's reason, which remains "fallible" and which will engender "different opinions" that will organize themselves into conflicting group interests.<sup>180</sup> Second, "[a]s long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves."<sup>181</sup> Indeed, Madison lamented that "[i]n all very numerous assemblies, of whatever characters composed, passion never fails to wrest the sceptre from reason."<sup>182</sup> So inevitable is passion's force that "[h]ad every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob."<sup>183</sup>

These observations suggest that, because of defects in man's nature, republics were not guaranteed to remain stable. Paradoxically, the Framers had no choice but to put much of their faith in

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175. *Id.* NO. 1, at 1 (Alexander Hamilton).

176. *Id.*

177. *Id.*

178. *Id.* NO. 10, at 43 (James Madison).

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* NO. 55, at 288 (James Madison).

183. *Id.*

the people, for the Constitution derived solely from their authority. Hobbes's sovereign also derived his whole authority from the people, but once authorized his sovereign could never be lawfully deposed or shackled with legal restrictions.<sup>184</sup> The Constitution, on the other hand, empowered the people to change, limit, and even dissolve their government.<sup>185</sup>

Given the significance of these powers, the Framers implored men to embark on the difficult but necessary task of vigilantly exercising the correct sort of public virtue. Baron de Montesquieu partly anticipated the colonists' new understanding of virtue forty years before the American Revolution. Montesquieu had surmised that, although a monarchy can subsist without public virtue by its subjects, a republic would perish. "There need not be much integrity for a monarchical or despotic government to maintain or sustain itself," he declared.<sup>186</sup> Rather, the "force of the laws in the one and the prince's ever-raised arm in the other can rule or contain the whole."<sup>187</sup> On the other hand, Montesquieu explained, "in a popular state [there] must be an additional spring which is called VIRTUE."<sup>188</sup> This hypothesis from France was also aired in America. John Adams wrote that "[u]nder a well regulated Commonwealth, the People must be wise [and] virtuous and cannot be otherwise."<sup>189</sup> By contrast, "[u]nder a Monarchy [men] may be as vicious and foolish as they please, nay, they cannot but be vicious and foolish," a sure reference to the mindless scuffles among the nobility over matters of honor.<sup>190</sup> Pastor Samuel McClintock recited similar views in a sermon delivered before

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184. See *supra* notes 91–92 and accompanying text.

185. See Mark E. Brandon, *Family at the Birth of American Constitutional Order*, 77 TEX. L. REV. 1195, 1227 (1999).

186. MONTESQUIEU, *THE SPIRIT OF THE LAWS* 22 (Ann M. Cohler et al. trans., Cambridge Univ. Press 1989) (1748).

187. *Id.*

188. *Id.*

189. Letter from John Adams to Mercy Warren (Jan. 8, 1776), in 1 THE FOUNDERS' CONSTITUTION 669, 669 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter Adams Letter].

190. *Id.*; see also FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 70 (1985) ("The vital—that is life-giving—principle of republics was *public virtue*."); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 68 (1969) ("Every state in which the people participated needed a degree of virtue; but a republic which rested solely on the people absolutely required it.").

the New Hampshire legislature on the commencement of the state's new constitution.

In a word, the history of all nations and ages, shews that public virtue makes a people great and happy, vice contemptible and miserable. . . . In absolute governments, the principle of honor may in some measure supply the place of virtue, and there may be the shew of public happiness and grandeur, while the people are really in a state of slavery; but as virtue is the basis of republics, their existence depends upon it, and the moment that the people in general lose their virtue, and become venal and corrupt, they cease to be free. This shews of what importance it is to preserve public virtue under such a constitution as our's, and how much it becomes all who have any regard to the good of their country . . . .<sup>191</sup>

Here, McClintock explicitly segregated "honor" from "virtue" by charging virtue to do work for the "good of their country," while rebuffing honor as obsessed with "venality."

What do these calls for public virtue have to do with male identity and the Constitution? Public virtue made demands on men to fashion their identities in a way that would evince their competence for self-government. This meant that American men also had to refute the competing descriptions of male identity ascribed to them by those, like Filmer and Hobbes, who would have denounced the Constitution as unviable or dangerous. Americans sought to show that their men were neither hypermasculine nor infantilized, both traits that made men ineligible for constitutional democracy in the eyes of Hobbes and Filmer. The Americans thus produced an ideal of a gentleman who not only was abidingly civil in the face of insults and injuries, but also always insisted on thinking for himself with calm deliberation. Civility and deliberation, then, became two of the foremost public virtues for American men.

### A. *Civility*

Beyond its affiliation with a dainty etiquette, civility can be an indispensable social adhesive for a community. As hinted by its etymological presence in "civilization" and "civil society," civility is at base an ethic of cooperation, or as Stephen

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191. Samuel McClintock, A Sermon on Occasion of the Commencement of the New-Hampshire Constitution, in 1 *POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730-1805*, at 789, 805 (Ellis Sandoz ed., 1998).

Carter wrote, "the sum of the many sacrifices we are called to make for the sake of living together."<sup>192</sup> And living together implies the existence of a community, a connection made lucid in the now forgotten but once tangled semantic origins of "civility" and "citizenship."<sup>193</sup> Using "civility" to refer to the latter, Coverdale in 1568 wrote in *Christ's Cross* that "[y]our joy is in heaven, where your conservation and civility is."<sup>194</sup> Referring again to citizenship, Wyclife's *Acts* from 1382 reads, "I with moche summe gat this ciuylite."<sup>195</sup> Similarly, civility once served as a stand-in for "[p]olity, civil organization and government."<sup>196</sup> To wit: In 1537, Starkey announced in *To Pole* that "[i]n the joyning of these two lives together . . . stondeth the chief point of true christian civility."<sup>197</sup> More generally, civility was "[c]onformity to the principles of social order" and "behaviour befitting a citizen."<sup>198</sup> So Spenser declared in 1596 that "[t]hey should have beene reduced to perpetuall civilitie," and Milton wrote in 1641 that it was important "[t]o inbreed and cherish in a great people the seeds of vertu, and publick civility."<sup>199</sup>

Of course, the contemporary understanding of civility does not conflate it with citizenship. Even by the 1600s, people used civility to mean an "act or expression of politeness"<sup>200</sup> and "[d]ecency" and "seemliness."<sup>201</sup> As the Chicago sociologist Edward Shils explained, civility as we presently understand it "is a broader phenomenon than citizenship in the state."<sup>202</sup> He posited that citizenship is a phenomenon of the state, in that it is "the complex of actions of submission to, criticism and active guidance of the government."<sup>203</sup> Be that as it may, Shils made a

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192. STEPHEN L. CARTER, CIVILITY: MANNERS, MORALS, AND THE ETIQUETTE OF DEMOCRACY 11 (1998); see also John M. Kang, *The Uses of Insincerity: Thomas Hobbes's Theory of Law and Society* 15 L. & LITERATURE 371 (2003) (making an analogous argument).

193. See 3 OXFORD ENGLISH DICTIONARY 256 (2d ed. 1989).

194. *Id.*

195. *Id.*

196. *Id.* at 257.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. EDWARD SHILS, THE VIRTUE OF CIVILITY: SELECTED ESSAYS ON LIBERALISM, TRADITION, AND CIVIL SOCIETY 73 (Steven Grosby ed., 1997).

203. *Id.* The political theorist Judith Shklar elaborated:

suggestive comment about civility's relation to political membership:

Civility is nevertheless a function of a sense of membership in a national society coterminous with the boundaries of the state. The society which is the object of civility is a national society; the state within which it operates is a national state. Nationality and civility seemed at one time to grow apace; they were not identical but they were intimately intertwined because civility was focused on the national society.<sup>204</sup>

These remarks at first seem somewhat implausible. Are we not civil to those who are non-Americans, and, when traveling abroad, have we not been treated with civility, even by people who hate our government? Still, although not the same as citizenship or nationalism, civility can serve as a means toward a nation's collective identity and social cohesion. Recall Locke's account of civil society as separate from the state. For Locke, the absence of the latter need not, as Hobbes threatened, return people to the state of nature; civil society could endure. Shils, like Locke, declared that "[t]he idea of civil society is the idea of society which has a life of its own, and which is separate from the state, and largely in autonomy from it, which lies beyond the boundaries of the family and the clan, and beyond the locality."<sup>205</sup> One index of a properly functioning civil society is, for Shils, a widespread practice of civility.<sup>206</sup> For civility, in political terms, "is an attitude of concern for the good of the entire society. . . . It is solicitous of the wellbeing of the whole of the

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Good citizenship should not be confused with what is usually meant by goodness. . . . Good citizens fulfill the demands of their polity, and they are no better and no worse as citizens than the laws that they frame and obey. They support the public good as it is defined by their constitution and its fundamental ethos. The good person and the good citizen could only be identical in a perfect state, and even then only if we accept the notion that civic virtue, manly rectitude as the term implies, is the best human character. With that exception the possibility of tension between personal morality and citizenship is always possible and even likely, and there are, of course, regimes so terrible that good people are bound to be bad citizens there, but America has never been quite that bad.

Judith N. Shklar, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 6–7 (1991).

204. SHILS, *supra* note 202, at 17 (differentiating nationality from civility and noting that "[w]hen nationality becomes nationalistic, it usually has become uncivil as well; the demand for complete national solidarity has often involved uncivil suppression").

205. *Id.* at 320–21.

206. *See id.* at 320–21, 335.

larger interest."<sup>207</sup> But unlike nationalism, which places national pride above individual well-being, civility is "respect for the dignity and the desire for dignity of other persons."<sup>208</sup> "Civility is," Shils stated, "conduct which accords, however superficially and however conventionally, esteem to others, either for particular properties or in general."<sup>209</sup> A civility worth its name "treats others as, at least, equal in dignity, never as inferior in dignity."<sup>210</sup> And consider Professor Carter's injunction that "[r]ules of civility are . . . also rules of morality: it is morally proper to treat our fellow citizens with respect, and morally improper not to."<sup>211</sup> So, too, Shils declared, "civility as a feature of civil society considers others as fellow-citizens of equal dignity in their rights and obligations as members of civil society."<sup>212</sup> Even when civility is insincere,<sup>213</sup> these remarks suggest that, at its heart, civility as a political practice involves a commitment, albeit sometimes only an outward one, to treat those in one's community with equal respect. Here it might be useful to compare the civility on offer to the honor sought by men in Hobbes's England. Civility, by its very meaning as equal respect or dignity, is something that all can possess. Indeed, the logic of civility requires that one bestow it on others instead of hoarding it for oneself. Honor is precisely the opposite of civility insofar as it does not acquire its value unless it is denied others.

Consonant with this rendering of honor, Hobbes announced that "the acknowledgement of power is called HONOR" and that "HONOURABLE are those signs for which one man acknowledgeth power or excess above his concurrent in another."<sup>214</sup> So runs the litany of things that Hobbes deemed honorable: "Beauty of person, consisting in a lively aspect of the counte-

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207. *Id.* at 335.

208. *Id.* at 338.

209. *Id.*

210. *Id.*

211. CARTER, *supra* note 192, at 11.

212. SHILS, *supra* note 202, at 338. One cannot be completely civil for "[s]elfishness and parochiality are inexpungible from human life." *Id.* at 350. Plus, we may not want consummate civility: civility can stifle diversity, dissent, and innovation, the sorts of things that a liberal democracy desires and nourishes. *See id.* at 97.

213. *See* Kang, *supra* note 192.

214. THOMAS HOBBS, THE ELEMENTS OF LAW NATURAL AND POLITIC 48 (J.C.A. Gaskin ed., Oxford Univ. Press 1994) (1640).

nance";<sup>215</sup> "general reputation amongst those of the other sex";<sup>216</sup> "to teach or persuade . . . because they be signs of knowledge";<sup>217</sup> "riches";<sup>218</sup> "nobility . . . as signs of power in the ancestors";<sup>219</sup> "authority" as "a sign of strength, wisdom, favour or riches by which it is attained."<sup>220</sup> All of these qualities are honorable because they are possessed by a few. This is why nobles dueling over church seats, cordwainers fought over whose boot was better, and squires pummeled each other for the attention of the king. The regard for honor obviously does not have to take such violent forms, but in early modern England, it did. Civility, on the other hand, seeks to make itself available to everyone in the relevant community; it is by nature a democratic resource of which all are presumptively deserving.

We should not be surprised, then, that the American colonists adopted civility as a cornerstone of their republican virtue.<sup>221</sup> After all, under republican government, the people sought to govern themselves without a king. Civility, with its emphasis on equal respect, would seem patently serviceable. An exploration of the particulars follows.

### 1. *Criticism of the King*

Let us begin with the colonists' criticism of monarchy, for this also furnishes us with a commentary about how men in a republican democracy should embrace civility and abjure hypermasculinity. Thomas Paine delivered the most incisive criticisms against monarchic rule. Paine denied that kings began from "an honorable origin,"<sup>222</sup> for theirs is founded on an arrogant and dangerous masculinity:

It is more than probable, that could we take off the dark covering of antiquity, and trace them to their first rise, that we

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215. *Id.* at 48–49.

216. *Id.* at 49.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. Note here Shils's rough equation of civility with Montesquieu's account of republican virtue. See SHILS, *supra* note 202, at 335. John Rawls's account of civility is roughly complementary to those of Shils and Montesquieu. See JOHN RAWLS, *POLITICAL LIBERALISM* 236 (1993).

222. PAINE, *supra* note 121, at 16.

should find the first of them nothing better than the principal ruffian of some restless gang, whose savage manners of pre-eminence in subtlety obtained him the title of chief among plunderers; and who by increasing in power, and extending his depredations, overawed the quiet and defenceless to purchase their safety by frequent contributions.<sup>223</sup>

A jarring rhetorical shift was afoot. Filmer had represented the king as the mature and manly father, and Hobbes had stigmatized ordinary men as hypermasculine and requiring control. By the late eighteenth century, Paine reversed these roles. The king is a "ruffian of some restless gang, whose savage manners . . . obtained him the title of chief among plunderers."<sup>224</sup> No longer the benevolent patriarch, he "overawed the quiet and defenseless to purchase their safety by frequent contributions."<sup>225</sup> Paine did not argue that the sovereign threatens civility just because he wields violence. Hobbes's sovereign, for example, held a monopoly on violence but meant to subdue hypermasculine men for purposes of civil society. By contrast, the violence on display by Paine's monarch symbolically connects him to the atavistic brute in Hobbes's state of nature; unlike Hobbes's sovereign, Paine's king signals the absence of civil society.

The difference lies in the latter king's attack on civility. Paine's king uses violence to assault the dignity of others, and he treats them as means to his singularly personal ends. Whereas Carter and Shils suggested that civility presupposes a community of equals, the king's violence initiates a gunman's tyranny that places him outside the limits of law. By laying siege to the norms of civility, Paine's king feels no compunction in trampling on the principle of the consent of the governed. Hence Paine worried:

When William the Conqueror subdued England, he gave them law at the point of the sword; and until we consent, that the seat of government, in America, be legally and authoritatively occupied, we shall be in danger of having it

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223. *Id.* Note also Filmer's concession that many kings "at first do most unjustly obtain the exercise of [the natural right of a supreme father]." FILMER, *supra* note 94, at 11. But Filmer, unlike Paine, was quick to add that such acts are "by the secret will of God." *Id.*

224. PAINE, *supra* note 121, at 16.

225. *Id.*



filled by some fortunate ruffian, who may treat us in the same manner, and then, where will be our freedom?<sup>226</sup>

The assault on civility can thus also present a threat to a republican government where the people formally retained the freedom of collective self-direction.

Partly for these reasons, the Constitution sought preemptive measures to limit political leaders from indulging the sort of politically destructive hypermasculinity exhibited by the king. Although a monarch claims the throne by inheritance, Article II, Section 1 of the Constitution requires election of the President to a four-year term.<sup>227</sup> Hamilton stressed in the *Federalist Papers* that the term limit demonstrates a "total dissimilitude between *him* and a king of Great Britain, who is an *hereditary* monarch, possessing the crown as a patrimony descendible to his heirs for ever."<sup>228</sup> Article II, Section 4 created another limit by stating that the President could be removed upon impeachment and conviction for treason, bribery, or "other high Crimes and Misdemeanors."<sup>229</sup> The king's position is "sacred and inviolable: there is no constitutional tribunal to which he is amenable; no punishment to which he can be subjected, without involving the crisis of a national revolution."<sup>230</sup> And whereas the king "has an absolute negative upon the acts of the two houses of parliament,"<sup>231</sup> two thirds of the House and Senate can override the President's veto on a bill.<sup>232</sup>

The Constitution provides other limits, too. The President may assume the role of commander-in-chief of the state mili-

226. *Id.* at 43.

227. U.S. CONST. art. II, § 1. Later, the Constitution limited the President to two terms. U.S. CONST. amend. XXII. Hamilton wrote:

In a monarchy, [a standard of good behavior for continuance in office] is an excellent barrier to the despotism of the prince: in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.

THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 167, at 402.

228. THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 167, at 355–56. Some scholars contend, however, that Hamilton envisioned the presidency as possessing an avowedly masculine identity. See Paula A. Monopoli, *Gender and Constitutional Design*, 115 YALE L.J. 2643, 2645–46 (2006).

229. U.S. CONST. art. II, § 4.

230. THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 167, at 356.

231. *Id.*

232. U.S. CONST. art. I, § 7, cl. 2.

tias, but only when the militia is "called into the actual Service of the United States."<sup>233</sup> Hamilton reminded his readers that the British king has "at all times the entire command of all the militia," extending to "the *declaring* of war, and to the *raising* and *regulating* of fleets and armies,"<sup>234</sup> whereas the Constitution gives such powers to Congress.<sup>235</sup> In foreign affairs, the "king of Great Britain is the sole and absolute representative of the nation."<sup>236</sup> But the President must earn two-thirds approval from the Senate to make treaties.<sup>237</sup> Lastly, in a sharp rejoinder to Filmer's promiscuous mixture of church and state that had endowed the king with heaven's mandate, Hamilton announced that the President has "no particle of spiritual jurisdiction."<sup>238</sup>

Such criticisms of the king were an extension of the dissatisfaction that was common around the time of the Revolution with patriachalism's general claims of manly authority. As Wood observed, "Certainly by 1750 ancient patriarchal absolutism no longer had the same ideological significance it had once possessed,"<sup>239</sup> and "few fathers, or at least few gentry fathers, now dared to justify controlling their household dependents in the arbitrary manner advocated a century earlier by Sir Robert Filmer."<sup>240</sup> More children left the home and asserted a greater right against their parents to choose their marital partners.<sup>241</sup> Sons were more likely to challenge and fight their fathers, and "American youngsters had a reputation for being more unruly than children elsewhere."<sup>242</sup> Also suggestive here is the condition of divorce in the colonies. Divorce was not permitted in England except through "rare private bills in Parliament."<sup>243</sup> But some colonies defiantly drafted legal means for divorce. Much more so than their English counterparts, American women used these means to abandon the patriarchal figures of

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233. U.S. CONST. art. II, § 2, cl. 1.

234. THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 167, at 357.

235. U.S. CONST. art. I, § 8, cls. 11-14.

236. THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 167, at 359.

237. U.S. CONST. art. II, § 2, cl. 2.

238. THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 167, at 361.

239. WOOD, *supra* note 157, at 147.

240. *Id.*

241. *See id.*

242. *Id.* at 155.

243. LINDA K. KERBER, WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA 160 (1980).

their husbands.<sup>244</sup> This challenge to patriarchy in the home was analogous to other contexts, as servants were more likely to challenge their masters and inferiors became more suspicious of their superiors.<sup>245</sup> "Everywhere," observed Wood, "ordinary people were no longer willing to play their accustomed roles in the hierarchy, no longer willing to follow their callings, no longer willing to restrict their consumption of goods."<sup>246</sup> In Wood's account, "[t]hey were less dependent, less willing to walk while gentlemen rode, less willing to doff their caps, less deferential, less passive, less respectful of those above them."<sup>247</sup> Just as patriarchy in the English family had propped up patriarchy during Filmer's time, its weakening in the American family tended to diminish it in other areas of colonial America.<sup>248</sup>

There were two main causes for this dissolution of patriarchal authority. First, the traditional bonds that made patriarchy thrive were harder to sustain against the sudden and powerful changes in the movement of people across America. The population had doubled from 1750 to 1770 and doubled again from 1770 to 1790, "multiplying more rapidly than any other people in the Western world."<sup>249</sup> This growing number aggressively moved into new towns and the unsettled frontier as opportunities arose.<sup>250</sup> Such movement "strained and broke apart households, churches, and neighborhoods," and young men "became more autonomous and more independent of paternal and patronage relationships."<sup>251</sup>

Second, in addition to these social forces, patriarchalism came under attack from a new Enlightenment philosophy that urged the merits of civility and affection in people's private lives and public dealings.<sup>252</sup> By expecting everyone to work cooperatively, civility would help to bolster the colonists' efforts at self-government.

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244. See *id.* at 160–64.

245. See WOOD, *supra* note 157, at 145.

246. *Id.* at 145–46.

247. *Id.* at 146.

248. See Brandon, *supra* note 185, at 1216–18, 1222–27.

249. WOOD, *supra* note 157, at 125.

250. See *id.* at 126–28.

251. See *id.* at 129.

252. See *infra* Part IV.A.2.

## 2. *Enlightenment Embrace of Civility*

The Americans sought to create a public virtue that would help to undergird their new project of constitutional self-government, but the accounts of male identity from Hobbes and Filmer scarcely lent themselves to this endeavor. Hobbes depicted hypermasculine men who were so overwhelmed with belligerent passions that only the fear of violent death had any chance of scaring them into peaceable conduct. Filmer, on the other hand, believed that men could be regulated by social bonds of affect, but these bonds were hierarchically structured and ultimately required meek deference by infantile men toward a patriarchal king.<sup>253</sup> American men had to fashion an alternative male identity.

They developed it to include the democratic attitude of treating each other with civility and even affection.<sup>254</sup> By doing so, they adopted an ethos that tended to evince those social habits conducive to political cooperation among men of differing views and unequal stations.<sup>255</sup> Part of this ethos derived from the Enlightenment philosophy that was spreading over Western Europe at this time.<sup>256</sup> As its name implies, the Enlightenment sought to "enlighten" men's minds by ridding them of superstitions and stifling traditions.<sup>257</sup> Yet the Enlightenment

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253. See WOOD, *supra* note 157, at 189 ("Destroying the ligaments of patronage and kinship that had held the old monarchical society together was only half the radicalism of the republican revolution.").

254. See *id.* at 213–25; KANN, *supra* note 23, *passim*; MARK E. KANN, THE GENDERING OF AMERICAN POLITICS: FOUNDING MOTHERS, FOUNDING FATHERS, AND POLITICAL PATRIARCHY 73–74, 125–27 (1999).

255. See *infra* notes 271–81 and accompanying text.

256. See WOOD, *supra* note 157, at 194.

257. See *id.* at 191. Justice Brandeis alluded to these twin aims when he wrote that "[m]en feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears." *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring). For historian Peter Gay, the Enlightenment was a break from entrenched conventions. It "was a century of decline in mysticism, of growing hope for life and trust in effort, of commitment to inquiry and criticism, of interest in social reform, of increasing secularism, and a growing willingness to take risks." PETER GAY, THE ENLIGHTENMENT: AN INTERPRETATION: THE SCIENCE OF FREEDOM 6 (1969). The Enlightenment was an age, "perhaps best of all, of attacks on superstition." *Id.* at 23. Men were more willing to question conventions and find truth for themselves. Professor Gay offered examples:

Locke noted in his journal that there was a "large feild of knowledge proper for the use and advantage of men," namely to "finde out new inventions of dispatch to shorten or ease our labours, or applying sagaciously together

was not limited to the cultivation of men's reason; it also sought to help men become civil and kind by eliminating the barbarism and cruelty of monarchic culture.<sup>258</sup>

A chief illustration was available in the new outlook toward childrearing. Locke described the family as a place for parents to show affection toward their children and to teach them about independence:

*Paternal or Parental power is nothing but that, which Parents have over their Children, to govern them for the Childrens good, till they come to the use of Reason, or a state of Knowledge, wherein they may be supposed capable to un-*

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severall agents and patients to procure new and beneficiall productions whereby our stock of riches (i.e., things usefull for the conveniencys of our life) may be increased or better preservd." And, Locke added significantly, "for such discoverys as these the mind of man is well fitted." Lord Shaftesbury, Locke's disciple, more inward than his master, applied the ancient saying to man's self-mastery: the "wise and able man," he wrote, "by laying within himself the lasting and sure foundations of order, peace, and concord" thus becomes "the architect of his own life and fortune." Not surprisingly, both the proverb and the attitude spread to the English colonies in America: in 1770 Thomas Jefferson included "*faber suae quisque fortunae*" among his favorite maxims, while some years before Benjamin Franklin developed a plan for scientific cooperation among the colonies that would solve the mysteries of nature and enhance man's power, "over matter, and multiply the conveniences or pleasures of life."

*Id.* at 6–7 (footnotes omitted); see also *id.* at 6–12.

258. See WOOD, *supra* note 157, at 192 ("For the Enlightenment represented not just the spread of science, or liberty, or republican government—important as these were—but also the spread of what came to be called civilization."); see also *id.* at 189, 192–98. Locke had started down that path by treating the relationships among men in the state of nature as generally sociable and by arguing that men would not resort to Hobbes's demonic state of nature in the absence of government. See *supra* notes 138–39 and accompanying text. Notwithstanding his own investments in the South Carolina slave trade, Locke also wrote that "Slavery is so vile and miserable an Estate of Man, and so directly opposite to the generous Temper and Courage of our Nation; that 'tis hardly to be conceived, that an *Englishman*, much less a *Gentleman*, should plead for't." LOCKE, *supra* note 125, at 141.

Professor Gay noted that for Enlightenment thinkers, "[r]eason and humanity were easily confounded, and an instance of one was often taken as an instance of the other." GAY, *supra* note 257, at 29. Professor Gay listed the following examples:

Montesquieu listing the rights of accused persons, Lessing advocating tolerance of Jews, Beccaria constructing a humane jurisprudence, Rousseau defending the claims of the child, Voltaire rehabilitating the victims of judicial miscarriage, Kant analyzing the preconditions for world peace, all were elaborating a single view of man and of politics—a single view of man *in* politics—which offers no surprises, since it follows with inescapable logic from their general way of thinking.

*Id.* at 398; see also *id.* at 30–45.

derstand that Rule, whether it be the law of Nature or the municipal Law of their Country they are to govern themselves by: Capable, I say, to know it, as well as several others, who live, as Free-men, under that law.<sup>259</sup>

Locke's argument deserves amplification. Locke, unlike Filmer, approved of limits on parental authority. Such limits, Locke explained, are warranted. Parents should recognize independence when children acquire reason to think for themselves. Locke's formulations of the family enabled him to challenge Filmer's support for patriarchy. Filmer had discounted the possibility that children could ever possess the reason necessary to be responsible political actors; hence, on his terms, men were forever dependent on the fatherly guidance of the king. But according to Locke, because men were said to possess such reason, they could not logically be required to confer authority on the king. No less important, Locke implied that parental authority could not extend to govern children in the political realm, because parental authority did not equate to political authority.<sup>260</sup> Elsewhere he advised parents that

in a great many things [the child] must be trusted to his own conduct, since there cannot always be a guard upon him, except what you have put into his own mind by good principles and established habits, which is the best and surest, and therefore most to be taken care of.<sup>261</sup>

Such views were widespread by the eighteenth century.<sup>262</sup> Instead of coercion, parents were expected to treat their children with love and to prepare them to lead independent lives as adults.<sup>263</sup>

259. LOCKE, *supra* note 135, at 381.

260. Locke later made this point explicit: "[T]he *Paternal* is a natural *Government*, but not at all extending it self to the Ends, and Jurisdictions of that which is Political. The *Power of the Father* doth not reach at all to the *Property* of the Child, which is only in his own disposing." *Id.*

261. JOHN LOCKE, SOME THOUGHTS CONCERNING EDUCATION AND OF THE CONDUCT OF THE UNDERSTANDING 15 (Ruth W. Grant & Nathan Tarcov eds., Hackett Publ'g Co. 1996) (1693).

262. Professor Wood wrote:

Nearly every work of the age—whether of history, fiction, or pedagogy, from Marmontel's *Memoirs* to Goldsmith's *Vicar of Wakefield* to Chesterfield's *Letters*—dwelt on issues of familial responsibility and warned against the evils of parental tyranny and the harsh and arbitrary modes of child-rearing of an older, more savage age. Charles Rollin's *Ancient History* attacked primogeniture and other legal devices that supported an artificial patriarchal authority. Samuel Richardson's *Clarissa* criticized parents who placed family

If parents were supposed to raise their children in preparation for republican government, men were already expected to exemplify those virtues necessary for its success. "Always at the center of this [Enlightenment] advance," Professor Wood wrote, "was the changing idea of a gentleman."<sup>264</sup> Among monarchists, a gentleman was a member of the aristocracy by good birth and landed wealth, not through earned effort.<sup>265</sup> By contrast, in America, the gentleman defined himself through the social products of self-improvement: "politeness, grace, taste, learning, and character."<sup>266</sup> Such traits were acutely valuable in a republican nation where all power resided with the people. As Wood concluded, "We shall never understand the unique character of the revolutionary leaders until we appreciate the seriousness with which they took these new republican ideas of what it was to be a gentleman."<sup>267</sup> Yet what precisely did the gentleman's "politeness, grace, taste, learning, and character" mean?

The best answer to this question lies in the example of George Washington, a nonpareil of the enlightened republican gentleman. Although we now remember him for his reputed honesty, Washington's most celebrated virtue was perhaps his studiously

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pride and wealth ahead of the desires and integrity of their children. Even Hogarth's popular series of prints *Marriage à la Mode* pointed out the dangers of parents arranging their children's marriages. Being a parent was no longer simply a biological fact; it was also a cultural responsibility. As Fénelon's *Telemachus* attested, a child's true parents were not his blood relatives but those moral preceptors like Mentor who shaped his mind and raised him to become a reasoning moral adult in a corrupt and complex world. Children were no longer merely dependents but moral beings to be cared for and educated.

WOOD, *supra* note 157, at 148–49 (footnote omitted).

263. See generally J.H. PLUMB, *THE NEW WORLD OF CHILDREN IN EIGHTEENTH-CENTURY ENGLAND, 67 PAST & PRESENT* 64 (1975).

264. WOOD, *supra* note 157, at 194.

265. See *id.* at 194–95.

266. *Id.* at 195. ("The colonists were eager to create a new kind of aristocracy, based on principles that could be learned and were superior to those of birth and family, and even great wealth."). It is worth considering that so many Founding Fathers were not men of high birth. The following men, for example, were the first in their families to attend college and acquire the sort of liberal arts education idealized by the Enlightenment: "Samuel Adams, John Adams, Thomas Jefferson, James Otis, John Jay, James Madison, David Ramsay, Benjamin Rush, James Wilson, John Marshall." *Id.* at 197. "Gentleman," however, was not fully divorced from its class-based connotations. See KANN, *supra* note 23, at 23–24.

267. WOOD, *supra* note 157, at 197–98 ("All the founding fathers were aware of these conventions of civility, and all in varying degrees tried to live up to them.").

crafted civility.<sup>268</sup> As a child, Washington had copied *The Rules of Civility and Decent Behavior in Company and Conversation*, a collection of 110 maxims.<sup>269</sup> The rules are useful for comparing Washington's mindset with that of the inexorably testy men described by Hobbes. Here are some of the rules that young George copied: "Show not yourself glad at the misfortune of another though he were your enemy" (rule 22);<sup>270</sup> "If any one come to speak to you while you are . . . sitting, stand up, though he be your inferior . . . ." (rule 28); "To one that is your equal, or not much inferior, you are to give the chief place in your lodging, and he to whom it is offered ought at the first to refuse it, but at the second to accept though not without acknowledging his own unworthiness" (rule 32);<sup>271</sup> "Use no reproachful language against any one; neither curse nor revile" (rule 49).<sup>272</sup>

Washington's rules of civility were more than quaint. They were the means by which the colonial men tried to work together as rough social equals in a republic. Illustrative of the civility of Carter and Shils, the rules reflected an aspiration to develop an account of gentlemanliness that could facilitate cooperation among a diversity of men by acknowledging their equal rights to dignity. This perspective became more obvious when Washington warmed civility into the rhetoric of affection. After the Revolutionary War, he announced his retirement as general and sent to the States a letter containing his hopes and concerns for the new Republic. He urged as "essential to the well being" of the United States

[t]he prevalence of that pacific and friendly Disposition, among the People of the United States, which will induce them to forget their local prejudices and policies, to make those mutual concessions which are requisite to the general

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268. Professor Wood suggested that "Washington's behavior, for example, is incomprehensible except in terms of these new, enlightened standards of gentility. Few were more eager to participate in the rolling back of parochialism, fanaticism, and barbarism." *Id.* at 197. Later, Professor Wood wrote that "Washington's Enlightenment was a more down-to-earth affair, concerned with social behavior and living in the everyday world of people. His Enlightenment involved civility." *Id.* at 198.

269. See *Prologue* to GEORGE WASHINGTON, A COLLECTION 2, 3 (William B. Allen ed., Liberty Fund 1988) [hereinafter WASHINGTON COLLECTION].

270. GEORGE WASHINGTON, THE RULES OF CIVILITY AND DECENT BEHAVIOR IN COMPANY AND CONVERSATION, in WASHINGTON COLLECTION, *supra* note 269, at 6, 7.

271. *Id.* at 8.

272. *Id.* at 9.



prosperity, and in some instances, to sacrifice their individual advantages to the interest of the Community.<sup>273</sup>

Washington concluded the letter with a prayer that Americans would "entertain a brotherly affection and love for one another, for their fellow Citizens of the United States at large, and particularly for their brethren who have served in the Field."<sup>274</sup> Washington warned of how competing views and interests bred jealousy and even hate among the States. It is no wonder that in his Presidential farewell address he again spoke of his yearning that "your Union and brotherly affection may be perpetual."<sup>275</sup> Washington felt affection for men across religions as well. Addressing Jewish congregations in various cities, he observed that the "liberal sentiment towards each other which marks every political and religious denomination of men in this country stands unrivalled in the history of nations."<sup>276</sup> More than polite toleration, Washington meant "[t]he affection of such a people," which he prized as "a treasure beyond the reach of calculation."<sup>277</sup> In a show of political inclusion, he eagerly informed the congregations that the "affectionate expressions of your address again excite my gratitude, and receive my warmest acknowledgements."<sup>278</sup>

We can enrich our understanding of Washington by turning to an analysis of Washington's favorite play, Joseph Addison's *Cato*.<sup>279</sup> Although penned by an Englishman, it became the chief artistic voice for the Americans' republicanism.<sup>280</sup> Wash-

273. George Washington, Circular to the States (June 14, 1783) in WASHINGTON COLLECTION, *supra* note 269, at 239, 242.

274. *Id.* at 249.

275. George Washington, Farewell Address (Sept. 19, 1796), in WASHINGTON COLLECTION, *supra* note 269, at 512, 514.

276. George Washington, Letter To the Hebrew Congregations (Jan. 1790), in WASHINGTON COLLECTION, *supra* note 269, at 545, 545.

277. *Id.*

278. *Id.* at 546.

279. JOSEPH ADDISON, *CATO: A TRAGEDY, AND SELECTED ESSAYS* (Christine Dunn Henderson & Mark E. Yellin eds., Liberty Fund 2004) [hereinafter ADDISON COLLECTION]. For the proposition that *Cato* was Washington's favorite play, see Forrest McDonald, *Foreword to id.* at viii, and GARRY WILLS, *CINCINNATUS: GEORGE WASHINGTON AND THE ENLIGHTENMENT* 8 (1984).

280. See Christine Dunn Henderson & Mark E. Yellin, *Introduction to ADDISON COLLECTION*, *supra* note 279, at xi, xxii; McDonald, *supra* note 279, at viii-x; WILLS, *supra* note 279, at 137 (calling *Cato* "the most popular [play] in eighteenth-century America").

ington saw *Cato* many times and often quoted from it.<sup>281</sup> He also had it staged for dispirited troops at Valley Forge, and, when his officers threatened mutiny in 1783, he shamed them, as only he could, by reciting apt lines from the play.<sup>282</sup> The play celebrates public-spiritedness in the service of war, and so one can understand why it would resonate with Americans during the Revolution.<sup>283</sup> Much of the dialogue, however, lauds those virtues which are peculiarly useful for peace and cooperation. Washington identified with Juba, the young African prince who idolizes the Roman Cato and is devoted to the latter's fight to protect Rome's democracy against Caesar's dictatorship.<sup>284</sup> Although Juba's reputation for bravery is unassailable, he does not glamorize war as a bid for manly valor. He treats war as a means to make and defend a world where men may engage each other with gentleness. The African military general Syphax mocks the Roman soldiers as effeminate for lacking the killer instincts and martial fortitude of their African counterparts. Juba chides him:

These all are virtues of a meaner rank,  
Perfections that are placed in bones and nerves.  
A Roman soul is bent on higher views:  
To civilize the rude, unpolished world,  
And lay it under the restraint of laws;  
To make man mild, and sociable to man;  
To cultivate the wild, licentious savage  
With wisdom, discipline, and liberal arts—  
The embellishments of life; virtues like these

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281. See McDonald, *supra* note 279, at viii; see also WOOD, *supra* note 157, at 197–98 (“Washington loved Joseph Addison’s play *Cato* and saw it over and over and incorporated its lines into his correspondence. The play, very much an Enlightenment tract, helped to teach him what it meant to be liberal and virtuous, what it meant to be a stoical classical hero.”).

282. See McDonald, *supra* note 279, at viii; see also McDONALD, *supra* note 190, at 195 (“It seems likely that the source of the [republican] ideal, in Washington’s case, was Joseph Addison’s play *Cato*. . . . That it offered a role model that was strikingly similar to the way in which Washington patterned his life is indicated by a careful reading of the play.”). Patrick Henry’s cry of “[g]ive me liberty or give me death” was also quietly lifted from *Cato*. See *id.* at 10.

283. See McDonald, *supra* note 279, at ix.

284. See *id.*

Make human nature shine, reform the soul,  
And break our fierce barbarians into men.<sup>285</sup>

Juba transitions from biological to cultural meanings of gender. To be "men" is to be other than "barbarians" and "savages." It is, ideally, to be "mild" and "sociable," absent the "rude" and "unpolished." In an uncanny paradox, the valiant warrior Juba states that men earn their gendered identity as such when they learn to value the traditionally feminine virtues of civility and sociability.

Addison himself extolled such virtues. Dwelling on his views may help to illuminate *Cato's* attractions for Washington and his contemporaries. Addison derided those who "think it more honourable to revenge, than to forgive an injury; who make no scruple of telling a lie, but would put any man to death that accuses them of it; who are more careful to guard their reputation by their courage, than by their virtue."<sup>286</sup> Elsewhere, he surmised that "[h]alf the Misery of Human Life might be extinguished, would Men alleviate the general Curse they lye under, by mutual Offices of Compassion, Benevolence, and Humanity."<sup>287</sup> And against the obsession with public slights in early modern England, Addison reminded the reader that

*Plutarch* says very finely, that a Man should not allow himself to hate even his Enemies, because, says he, if you indulge this Passion in some Occasions, it will rise of it self in others; if you hate your Enemies, you will contract such a vicious Habit of Mind, as by Degrees will break out upon those who are your Friends, or those who are indifferent to you.<sup>288</sup>

Addison commended forgiveness and its correlating civility for their benefits to social relationships, not, like Christianity, for their intrinsic worth. Forgiveness and civility, in Addison's hands, take shape as *public* virtues, allusive of civility's past association with citizenship and government.

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285. JOSEPH ADDISON, *CATO*, reprinted in ADDISON COLLECTION, *supra* note 279, at 1, 18 (footnotes omitted).

286. JOSEPH ADDISON, *Guardian*, No. 161 (Sept. 15, 1713), reprinted in ADDISON COLLECTION, *supra* note 279, at 194, 195.

287. JOSEPH ADDISON, *Spectator*, No. 169 (Sept. 13, 1711), reprinted in ADDISON COLLECTION, *supra* note 279, at 127, 127.

288. JOSEPH ADDISON, *Spectator*, No. 125 (July 24, 1711), reprinted in ADDISON COLLECTION, *supra* note 279, at 123, 124 (footnote omitted).

One might object that the foregoing analysis of Washington piously omits his military service and, thus, his propensity for conduct that is not civil. Yet, even here, our received picture of Washington glows as a paragon of civility. We remember Washington as the "perfect Cincinnatus, the Roman patriot who returned to his farm after his victories in war."<sup>289</sup> He devoted himself to his country, and, even though he could have exploited his fame to obtain more political power, he resigned as commander-in-chief of the colonial Army.<sup>290</sup> By doing so, he offered for view a modesty that was virtually unimaginable, even for a gentleman. Consider how his resignation deflected the charges of hypermasculinity that Paine had effortlessly flung at the king. Whereas the king had brutishly usurped power, Washington declined it in a gesture that is a monument to civility's gentle self-effacement. And whereas Paine's king arrogantly placed himself outside the rule of law, Washington's resignation represented a civility in which he preferred to don the egalitarian dignity of his fellow citizens than to bask in the privileged honor of the few. Evoking the older meaning of civility as citizenship, Washington bypassed a potential opportunity for emperorsip to become a regular citizen.<sup>291</sup> This per-

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289. WOOD, *supra* note 157, at 205 ("The greatest act of his life, the one that gave him his greatest fame, was his resignation as commander in chief of the American forces.").

290. *See id.* at 205–06 ("He was trying to live up to the age's image of a classical disinterested patriot who devotes his life to his country.").

291. The manner in which Washington's contemporaries portrayed him in art is telling. Wills explained:

The instinct for a secular and simple representation of Washington's heroism is nowhere better demonstrated than in the fact that the most popular portraits of all were the presidential portraits done by Gilbert Stuart . . . where [Washington] appears simply as Citizen Washington, wearing the black suit of his inauguration . . . His favorite form of address, when speaking to his countrymen, whether as Commander in Chief or as President, was "my fellow citizens"; and the republic repaid this compliment by sensing that the highest recognition it could offer him was as a *citizen* leader. The man whose glory came from his return to the plow could gain no luster by mounting a throne or wearing a crown.

WILLS, *supra* note 279, at 79–80. So, too, Wills commented:

The secular and civilian ideal of Cincinnatus made American artists represent Washington, even in his military days, with great restraint. There was less emphasis on the glory of battle than on dutiful service. The city of Charleston rejected the painting it had commissioned from [John] Trumbull, because it showed Washington standing by a theatrically rearing horse. . . . When Thomas Sully attempted a heroic

formance, of course, was consciously staged and Washington "knew at once that he had acquired instant fame as a modern Cincinnatus," making him internationally famous.<sup>292</sup> Still, what is important here is that Washington's public civility was a silent admission of his own democratic dependence on the good wishes of the people.<sup>293</sup> In his grand coyness, Washington acknowledged that a leader, even one who was venerated, ran a risk in openly seeking political power in a republican nation; the presidency could not be seized by one but had to be offered by the many.<sup>294</sup> The young republic had come a long way from rule by a king who was, in Paine's words, the "principal ruffian of some restless gang."<sup>295</sup>

Civility did more than govern the conduct of the first President. The government as a whole was expected to recognize its

equestrian in his *Crossing of the Delaware*, it stayed rolled up in his studio, since he could not interest a buyer.

*Id.* at 82. On a related note, Washington's famous "Farewell Address" acquired its name from someone other than Washington, for "he gave it no more formal title than the republican salutation, 'Friends and Fellow Citizens.'" *Id.* at 88.

292. WOOD, *supra* note 157, at 206. Wills observed of Washington:

He was a virtuoso of resignations. He perfected the art of getting power by giving it away. . . .

Unlike other officers in the Revolution, he did not resign or threaten to resign when baffled of honor or advantage. He did not want to cheapen the currency; he would not anticipate his promised abdication at war's end. His whole war service was urged forward under the archway of two pledges—to receive no pay, and to resign when independence was won. He was choreographing his departure with great care. It was an act of pedagogical theater; and the world applauded.

WILLS, *supra* note 279, at 3 (citation omitted).

293. Wills remarked:

Washington was constantly testing public opinion and tailoring his actions to suit it. If there was widespread fear that hereditary membership in the Society of the Cincinnati [a club of distinguished and upper class war veterans] would create an aristocracy, then Washington would abolish that item, though he thought the public mistaken in its fears. . . .

Washington realized that power is a tree that grows by a constant prudent trimming; that winning the people's long-term confidence is a more solid ground for achievement than either pandering to their whims or defying their expectations.

WILLS, *supra* note 279, at 103–04.

294. Consider Wills's argument that Washington's charisma "came from a prominently displayed eagerness to transcend itself; he gained power from his readiness to give it up. And in accepting the ideal of Cincinnatus, Washington automatically limited the dangers of charismatic leadership, which is always at least quasi-religious, an assertion of semi-divine 'grace.'" WILLS, *supra* note 279, at 23.

295. PAINE, *supra* note 121, at 16.

norms. The Third and Fourth Amendments of the Constitution contain, respectively, the right against the quartering of troops in private homes<sup>296</sup> and the right against unreasonable searches and seizures of persons, houses, papers, and effects.<sup>297</sup> One can understand both Amendments as prohibiting governmental intrusion because it is violative of one's dignity, and thus, by convention, rude; imagine the uncivil handling one would experience by a throng of soldiers who have their way in one's home<sup>298</sup> or by even something as commonplace as a pat-down by the constable.<sup>299</sup> Perhaps most conspicuously, the Constitution does not permit cruel and unusual punishment,<sup>300</sup> the grossest example of brutish intemperance by the government. Here, one will remember civility's philology as citizenship and the right to equal dignity that imbues it.<sup>301</sup> What makes cruel and unusual punishment uncivil is not only its outward barbarity but also its attack on the principle of equal dignity.<sup>302</sup> Other constituent parts of the Constitution also allude to this latter view of civility.<sup>303</sup> The Religion Clauses prohibit majority religions that control government from degrading the dignity of minority faiths.<sup>304</sup> We can infer that Article VI performs the

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296. U.S. CONST. amend. III.

297. U.S. CONST. amend. IV.

298. Justice Joseph Story feared that, in the absence of the Third Amendment, people's lives would be "full of inconvenience and peril." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1893 (1833) *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 189, at 218, 218.

299. *See* Cooper, *supra* note 2, at 5–6.

300. U.S. CONST. amend. VIII.

301. *See supra* notes 192–99 and accompanying text.

302. *See, e.g.,* William J. Brennan, *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 330–31 (1986) (arguing that the death penalty is unconstitutional because it violates norms of human dignity that inform the Eighth Amendment); Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1784–85 (1970) (arguing that the death penalty is unconstitutional because it is at least highly suspect under these norms).

303. Kenneth Karst offered a vigorous argument that the Constitution is animated by something akin to what has been described here as civility in a principle of "equal citizenship." KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989).

304. *See* Kenneth L. Karst, *The First Amendment, The Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503 (1992). Justice O'Connor articulated a similar view in her interpretation of the Establishment Clause. She wrote that "[e]ndorsement [of religion] sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to

same function by banning the government from administering religious tests as a precondition to hold office.<sup>305</sup> The First Amendment's rights of speech and press protect people and publishers against an analogous degradation for their political and social beliefs.<sup>306</sup>

### 3. *Necessary for Adjudication*

John Adams took civility in a somewhat different direction by explaining how it was essential for a political society that was dedicated to impartial adjudication. "The judicial Power of the United States," according to Article III of the Constitution, "shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>307</sup> In Hobbes's state of nature, however, all men retained the authority to decide disputes for themselves, and, driven by hypermasculinity, they exercised their freedom in ways that were incompatible with civil society.<sup>308</sup> John Adams fretted that men in America behaved all too similarly. Denouncing fistfights among a group of public officials, he wrote that "[m]an is distinguished from other animals, his fellow inhabitants of this planet, by a capacity of acquiring knowledge and civility, more than by any excellency, corporeal, or mental, with which mere nature has furnished his species."<sup>309</sup> Life prior to the invention of civility is, Adams argued, a prepolitical existence, and his descriptions should call to mind Hobbes's state of nature. When men first walked the earth, "[e]ach individual [was] his own sovereign, accountable to no other upon earth, and punishable by none."<sup>310</sup> "In this savage state," Adams wrote, "courage, hardiness, activity, and strength, the virtues

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adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984).

305. U.S. CONST. art. VI.

306. Note the common-law prohibition against viewpoint discrimination. *See, e.g., Police Dep't v. Mosley* 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

307. U.S. CONST. art. III.

308. *See supra* Part I.

309. JOHN ADAMS, *On Private Revenge: No. 1*, in *THE REVOLUTIONARY WRITINGS OF JOHN ADAMS* 1, 3 (C. Bradley Thompson ed., Liberty Fund 2000) [hereinafter *WRITINGS*].

310. *Id.* at 4.

of their brother brutes, are the only excellencies to which men can aspire."<sup>311</sup> These "excellencies" are the explosive ingredients for a violent culture of honor:

Emulations and competitions for superiority in such qualities [as courage, hardiness, strength, and so on], will soon commence; and any action which may be taken for an insult, will be considered as a pretension to such superiority; it will raise resentment in proportion, and shame and grief will prompt the savage to claim satisfaction or to take revenge.<sup>312</sup>

This passage was part of Adams's project to stigmatize hypermasculinity. He continued: "The doctrine, that the person assaulted 'should act with spirit,' 'should defend himself by drawing his sword and killing, or by wringing noses, and boxing it out with the offender,' is the tenet of a coxcomb and the sentiment of a brute."<sup>313</sup> Adams scoffed, "are cocks and bulls and horses the proper exemplars for the imitation of men, especially of men of sense, and even of the highest personages in the government!"<sup>314</sup>

The harm transcends the embarrassing ascription of animality. Hypermasculinity, Adams warned, is incompatible with government under a rule of law. For in a violent culture of honor, any request by an aggrieved man for an impartial judge would amount to self-inflicted emasculation, a confession that he lacked the manly resolve to settle the score.<sup>315</sup> The willingness to accept impartial adjudication was, for Adams, what separated "savage nations" from "polite ones": "that among the former every individual is his own judge and his own executioner; but among the latter all pretensions to judgment and punishment are resigned to tribunals erected by the public."<sup>316</sup>

Apparently, though, these distinctions are not hermetic. Even in polite societies, "boxing, clubs, swords, or firearms, are resorted to

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311. *Id.*

312. *Id.*

313. *Id.* at 6.

314. *Id.*

315. *See id.* at 4 ("The father, the brother, or the friend begins then to espouse the cause of the deceased; not, indeed, so much from any love he bore him living, or from any grief he suffers for him dead, as from a principle of bravery and honor, to show himself able and willing to encounter the man who had just before vanquished another.").

316. *Id.* at 5.



for deciding every quarrel, about a girl, a game at cards, or any little accident that wine or folly or jealousy may suspect to be an affront."<sup>317</sup> There is also the danger that soldiers will ridicule the senate and "slight the orders sent them by a body of men whom they look upon as cowards, and therefore unworthy to command them."<sup>318</sup> Because of hypermasculinity's threats to republican government, Adams advised men to adopt a new conception of male identity. He stated that even in the army "every gentleman, every man of sense . . . has a more delicate and manly way of thinking, and from his heart despises all such little, narrow, sordid notions."<sup>319</sup> To be manly, then, is to submit to civil authority, not to flaunt one's soldierly masculinity. Adams closed his essay *On Revenge* with lines that read like censure to the honor-obsessed men of early modern England. He reminded men to "consider how extremely addicted they are to magnify and exaggerate the injuries that are offered to themselves, and to diminish and extenuate the wrongs that they offer to others."<sup>320</sup>

One might be tempted here to treat the duel between Aaron Burr and Alexander Hamilton as a colorful reproof to hopes for a republican culture dedicated to peaceful adjudication. Their deadly conflict derived exclusively from considerations of personal honor and would thus hearken to the brutal grudges borne by men in early modern England over analogous issues of status. Stewing for over a decade, the mutual contempt between Burr and Hamilton had reached a boil in 1804.<sup>321</sup> By then, both men had garnered extraordinary honors: Hamilton had been Secretary of Treasury and, after Washington, the most powerful member of the Federalist Party, while Burr was

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317. *Id.*

318. *Id.* at 6 (quoting Montesquieu).

319. *Id.* Earlier, Adams asserted that "[t]o exterminate from among mankind such revengeful sentiments and tempers, is one of the highest and most important strains of civil and humane policy." *Id.* at 5. And he pleaded:

Far from aiming at a reputation for such qualities and accomplishments as those of boxing or cuffing, a man of sense would hold even the true martial qualities, courage, strength, and skill in war, in a much lower estimation than the attributes of wisdom and virtue, skill in arts and sciences, and a true taste to what is right, what is fit, what is true, generous, manly, and noble, in civil life.

JOHN ADAMS, *On Private Revenge*: No. III, in WRITINGS, *supra* note 309, at 12, 15–16.

320. *Id.* at 17.

321. See JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* 35 (2000).

Vice President and a gubernatorial candidate in New York.<sup>322</sup> For men such as these, whose public identities were sewn from emblems of honor, the practice of insults (both inflicting and suffering) was always a solemn matter.

So it was no surprise that Burr grew inconsolably livid when Hamilton publicly called him "despicable."<sup>323</sup> Burr's emissary demanded that Hamilton retract his insult, regardless of whether it referred to Burr's politics or person: "No denial or declaration will be satisfactory . . . unless it be general, so as to wholly exclude the idea that rumors derogatory to Col. Burr's honor have originated with [General] Hamilton or have been fairly inferred from anything he has said."<sup>324</sup> Hamilton refused to abide, for that would be to compromise *his* honor. "I have not censured him on light grounds," Hamilton defended, "or from unworthy inducements. I certainly have had strong reasons for what I may have said."<sup>325</sup> A quandary ensued: Hamilton and Burr could uphold their respective honor only by ruining the other's. After awkward attempts by Hamilton for a face-saving exit, Burr angrily issued an invitation for a duel, which Hamilton hesitatingly accepted, to his demise.<sup>326</sup>

Historian Joseph Ellis believed that through their violent contest for honor Burr and Hamilton "managed to make a dramatic final statement about the time of their time."<sup>327</sup> Ellis elaborated:

Honor mattered because character mattered. And character mattered because the fate of the American experiment with republican government still required virtuous leaders to survive. . . . [America] still required honorable and virtuous leaders to endure. Both Burr and Hamilton came to the [duel] because they wished to be regarded as part of such company.<sup>328</sup>

One problem here is the casual rendering of "honorable" and "virtuous" as consonant. As illustrated earlier through Pastor Samuel McClintock, John Adams, and others, there was ample contempt for those obsessed with personal honor at the ex-

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322. See *id.* at 32, 39.

323. See *id.* at 32.

324. *Id.* at 35 (internal quotation marks omitted).

325. *Id.* at 38 (internal quotation marks omitted).

326. See *id.* at 35-36.

327. *Id.* at 47.

328. *Id.*

pense of public virtue.<sup>329</sup> Thomas Paine, for one, condemned duels as “gothic and absurd.”<sup>330</sup> Also telling is that New York, where Burr and Hamilton arranged the duel’s terms, had prohibited dueling, and this was why the members of their respective entourages, to avoid becoming legally compromised as witnesses, were not allowed to see the fight.<sup>331</sup> Aware of its legal stigma, Burr and Hamilton referred to their duel as an “interview” and thus injected the “language of deniability,” should the case ever go to court.<sup>332</sup> Hamilton also tried to justify in his “Statement on the Impending Duel” how someone of his maturity and position could yield to such a shameful exercise in adolescent pride.<sup>333</sup> Even Professor Ellis qualified that the famous duel “represented a momentary breakdown in the dominant pattern of nonviolent conflict within the American revolutionary generation.”<sup>334</sup> In any case, after Hamilton’s death, the North-

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329. See *supra* notes 190–91 and accompanying text. James Wilson, one of the six original Justices of the U.S. Supreme Court, also captured the ethos of the times in these remarks from the mid eighteenth century:

The wisest and most benign constitution of a rational and moral system is that, in which the degree of private affection, most useful to the individual, is, at the same time, consistent with the greatest interest of the system; and in which the degree of social affection, most useful to the system, is, at the same time, productive of the greatest happiness to the individual. Thus it is in the system of society. In that system, he who acts on such principles, and is governed by such affections, as sever him from the common good and publick interest, works, in reality, towards his misery: while he, on the other hand, who operates for the good of the whole, as is by nature and by nature’s God appointed him, pursues, in truth, and at the same time, his own felicity.

Regulated by this standard, extensive, unerring, and sublime, self-love and social are the same.

1 JAMES WILSON, *Of Man, as a Member of Society*, in COLLECTED WORKS OF JAMES WILSON 621, 634 (Kermit L. Hall & Mark David Hall eds., 2007).

330. 1 THOMAS PAINE, *Duelling*, PA. MAG. (May 1775), reprinted in THE WRITINGS OF THOMAS PAINE 40, 40 (Moncure Daniel Conway ed., New York, G.P. Putnam’s Sons, 1894).

331. ELLIS, *supra* note 321, at 23.

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

333. See *id.* at 37 (internal quotation marks omitted). Professor Mansfield casually noted that Hamilton was “not a gender-neutral but a man who gave up his life in a duel because he was a gentleman.” MANSFIELD, *supra* note 90, at 6. Hamilton, however, was hardly the gentleman by participating in a ritual prompted by hypermasculine passions.

334. ELLIS, *supra* note 324, at 39. Professor Wood commented on dueling and civility:

As honor came under attack, so too did dueling—as the special means by which gentlemen protected their honor. Despite growing criticism throughout the Western world, dueling continued to be practiced,

ern public lost whatever begrudging tolerance it may have had for duels.<sup>335</sup> New York prosecuted the men who helped Hamilton and Burr to arrange the duel, denying them their voting rights.<sup>336</sup> Burr was reviled and disgracefully took flight from pending murder charges in New York and New Jersey; his political career was in tatters.<sup>337</sup> "In the years following the duel, Northern public opinion turned permanently against dueling, and the practice nearly disappeared in the North."<sup>338</sup> The duel was therefore mostly an aberration in a republican culture of civility, at least in the North.<sup>339</sup>

The Americans' emphasis on deliberation, however, was not an aberration; it was important to them as a means to discover truth. If civility represented the American male's willingness to accommodate the socially offensive, deliberation represented the other pole where the American male refused to defer to authority and insisted on thinking for himself. The former tended to deflect Hobbes's indictment of hypermasculinity whereas the latter tended to refute Filmer's portrait of men other than the king as infantile and overly dependent.

### B. Deliberation

The careful weighing presupposed by deliberation of competing arguments and diverse ideas was philosophically valuable for a government where authority formally resided with the people. After all, if the people were ruled by their impulses,

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especially by military officers and Southerners. Some justified dueling on the grounds that it was a civilizing agent, inhibiting gentlemen from using "illiberal language" with one another. Others saw dueling as a means of maintaining courage as a virtue amidst the spread of an effeminizing luxury. Although Aaron Burr's killing of Alexander Hamilton in 1804 in a duel did much to intensify condemnation of the practice, it was the spread of egalitarian sentiments that most effectively undermined it.

WOOD, *supra* note 157, at 344–45.

335. See C.A. Harwell Wells, Note, *The End of the Affair? Anti-Dueling Laws and Social Norms in Antebellum America*, 54 VAND. L. REV. 1805, 1820 (2001).

336. See *id.*

337. See *id.*

338. *Id.*

339. This is not to suggest that duels were nonexistent in colonial America, especially in the South. There, "in the early 1800s the duel developed into one of the central rituals of the planter elite that dominated Southern society." *Id.* at 1821. The South never quite adopted the republican ethos described in this Article. See McDONALD, *supra* note 190, at 73–77. I hope to address this aspect of republicanism and manliness in a future article.

or for whatever reason failed to exercise their deliberative abilities, the very idea of giving authority to them would seem questionable. This was a central premise in the arguments of Hobbes and Filmer.<sup>340</sup> They braced their opposition to constitutional democracy by ascribing to men a lack of deliberative capacity. Hobbes argued that too many men, being robustly hypermasculine, regularly boiled with rage because of some trifle insult, instead of demonstrating sustained deliberation. And from the other side, Filmer happily observed that men, lacking manly independence, blankly deferred to their masters. To realize the self-government imagined by republican constitutionalism, American men aspired to be deliberative beings who were manly enough to think for themselves.<sup>341</sup>

In 1787 Noah Webster, the dictionary author and political writer, declared fatuously that America is “an empire of reason.”<sup>342</sup> Self-congratulation gave way to entreaty, however, as Webster announced that in a government dedicated to reason,

it is not only the *right*, but the indispensable *duty* of every citizen to examine the principles of it, to compare them with the principles of other governments, with a constant eye to our particular situation and circumstances, and thus endeavor to foresee the future operations of our own system, and its effects upon human happiness.<sup>343</sup>

Men are expected to renounce their hypermasculine passions in favor of “examining” and “comparing” political principles. Rather than being a handmaiden to the self-regard of hypermasculinity, deliberation should serve the collective aim of “human happiness.” Webster’s esteem for deliberation also speaks to the maturity that Filmer denied in men, as the former

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340. See *supra* Parts I & II.

341. The ability to think for oneself was part of a larger effort by republican men to be independent of government. Professor McDonald argued that in the southern United States, men did not subscribe to the republican virtue espoused by their Yankee counterparts, opting instead for private property as the main source for political independence from the government. The rationale was that a man who was financially dependent on the government would also likely be politically dependent on, and thus subject to domination by, the government. McDONALD, *supra* note 190, at 74.

342. Noah Webster, *An Examination into the Leading Principles of the Federal Constitution*, in *FRIENDS OF THE CONSTITUTION: WRITINGS OF THE “OTHER” FEDERALISTS, 1787–1788*, at 373, 373 (Colleen A. Sheehan & Gary L. McDowell eds., 1998) [hereinafter *FRIENDS*].

343. *Id.* at 374.

calls on men to tackle the most fundamental issues of politics instead of reflexively submitting to their social betters. Likewise, Nicholas Collin, a prominent minister and board member of what would become the University of Pennsylvania, argued that under a republican government,

the people cannot be led as children, or drove as mules [and] the only method is, to make them rational beings. Men of reflection have the advantage, not only to see things in extensive combinations, and remote consequences, but to feel an important truth with more sensibility . . . .<sup>344</sup>

It was unrealistic, Collin later wrote, to make "every citizen an enlightened patriot," but through "various excellent improvements in the public education [and] the institution of political societies throughout the continent, much may be done."<sup>345</sup>

If these glosses on deliberation attend only indirectly to how it pertains to male identity, Madison's *Federalist No. 57* provides more explicit treatments:

If it be asked, what is to restrain the house of representatives from making legal discriminations in favour of themselves, and a particular class of the society? I answer, the genius of the whole system; the nature of just and constitutional laws; and, above all, the vigilant and *manly* spirit which actuates the people of America; a spirit which nourishes freedom, and in return is nourished by it.<sup>346</sup>

"Manly spirit" combats government corruption and bias and secures the people's freedom. But what exactly is manly spirit? Madison's *Federalist No. 14* provides an attempted answer, dressed as a question:

Is it not the glory of the people of America, that whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to over-rule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?<sup>347</sup>

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344. Nicholas Collin, *An Essay on the Means of Promoting Federal Sentiments in the United States*, in FRIENDS, *supra* note 342, at 406, 408.

345. *Id.* at 409.

346. THE FEDERALIST NO. 57 (James Madison), *supra* note 167, at 297 (emphasis added).

347. *Id.* NO. 14, at 67 (James Madison).

Madison called this disposition to think for oneself “manly.”<sup>348</sup> Americans, unlike the overly dependent boy-men in Filmer’s cosmology, are said to be manly in their independence, but this independence never veers into the Hobbesian world of hyper-masculinity. For men are supposed to use their independence to defend those “private rights” which all Americans enjoy, and thus ultimately, for the “public happiness.” It is an independence that repudiates “blind veneration” for antiquity, custom, or names—the social accoutrements that organized the patriarchy of Filmer’s England and whose honorifics caused Hobbes’s men to fight each other. Manly independence calls upon men to deliberate what is true, not to act out of fear or instinct.

John Adams echoed Madison’s insistence that manliness requires sober deliberation:

Let us examine, then, with a sober, a *manly*, a British, and a Christian spirit; let us neglect all party virulence and advert to facts; let us believe no man to be infallible or impeccable in government, any more than in religion; take no man’s word against evidence, nor implicitly adopt the sentiments of others, who may be deceived themselves, or may be interested in deceiving us.<sup>349</sup>

Although here British culture and Christianity slovenly commingle with “manly spirit,” Adams, like Madison, also treated manliness as the desire to think for oneself. True, men in early modern England were also presumably thinking for themselves when they pounced on someone who slighted them, but Adams did not want men to act so impulsively. He valued independence of mind as a means for men to discover the truth through deliberation. To be guided by a manly spirit is to “neglect all party virulence and advert to facts” and to “take no man’s word against evidence, nor implicitly [to] adopt the sentiments of others.”<sup>350</sup> American men, said Adams, have lacked this manly spirit, for the “true source of our sufferings has been

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348. *Id.* (“To this manly spirit, posterity will be indebted for the possession, and the world for the example, of the numerous innovations displayed on the American theatre, in favour of private rights and public happiness.”).

349. JOHN ADAMS, *On Self-Delusion*, in *WRITINGS*, *supra* note 309, at 7, 11–12 (emphasis added).

350. *Id.*

our timidity."<sup>351</sup> In short, "We have been afraid to think" and "have felt a reluctance to examin[e] . . . the grounds of our privileges, and the extent in which we have an indisputable right to demand them, against all the power and authority on earth."<sup>352</sup>

Like Madison and Adams, Thomas Paine praised independence of mind. Against Filmer, Paine declared that every man must ensure "he does not adopt the slavish custom of following what in other governments are called LEADERS."<sup>353</sup> Paine explained:

This is not inflaming or exaggerating matters, but trying them by those feelings and affections which nature justifies, and without which, we should be incapable of discharging the social duties of life, or enjoying the felicities of it. I mean not to exhibit horror for the purpose of provoking revenge, but to awaken us from fatal and unmanly slumbers, that we may pursue determinately some fixed object. It is not in the power of Britain or of Europe to conquer America, if she do not conquer herself by *delay* and *timidity*.<sup>354</sup>

Paine called on men to assert their independence against Britain and to awaken from their "unmanly slumbers." To act manly, though, is not to indulge one's passions, as did Hobbes's hypermasculine men. It is not to explode with "revenge" based on the perception of "inflaming or exaggerating matters." For Paine, to act manly is to "pursue determinately some fixed object" distilled through deliberation and according to "those feelings and affections which nature justifies," and, therefore, on the basis of legitimate reasons. Paine reminded Americans that de-

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351. JOHN ADAMS, *A Dissertation on the Canon and Feudal Law*, in WRITINGS, *supra* note 309, at 21, 30.

352. *Id.* Worth noting here is another bid by Adams to ally manliness with republican government and deliberation, against the mindless foppishness of the monarchy. He wrote that a republican government,

altho it will infallibly beggar me and my Children, will produce Strength, Hardiness, Activity, Courage, Fortitude and Enterprise; the manly noble and Sublime Qualities in Human Nature, in Abundance. A Monarchy would probably, somehow or other make me rich, but it would produce so much Taste and Politeness so much Elegance in Dress, Furniture, Equipage, so much Musick and Dancing, so much Fencing and Skaiting, so much Cards and Backgammon; so much Horse Racing and Cockfighting, so many Balls and Assemblies, so many Plays and Concerts that the very Imagination of them makes me feel vain, light, frivolous and insignificant.

Adams Letter, *supra* note 189, at 669.

353. THOMAS PAINE, *THE RIGHTS OF MAN, PART THE SECOND* (1776), *reprinted in* PAINE COLLECTION, *supra* note 121, at 541, 571.

354. PAINE, *supra* note 121, at 5, 27.



liberation is a political duty arising from membership in a constitutional democracy. In such a government, "[e]very man," Paine wrote, "is a proprietor in government, and considers it a necessary part of his business to understand."<sup>355</sup>

Notice how Paine, Adams, and Madison silently evoked courage in their calls for deliberation. Paine urged a manly deliberation to prevent Britain from conquering America; Adams upbraided men for blindly following convention and being too "timid" to think for themselves; Madison exhorted men to stand up to government by deliberating the rightness of its actions. Men are charged in all three examples to confront intimidating forces: the greatest military empire in history, the scorn of popular opinion, and powerful governmental leaders. Deliberation under these circumstances is dangerous; a man could lose his freedom, his reputation, or his life.

The prospect of danger also makes courage—and the deliberation it wills—a masculine virtue.<sup>356</sup> William Ian Miller provided this etymological commentary:

So bound up is courage with manhood that it is nearly impossible to speak of it without invoking male body parts or the word for man itself. Greek *andreia* (courage, literally manliness) is derived from the stem *andr-* (adult male). The Hebrew root G-B(V)-R (man) yields GEV(B)URA (courage). Latin *vir* (man) gives us "virtue"; although in modern English "virtue" has come to indicate general moral excellence, it used to mean, more narrowly, in earlier English as well as in Latin (*virtus*), courage, valor, forcefulness, strength, manliness.<sup>357</sup>

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355. *Id.* at 571.

356. See WILLIAM IAN MILLER, *THE MYSTERY OF COURAGE* 232 (2000) ("There is no getting around the fact that courage as traditionally conceptualized, and conceptions of manhood are intimately bound up with each other.") Miller elaborated:

[M]en bear the burden of living up to a murderous and terrifying ideal; women bear the burden of being excluded from living up to it, which, though saving them from fighting wars, was forever used to justify their subordination. Women, instead, in many cultures, were relegated to the virtue of chastity.

*Id.* Professor Mansfield added that "[t]he manly man is in control when control is difficult or contested—in a situation of risk," and "[m]anliness, like suffering, deals with fear." MANSFIELD, *supra* note 90, at 16, 18.

357. MILLER, *supra* note 356, at 233. Miller also added: "With courage comes embedded a theory of manhood. In a significant number of cultures, as chastity was to women, so courage was to men: the virtue at the center of their gendered identity . . ." *Id.* at 13. Miller elaborated: "Courage, manliness, manly virtue, is defined less by what

When summoned by courage, deliberation became a masculine activity that symbolically elevated men from the infantilization presupposed by patriarchy. At the same time, because the task of deliberation is necessarily tentative and involves habits of restraint and caution, it suggests calm maturity, not violent hypermasculinity.

Although a desire for deliberation was crucial for republican virtue, the term, like hypermasculinity and civility, does not make a direct appearance in the Constitution's text. Notwithstanding this silence, the Constitution has crafted institutions that promote deliberation. A superb example is the Electoral College.<sup>358</sup> Hamilton explained how

as the electors, chosen in each state, are to assemble and vote in the state in which they are chosen, this detached and divided situation will expose them much less to heats and ferments, that might be communicated from them to the people, than if they were all to be convened at one time, and in one place.<sup>359</sup>

Similar reasons were advanced for Article III, Section 1's establishment of life tenure for federal judges.<sup>360</sup> "Periodical appointments," *Federalist No. 78* warns, "would, in some way or other, be fatal to their necessary independence."<sup>361</sup> After all, if federal judges could be removed by either the legislature or the executive,

there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition

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it is than by what it is never supposed to be: womanish or effeminate." *Id.* at 233. As Miller argues, for good or for ill, men, not women, are expected to be courageous. *Id.*

358. See U.S. CONST. art. II, § 1, cl. 3, *amended* by U.S. CONST. amend. XII; see also SUNSTEIN, *supra* note 165, at 21 ("[The Electoral College] was, at the inception, to be a deliberative body, one that would discuss who ought to be President, rather than simply register votes.").

359. THE FEDERALIST NO. 68 (Alexander Hamilton), *supra* note 167, at 352 ("It was equally desirable, that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation . . . . A small number of persons, elected by their fellow citizens from the general mass, will be most likely to possess the information and discernment requisite to so complicated an investigation.").

360. See U.S. CONST. art. III, § 1.

361. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 167, at 407.

to consult popularity, to justify a reliance that nothing would be consulted but the constitution and the laws.<sup>362</sup>

In other words, life tenure would be conducive to a deliberation that would not be vexed by vocational uncertainty. Related concerns prompted the creation of relatively long terms for federal senators.<sup>363</sup> "Sufficient permanency," Madison declared, was necessary "to provide for such objects as require a continued attention, and a train of measures, may be justly and effectually answerable for the attainment of those objects."<sup>364</sup> Sparta and Rome had senators "for life" partly for the purpose of serving as "an anchor against popular fluctuations."<sup>365</sup> So, too, American senators, with longer terms than House representatives, could serve as "the cool and deliberate sense of the community" when the people were "stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentation of interested men."<sup>366</sup> Senators were also required by the Constitution to be at least thirty years old<sup>367</sup> and, the President, thirty-five.<sup>368</sup> Both prerequisites were intended to "confin[e] the elections to men of whom the people have had time to form a judgment, and with respect to whom they will not be liable to be deceived by those brilliant appearances of genius and patriotism, which, like transient meteors, sometimes mislead as well as dazzle."<sup>369</sup>

The Constitution's formal dedication to the public good also promotes deliberation.<sup>370</sup> The Constitution's Preamble situates the authority for the Constitution in "We the People" and declares that among the Constitution's purposes are to "provide for the *common* defence" and to "promote the *general* Wel-

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362. *Id.* Similar arguments were marshaled for Article III, Section 1's guarantee that the salaries of federal judges would not be diminished while they were in office. Hamilton argued that "[i]n the general course of human nature, a power over a man's subsistence amounts to a power over his will." *Id.* NO. 79, at 408 (Alexander Hamilton) (emphasis removed).

363. See U.S. CONST. art. I, § 3, cl. 1; see also SUNSTEIN, *supra* note 165, at 21.

364. THE FEDERALIST NO. 63 (James Madison), *supra* note 167, at 326–27.

365. *Id.* at 328.

366. *Id.* at 327.

367. U.S. CONST. art. I, § 3, cl. 3.

368. U.S. CONST. art. II, § 1, cl. 5.

369. THE FEDERALIST NO. 64 (John Jay), *supra* note 167, at 333.

370. See SUNSTEIN, *supra* note 165, at 22–23.

fare.”<sup>371</sup> Accordingly, governmental officials are expected to justify their political positions in terms that are most likely to benefit the public, not particular interests.<sup>372</sup> This expectation, in turn, requires that public leaders deliberate over the arguments that they intend to submit to the people.<sup>373</sup> Unintelligent, or, worse, unintelligible arguments would not benefit the public; neither would those that only pay lip service to the public good. Other parts of the Constitution also imply this expectation. The Commerce Clause of Article I, Section 8 states that only Congress may regulate commerce “among the several States.”<sup>374</sup> Courts have read the clause in its “dormant” form to prevent a state from discriminating against others to benefit financially its own residents.<sup>375</sup> For instance, under the Dormant Commerce Clause, Maine would have to show that there are good public-regarding reasons rooted in health and safety, rather than economic protectionism, for forbidding the introduction of live baitfish from other states.<sup>376</sup> The same logic applies to the Privileges and Immunities Clause of Article IV.<sup>377</sup> It, too, prohibits discrimination against out-of-staters and requires that states proffer persuasive arguments in public-regarding terms to justify laws that appear biased.<sup>378</sup>

## V. THE AMBIVALENT PLACE OF THE GENTLEMAN IN THE CONSTITUTIONAL ORDER

From the perspective of constitutional enterprise, should we create and sustain conditions for the ideal of the gentleman to thrive?<sup>379</sup> Although a thorough examination of the question will require another article, a preliminary response may begin by recognizing the answer’s unavoidable ambivalence.

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371. U.S. CONST. pmbl. (emphasis added).

372. For analogous arguments, see SUNSTEIN, *supra* note 165, at 17–27.

373. *See id.*

374. U.S. CONST. art. I, § 8, cl. 3.

375. *See* SUNSTEIN, *supra* note 165, at 32.

376. The facts are from *Maine v. Taylor*, 477 U.S. 131 (1986).

377. U.S. CONST. art. IV, § 2, cl. 1.; *see also* SUNSTEIN, *supra* note 165, at 32–33.

378. *See* SUNSTEIN, *supra* note 165, at 32–33.

379. Perhaps the point is moot to some. *See* MANSFIELD, *supra* note 90, at 230 (lamenting that “[t]he entire enterprise of modernity could be understood as a project to keep manliness unemployed”).

In some ways, the gentleman's ethos can help to undergird aspects of the Constitution. Consider the First Amendment right to free speech. As construed by the Supreme Court, the First Amendment protects speech that can be terribly offensive: racist speech,<sup>380</sup> subversive speech,<sup>381</sup> pornography that glorifies rape,<sup>382</sup> and bawdy profanity.<sup>383</sup> All of this speech is protected partly because of its potential to facilitate the audience in discovering an idea of truth.<sup>384</sup> The premise here is that the audience is more likely to ascertain the truth if it has access to a diversity of ideas and viewpoints.<sup>385</sup> A proper man, as the Founding Fathers had conceived him, would embrace the general merits of this premise.<sup>386</sup> Madison and Adams, for example, had implored men to keep an open mind as they commanded themselves in unending deliberation.<sup>387</sup> By contrast, such deliberation was incompatible with both the zealous myopia which plagued Hobbes's hypermasculine men and the reflexive deference to social betters which infantilized Filmer's subjects.<sup>388</sup>

Then there is the role of the gentleman's civility. Notice that the deliberation presupposed by the Court's justification for free speech also requires a firm tolerance. Although civility is not equivalent to tolerance, it embodies similar traits in publicly accommodating views that are distasteful or disagreeable. Because civility requires the gentleman to treat all as deserving dignity, it can be enlisted to support the Fourteenth Amendment's Equal Protection Clause. The clause is arguably animated by a princi-

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380. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

381. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

382. See, e.g., *Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985).

383. See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

384. See, e.g., LEE C. BOLLINGER, *THE TOLERANT SOCIETY* 45 (1986); THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6–7 (1970); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 785–86 (2d ed. 1988); John M. Kang, *Deliberating the Divine: On Extending the Justification from Truth to Religious Expression*, 73 *BROOK. L. REV.* 1, 1–33 (2007); William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 *GA. L. REV.* 1 (1995).

385. See Kang, *supra* note 384, at 9–20.

386. See *supra* Part IV.B.

387. For Madison, see *supra* notes 346–48 and accompanying text. For Adams, see *supra* notes 349–52 and accompanying text.

388. For Hobbes, see *supra* notes 80–89 and accompanying text. For Filmer, see *supra* notes 94–96 and accompanying text.

ple of equal respect whereby all persons are entitled to a presumption that they are worthy members of the community.<sup>389</sup>

Despite these positive reconstructions, the Supreme Court cases discussed at the beginning of this Article are heirs to an ideal of manliness that has performed with troubling consequences. Recall Justice Brandeis's opinion in *Whitney*. He praised civic courage as a distinctly manly virtue that was necessary to discover truth in the marketplace of ideas.<sup>390</sup> Justice Brandeis argued that the Founders "believed liberty to be the secret of happiness and courage to be the secret of liberty."<sup>391</sup> He added, "Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears."<sup>392</sup>

There is a distressing but suggestive paradox in Justice Brandeis's statements. His discussion notwithstanding, if there is a courageous figure in *Whitney*, it is not some man or group of men. Nor is it Justice Brandeis, who concurred with the judgment to reaffirm Whitney's conviction. It is Charlotte Anita Whitney herself. A Wellesley graduate, Whitney came from a distinguished upper-class family that boasted a state senator and a Supreme Court Justice.<sup>393</sup> But instead of indulging the privileges that attended her status, Whitney publicly dedicated herself to controversial and unpopular causes in the early 1900s, such as the protection of African Americans from lynching, the right of women to vote, and the economic rights of labor organizations that were vilified as Communist.<sup>394</sup> The Oakland Police Department eventually arrested Whitney for violating California's Criminal Syndicalism Act.<sup>395</sup> The Act forbade syndicalism, defined as advocating "the commission of crime, sabotage . . . or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership."<sup>396</sup> Jarringly, the Act also prohibited *membership* in a

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389. See Kang, *supra* note 384 (arguing that people's sincere embrace of the equal worth of all people is unnecessary for successful enforcement of equality under the law). See generally KARST, *supra* note 303 (arguing that a principle of equal citizenship animates the Constitution and, specifically, the Fourteenth Amendment).

390. See *supra* Introduction.

391. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

392. *Id.* at 376.

393. See Bhagwat, *supra* note 21, at 408.

394. See *id.* at 409–10, 412.

395. *Whitney*, 274 U.S. at 360 (majority opinion).

396. *Id.* at 359–60.

group "organized or assembled to advocate, teach or aid and abet criminal syndicalism."<sup>397</sup> Whitney was convicted under the latter section even though she did not formally belong to an organization advocating syndicalism.<sup>398</sup> The Supreme Court reaffirmed her conviction and Whitney faced jail time.<sup>399</sup> Instead of requesting a pardon from the governor as her supporters urged, Whitney courageously refused on grounds that she "had done nothing to be pardoned for."<sup>400</sup>

In spite of such manifest demonstrations of bravery, Whitney was banished to invisibility in Justice Brandeis's summons for civic courage, and this omission should temper the praise that he has received for writing perhaps the most celebrated opinion about the First Amendment.<sup>401</sup> In his opinion, women merely exist as captive ciphers, awaiting rescue from gallant and enlightened men or suffering at the hands of those who are superstitious and paranoid: "Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears."<sup>402</sup> The apparent un-self-consciousness with which Justice Brandeis cast men, not women, as agents of

397. *Id.* at 360.

398. See Bhagwat, *supra* note 21, at 411.

399. See *id.* at 421.

400. See *id.* Her pardon was granted, however, at the request of her lawyers and after a massive statewide writing campaign led by her many prominent supporters. See *id.*

401. DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 369 (1997) (calling the Brandeis opinion "probably the most effective judicial interpretation of the First Amendment ever written"); Blasi, *supra* note 18, at 668 (calling the Brandeis opinion "arguably the most important essay ever written, on or off the bench, on the meaning of the first amendment"); G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 325 (1996) (calling the Brandeis opinion "the first impressive appearance of the self-governance rationale in First Amendment theory").

402. *Whitney*, 274 U.S. at 376. Even when the impetus for the search for truth is resignation borne of stubborn failure, rather than enlightened courage, men are the center of the action. Consider Justice Oliver Wendell Holmes, Jr.'s words:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

*Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

political change can trace part of its cultural genealogy to the Founders who praised civic courage.

Let us return one last time to Thomas Paine, that irrepressible clarion of civic courage. Like Justice Brandeis, Paine had called upon men to deliberate pressing political issues, and, given the dangerous consequences of the decisions, he urged them to marshal their courage.<sup>403</sup> When they exhibited civic courage, Paine was delighted, as when the king's threatening speech, "instead of terrifying [the colonists], prepared a way for the manly principles of independence."<sup>404</sup> On the other hand, Paine called New York City, on the verge of a raid by British troops, "the hiding place of women and children."<sup>405</sup> Similarly, Paine warned that Lord Howe's "business in America is to conquer it, and in proportion as he finds himself unable to the task, he will employ his strength to distress women and weak minds, in order to accomplish through *their* fears what he cannot effect by his *own* force."<sup>406</sup> The degree to which Paine denied the presence of courage in women is illustrated by his spiteful barb against Tory party members who supported British rule in America. He wrote:

There is not such a Being in America as a Tory from conscience: Some secret defect or other is interwoven in the character of all those, be they men or women, who can look with patience on the brutality, luxury and debauchery of the British court, and the violations of their army here. A woman's virtue must sit very lightly on her who can even hint a favourable sentiment in their behalf. It is remarkable that the whole race of prostitutes in New York were Tories . . . .<sup>407</sup>

For Paine, a woman's virtue derives from her chastity; it is commensurate with the degree of sexual access to her body that she gives men. By contrast, men, as Paine had explained elsewhere, develop their virtue by awaking from their "unmanly slumbers" and battling the British Empire.<sup>408</sup> Theirs is a

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403. See *supra* note 353–55 and accompanying text.

404. PAINE, *supra* note 121, at 46.

405. THOMAS PAINE, THE AMERICAN CRISIS II (1776), reprinted in PAINE COLLECTION, *supra* note 121, at 100, 110.

406. THOMAS PAINE, THE AMERICAN CRISIS III (1776), reprinted in PAINE COLLECTION, *supra*, note 121, at 116, 141.

407. See *id.* at 133.

408. See *supra* note 354 and accompanying text.



virtue that is political and heroic, whereas women's virtue is insular and guarded. Paine treated men's virtue as animated by political courage while he treated women's virtue as constituted by sexual purity. This distinction may imply that men can lose their virtue if they fail to protect women from other men's sexual assaults, and women can lose *their* virtue if men fail to protect them from such assaults. A man's virtue, according to Paine, derives from his being woman's protector, a woman's virtue from being man's protected.

This cultural dynamic is formally celebrated by Justice Scalia in the VMI case.<sup>409</sup> VMI had required its recruits to follow a "Code of Honor" which declared that a gentleman

Does not go to a lady's house if he is affected by alcohol. He is temperate in the use of alcohol.

....

A gentleman never discusses the merits or demerits of a lady.

....

Does not slap strangers on the back nor so much as lay a finger on a lady.<sup>410</sup>

A gentleman, the Code implored, "is the descendant of the knight, the crusader; he is the defender of the defenseless."<sup>411</sup> But the binary language of defender and defenseless suggests that the virtue of a knight logically requires damsels in distress in whose service said virtue can be deployed. When those damsels attempt to morph into knights, the latter's status is besieged. That is arguably a chief reason why VMI opposed the introduction of women onto its campus.<sup>412</sup> It is instructive that the male cadets, despite their formal overtures to protect women, treated the female cadets with a hostility that hearkened back to their more unruly ancestors in the hypermasculinity condemned by Hobbes.<sup>413</sup>

Where does this leave the persona of the gentleman in the American constitutional enterprise? The gentleman's ethos is no longer as relevant today as it was in Washington's time. Today, we do not publicly say that civility, civic courage, and de-

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409. See *supra* notes 11–15 and accompanying text.

410. *United States v. Virginia*, 518 U.S. 515, 602–03 (1996) (Scalia, J., dissenting).

411. *Id.* at 602.

412. See Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 *BERKELEY WOMEN'S L.J.* 68, 111 (2002).

413. See *id.*

liberation are gendered virtues; women can easily assume them.<sup>414</sup> For the Supreme Court, even the very idea of male identity is ambiguous and less tethered to gendered social conventions. In *Lawrence v. Texas*, Justice Kennedy for the majority offered no explicit commentaries about manliness, opting for ruminations about a “personhood” in which one should be permitted to “define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>415</sup> At any rate, no one today seriously believes that only men are capable of self-government. Still, we might appreciate that this condition of relative legal equality between the genders might be partly owing to the Founding Fathers having introduced a political rhetoric whose logic would eventually corrode the male-centered, white, upper-class pedestal whence it ostensibly originated. Civility, after all, requires the gentleman to treat everyone, including women, with equal respect; a gentleman, as such, is morally bound to recognize civic courage even when it is wielded by those beneath his station; and deliberation can cause a gentleman to treat with skepticism his own assumptions of superiority. We might say, then, that the gentleman who is most in furtherance of the Constitution’s values is he who has sought to diminish the formal relevance of his gender. Gentlemanliness is thus distinguished from hypermasculinity in one final respect—the modesty of the former tends to compel it to be a self-consuming artifact, whereas the latter’s arrogance insists on its perpetual domination.<sup>416</sup>

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414. Professor Mansfield observed:

We now avoid using “man” to refer to both sexes, as in the glowing phrase “rights of man” to which America was once dedicated. All the man-words have been brought to account and corrected. Mankind has become humankind . . . . But even when “man” means only male, “manly” still seems pretentious in our new society, and threatening to it as well. A manly man is making a point of the bad attitude he ought to be playing down.

MANSFIELD, *supra* note 90, at 1.

415. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

416. Professor Mansfield never quite distinguished manliness from masculinity, so he proffered a different conclusion. He advocated formal equality between men and women under the law and gender-neutrality in the public sphere, but desired for the sexes to admit their individuality and embrace distinctly “manly” and “womanly” virtues in the private sphere. See MANSFIELD, *supra* note 90, at 239–44.

# MARKETING PHARMACEUTICAL PRODUCTS IN THE TWENTY-FIRST CENTURY: AN ANALYSIS OF THE CONTINUED VIABILITY OF TRADITIONAL PRINCIPLES OF LAW IN THE AGE OF DIRECT-TO- CONSUMER ADVERTISING

VICTOR E. SCHWARTZ,\* CARY SILVERMAN,\*\*  
MICHAEL J. HULKA\*\*\* & CHRISTOPHER E. APPEL\*\*\*\*

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\* Chairman, Public Policy Group, Shook, Hardy & Bacon L.L.P. (Washington, D.C.); Co-Author, PROSSER, WADE AND SCHWARTZ'S TORTS (11th ed. 2005); Member, Advisory Committees of the American Law Institute's Restatement of the Law (Third) Torts: Products Liability, Apportionment of Liability, General Principles, Liability for Physical and Emotional Harm projects; J.D., Columbia University (magna cum laude); B.A., Boston University (summa cum laude).

\*\* Of Counsel, Shook, Hardy & Bacon L.L.P. (Washington, D.C.); J.D., M.P.A., The George Washington University Law School (2000) (with honors); B.S., Management Science, State University of New York College at Geneseo (1997).

\*\*\* Counsel, Eli Lilly and Company; Law Clerk, Judge Michael S. Karne, U.S. Court of Appeals for the Seventh Circuit; J.D., Indiana University Bloomington School of Law (magna cum laude); Editor-in-Chief, Indiana Law Journal. The views expressed herein do not necessarily represent the position of Eli Lilly and Company.

\*\*\*\* Attorney, Public Policy Group, Shook, Hardy & Bacon L.L.P. (Washington, D.C.); J.D., Wake Forest University School of Law; B.S., University of Virginia.

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## INTRODUCTION

According to a recent article in the *New England Journal of Medicine*, total pharmaceutical industry spending on direct-to-consumer (DTC) advertising of prescription drugs rose from \$985 million in 1996 to \$4.2 billion in 2005—an increase of 330%.<sup>1</sup> As a result, advertisements for prescription drugs are pervasive and consumers regularly view them in magazines and online, watch them on television, and listen to them on the radio.

This figure, however, must be put in perspective. Research also shows that during the same period, spending on pharmaceutical marketing increased not only for DTC advertising, but also across the board, from about \$11.4 billion to \$29.9 billion.<sup>2</sup> In fact, although DTC advertising has increased steadily both in absolute terms and as a percentage of pharmaceutical sales, promotion of drug treatments directly to physicians and other health care professionals still far outweighs DTC advertising.<sup>3</sup> In 2005, \$7.2 billion was spent on promotion to physicians alone.<sup>4</sup> Relatively speaking, DTC advertising is concentrated on a small number of brands.<sup>5</sup> Its reach, however, is considerable, and DTC advertising is the subject of significant debate among courts and commentators.<sup>6</sup>

In light of these changes in the marketing environment, this Article examines whether traditional legal principles governing the duty to warn of the risks of pharmaceutical products remain sound public policy. First, the Article considers the early history of the sale and marketing of pharmaceutical products,

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1. Julie M. Donohue et al., *A Decade of Direct-to-Consumer Advertising of Prescription Drugs*, 357 NEW ENG. J. MED. 673, 673, 676 (2007).

2. *Id.*

3. *See id.* at 675–77 (finding that only 14% of total industry expenditures on pharmaceutical promotion were devoted to DTC advertising in 2005).

4. U.S. GEN. ACCOUNTING OFFICE, GAO-07-54, *PRESCRIPTION DRUGS: IMPROVEMENTS NEEDED IN FDA'S OVERSIGHT OF DIRECT-TO-CONSUMER ADVERTISING* 13 (2006) [hereinafter 2006 GAO REPORT]. Manufacturer spending on DTC advertising also pales in comparison to industry spending on research and development, with \$31.4 billion spent in 2005. *Id.*

5. Donohue, *supra* note 1, at 676 (finding that the twenty drugs with the highest DTC spending made up 54.4% of total industry spending on DTC advertising).

6. *See, e.g., infra* Part III.C (discussing the preemption debate for DTC-advertised drugs).

discussing the initial tragic absence of regulation, followed by the establishment of the FDA and the pre-market approval process. It then examines the modern age of pharmaceutical advertising, including the FDA's relatively recent guidance on DTC broadcast advertising and the extent of its regulation. Finally, the Article examines rules of law that establish the legal landscape for warnings and advertising in the pharmaceutical context. This includes the learned intermediary doctrine, the effect of regulatory compliance on product liability and consumer protection claims, and the application of conflict preemption principles to tort law claims involving FDA-approved products.

The Article finds that the two foundational tenets underlying these doctrines have not changed. First, on a societal level, the FDA continues to regulate the pharmaceutical industry closely, both in approving pharmaceutical products as safe and effective for certain classes of patients and in mandating disclosure of risks so that physicians can accurately counsel their patients. Second, physicians remain individually responsible for diagnosing each patient regardless of advertising and for helping each patient make an educated treatment decision in light of the risks and benefits of a drug. Because of their authority to write prescriptions, physicians have ultimate responsibility for deciding whether a given drug is appropriate and beneficial for the patient. Prescription drug manufacturers, therefore, have obligations to report all material information to the FDA, both before and after approval, so that the FDA can make a fully informed decision about what products should be available to the market and can convey adequate information to physicians for patient counseling purposes.

The Article concludes that, irrespective of the rise of DTC advertising, traditional principles of law fully retain their viability in the post-DTC world both as a matter of jurisprudence and sound public policy.

## I. MARKETING AND REGULATION OF PHARMACEUTICALS FROM PAST TO PRESENT

### *A. Concepts of Product Mislabeling and Pre-Market Regulation*

Before examining modern regulation of pharmaceutical products and their advertising, placing the current system in historical context is useful. Companies that sell medications

have advertised their products directly to consumers since the beginning of medicine. The increasing regulatory scrutiny regarding approval, marketing, and sale of prescription drugs, however, is a relatively recent development. The new oversight is meant to ensure that drugs are safe and effective and that drug advertising does not mislead the public.

During much of the eighteenth and nineteenth centuries, companies regularly advertised patent medicines, which were available without a prescription, directly to consumers in American newspapers. Indeed, during the 1800s, patent medicine advertisers spent more on newspaper advertisements than any other group.<sup>7</sup> At the time, no regulatory structure existed to provide for pre-market review of these medicines to ensure their safety or efficacy or to substantiate the claims their producers made in these advertisements. The grifting snake oil salesman, a character that still pervades the mythology of the American West, dates to this unregulated period.

In 1906, Upton Sinclair published his novel, *The Jungle*, with its detailed account of the unsanitary conditions of the Chicago stockyards.<sup>8</sup> Prompted by the resulting public outcry from the book and public reaction to similar disclosures in the nation's newspapers about poisonous preservatives and dyes in foods and cure-all patent medicines, Congress passed the original Pure Food and Drugs Act.<sup>9</sup>

But if the 1906 Act was meant to curb the deceptive practices of snake oil salesmen, it was poorly equipped for the task. First, the 1906 Act did not prevent manufacturers from placing worthless medicines on the market because proof of safety or efficacy was not required. Second, the Act was directed only at product labels,

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7. See Michael S. Wilkes et al., *Direct-To-Consumer Prescription Drug Advertising: Trends, Impact, and Implications*, 19 HEALTH AFF. 110, 112 (2000).

8. See UPTON SINCLAIR, *THE JUNGLE* (1906).

9. Pure Food and Drugs Act of 1906, Pub. L. No. 59-384, 34 Stat. 768, *repealed by* the Federal Food, Drug, and Cosmetic Act of 1938, Pub. L. No. 75-717, 52 Stat. 1040 (codified as amended at 21 U.S.C. §§ 301-399 (2000)); *see also* U.S. Food & Drug Admin., *Milestones in U.S. Food and Drug Law History*, FDA BACKGROUNDER, May 3, 1999, <http://www.fda.gov/opacom/backgrounders/miles.html> (citing, in addition to reaction to *The Jungle*, public unrest over "the use of poisonous preservatives and dyes in foods, and cure-all claims for worthless and dangerous patent medicines" as the "major problems leading to the enactment of" the 1906 Act and the Meat Inspection Act).

not extra-label advertising.<sup>10</sup> It defined a drug as “misbranded” only if the stated claims on the label regarding its curative or therapeutic qualities were proven false or fraudulent.<sup>11</sup>

These inadequacies became tragically apparent some three decades later. In June 1937, a salesman for the S.E. Massengill Co. reported that his customers sought a liquid version of the drug sulfanilamide, which had been used to treat streptococcal infections and had been proven to have dramatic curative effects in tablet or powder form.<sup>12</sup> Responding to the market need, a chemist and pharmacist for the company experimented with sulfanilamide’s solubility and found that it would dissolve in diethylene glycol.<sup>13</sup> Although the company tested the product for flavor, appearance, and fragrance, it did not test the product’s toxicity.<sup>14</sup> In sufficient doses, diethylene glycol is toxic to humans and animals, causing renal failure, encephalopathy, and death.<sup>15</sup> A scientific literature review or a few simple animal tests would have revealed its lethal properties.<sup>16</sup> S.E. Massengill, however, shipped the product without taking these precautions. Between September and October 1937, more than one hundred people across the country obtained the product from their doctors or bought it from a pharmacy and died after consuming it.<sup>17</sup>

After news of the strange deaths began surfacing, the FDA investigated and intervened, seizing shipments from pharmacies and doctor’s offices across the country. But the FDA’s sole authority for these seizures was not—as one might expect—that the drug was manufactured and sold without any pre-market toxicity review. Ironically, the FDA only had authority

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10. See Francis B. Palumbo & C. Daniel Mullins, *The Development of Direct-to-Consumer Prescription Drug Advertising Regulation*, 57 FOOD & DRUG L.J. 423, 424–25 & n.12 (2002) (noting the portion of the 1906 Act stating that a drug would be deemed misbranded if “its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article . . . which is false or fraudulent” (quoting the Pure Food and Drugs Act § 8, 34 Stat. at 770)).

11. See *id.* at 425 & n.12.

12. See Carol Ballentine, *Taste of Raspberries, Taste of Death: The 1937 Elixir Sulfanilamide Incident*, FDA CONSUMER, June 1981, available at <http://www.fda.gov/oc/history/elixir.html>.

13. See *id.*

14. See *id.*

15. See, e.g., Pankaj Hari et al., *Fatal Encephalopathy and Renal Failure Caused by Diethylene Glycol Poisoning*, 56 J. TROPICAL PEDIATRICS 442 (2006).

16. See Ballentine, *supra* note 12.

17. See *id.*



to intervene through the 1906 Act's prohibition against label misbranding.<sup>18</sup> The term "elixir" on the product's label implied that the product was an alcohol solution when, in fact, it contained no alcohol.<sup>19</sup> Had the product instead been labeled a "solution," the FDA would have had no authority under the 1906 Act to intervene.<sup>20</sup>

In response to the crisis, Congress repealed the 1906 Act and replaced it with the Federal Food, Drug, and Cosmetic Act of 1938 (FDCA).<sup>21</sup> The increased protections of the new act included an FDA pre-market notification (but not approval) requirement for all "new drugs."<sup>22</sup> In order to market a new drug, a manufacturer would submit a New Drug Application (NDA) to the FDA. If the FDA did not affirmatively deny the application within sixty days, then the manufacturer could market the drug immediately.<sup>23</sup> Unsurprisingly, given the Elixir Sulfanilamide incident, this pre-market notification system focused solely on proof of the new product's safety, not its efficacy.<sup>24</sup> Thus, the FDA retained jurisdiction over the product label and it obtained authority under the 1938 Act to conduct a pre-market safety review.

In the same year Congress expressly vested jurisdiction over all drug advertisements with the Federal Trade Commission (FTC).<sup>25</sup> Congress had created the FTC in 1914 with the passage of the Federal Trade Commission Act.<sup>26</sup> Under that Act, Congress authorized the FTC to regulate advertising generally, though the Supreme Court's interpretation of the statute lim-

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18. See David F. Cavers, *The Food, Drug, and Cosmetic Act of 1938: Its Legislative History and Its Substantive Provisions*, 6 LAW & CONTEMP. PROBS. 2, 20 (1939), reprinted in PETER BARTON HUTT ET AL., *FOOD AND DRUG LAW, CASES AND MATERIALS* 577, 577-78 (3d ed. 2007).

19. See Ballentine, *supra* note 12.

20. See *id.*

21. Federal Food, Drug, and Cosmetic Act of 1938, Pub. L. No. 75-717, 52 Stat. 1040 (codified as amended at 21 U.S.C. §§ 301-399 (2000)).

22. HUTT ET AL., *supra* note 18, at 577.

23. See *id.*

24. See *id.* at 578.

25. See Palumbo & Mullins, *supra* note 10, at 426.

26. Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41-58 (2000)) (establishing the FTC).

ited the FTC's purview to deceptive advertising that harmed a competitor company.<sup>27</sup>

Earlier proposals to amend the 1906 Act had sought to regulate DTC advertising of drugs. The legislative history of those attempts reveals the nature and extent of DTC advertising at the time. Legislation introduced in 1933 named some thirty-six particular disease states or conditions for which any advertising would be necessarily deemed false, including measles, mumps, scarlet fever, sexual impotence, tuberculosis, and venereal diseases.<sup>28</sup> The bill included an exception, however, if the advertisement was "disseminated to members of the medical and pharmacological professions only or [if the advertisement] appears in scientific periodicals."<sup>29</sup> The list of diseases and the need for a direct-to-physician exception suggest that DTC advertising was pervasive in the early 1930s and provide clues as to the conditions these products were marketed to address.

*B. Establishment of the Modern Regulatory Regime  
for Approval and Marketing of Prescription Drugs*

Before 1951, there was no recognized category under federal law for prescription drugs. That year, Congress enacted the Durham-Humphrey Amendments to the FDCA, which required licensed pharmacists to dispense drugs that cannot be safely used without medical supervision.<sup>30</sup> It is uncertain whether the prescription requirement put an immediate halt to DTC advertising. If we assume that the history of the 1933 legislation is indicative of the nature and extent of DTC advertising at the time of that bill's consideration, then we can extrapolate on the legislative history of the next major alteration to the FDCA, the 1962 Kefauver-Harris Drug Amendments. That legislative history suggests that implementation of a prescription-drug regulatory scheme in 1951 curbed DTC advertising for prescription drugs and shifted the industry's marketing focus to physicians and health care professionals.

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27. See Palumbo & Mullins, *supra* note 10, at 425 & n.14 (citing *FTC v. Raladam Co.*, 283 U.S. 643 (1931)).

28. See *id.* at 425 n.18 (quoting S. 1944, 73d Cong. § 9(c) (1933)).

29. *Id.*

30. See *id.* at 426.

In 1962, the Kefauver-Harris Drug Amendments authorized the FDA to regulate the marketing of prescription drugs.<sup>31</sup> By this time, Congress was drawing a distinction between the advertising of over-the-counter (OTC) medicines, which are directed at consumers, and the marketing of prescription drugs, the bulk of which, in Congress's estimation, was already directed at the medical community.<sup>32</sup> A memorandum of understanding between the two agencies governs this allocation of responsibilities in which the FTC continues to regulate OTC advertising, whereas the FDA regulates the marketing of prescription drugs.<sup>33</sup>

The 1962 Amendments and their implementing regulations set two major requirements for all prescription drug advertising.<sup>34</sup> First, advertisements must contain a "summary" that provides a description of the drug's side effects, contraindications, warnings, and precautions, as well as its directions for use.<sup>35</sup> Second, the advertisement, when viewed in its entirety, must present a "fair bal-

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31. 1962 Kefauver-Harris Drug Amendments, Pub. L. No. 87-781, 76 Stat. 780 (1962) (codified as amended at 21 U.S.C. § 352(n) (2000)); *see also* 15 U.S.C. §§ 45, 52 (2000); 21 U.S.C. § 352(n) (2000) (removing any "advertisement of a prescription drug, published after the effective date of regulations issued under this paragraph applicable to advertisements of prescription drugs," from the purview of the provisions of 15 U.S.C. §§ 52-57); 21 U.S.C. § 393(b)(1) (2000) ("The [FDA] shall . . . promote the public health by . . . taking appropriate action on the marketing of regulated products in a timely manner.").

32. *See* Palumbo & Mullins, *supra* note 10, at 427 n.29 ("There is a marked difference in the advertising and promotion of proprietary and ethical drugs. Proprietary drugs—those sold over the drugstore counter—are like most other products in that sales pressures are exerted upon the final consumer who is subjected to an intensive barrage of advertisements for brand name products in newspapers, magazines, radio, and television. In the case of ethical drugs—those sold under prescription—the brunt of promotion effort is directed to the prescribing physician. Since his prescription dictates the particular drug to be used, usually the brand name, the physician is the focal center of advertising and promotional pressures." (citing S. Rep. No. 87-448, at 115 et seq. (1961))).

33. *See* Memorandum of Understanding Between FTC and the FDA, 36 Fed. Reg. 18,539 (Sept. 15, 1971) (providing most recent agreement).

34. The FDCA's treatment of prescription drug advertising is quite brief. It requires only that the advertisement include the drug's name and formula, and a brief summary describing the drug's effectiveness and its safety risks. *See* Palumbo & Mullins, *supra* note 10, at 428 (citing 21 U.S.C. § 352(n) (2002)). Shortly after the 1962 Drug Amendments' passage, the FDA implemented its original drug-advertising regulations. *See* HUTT ET AL., *supra* note 18, at 535 (citing 28 Fed. Reg. 1448 (Feb. 14, 1963), 28 Fed. Reg. 6375 (June 20, 1963), 28 Fed. Reg. 9837 (Sept. 10, 1963), 28 Fed. Reg. 10993 (Oct. 15, 1963), 29 Fed. Reg. 257 (Jan. 10, 1964)). The FDA further revised those regulations later that same decade. *See id.*

35. 21 C.F.R. § 202.1(e) (1979).

ance" between the information relating to the drug's efficacy and information relating to its safety and risk profile.<sup>36</sup>

The 1962 Amendments also strengthened the FDA's pre-market review process, implementing the procedure that remains largely in effect today. Once again, the prompt for regulation arose out of a public health crisis. Thalidomide, a drug approved for marketing in various European countries, was discovered to be a teratogen, an agent that can cause malformations of an embryo or fetus.<sup>37</sup> A manufacturer had submitted an NDA to market the drug for use in the United States, which was pending at the time of this discovery. Congress responded by amending the FDCA to require affirmative approval by the FDA for NDAs, replacing the notification and automatic-approval system put in place by the 1938 Act.<sup>38</sup> In addition, Congress required manufacturers submitting NDAs to prove not only that a drug was safe,<sup>39</sup> but also that the product was effective.<sup>40</sup> For its part, the FDA now had to reach an affirmative conclusion that the drug was both safe and effective before the drug could be marketed.<sup>41</sup> The standards for approval have remained relatively

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36. 21 C.F.R. § 202.1(e)(5)(ii) (1979).

37. See HUTT ET AL., *supra* note 18, at 578.

38. See *id.* at 579.

39. Section 505(d) of the FDCA requires "the FDA to withhold approval unless the sponsor's NDA shows the drug to be safe 'by all methods reasonably applicable to show whether or not such drug is safe for use under the conditions of use prescribed, recommended, or suggested' in the proposed labeling." *Id.* at 685.

40. Section 505(d) of the FDCA requires the FDA to withhold approval unless the sponsor's NDA provides "'substantial evidence that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the proposed labeling.'" *Id.* at 579. Section 505(e) requires the FDA to "withdraw approval of any drug after notice and opportunity for hearing if he finds that 'on the basis of new information before him' substantial evidence of efficacy is lacking." *Id.*

41. See 21 U.S.C. § 355(d)-(e) (2000). Specifically, an NDA must summarize the general understanding of the application, the drug type, and the rationale for approval, as well as a description of the drug's chemistry, its manufacturing practices, and its quality controls. See 21 C.F.R. § 314.50(c)-(d) (2000). It must contain pre-clinical data (that is, the results of animal and *in vitro* studies) regarding the product's pharmacology and toxicology, and that data must be accompanied by a statement of compliance with good laboratory practices. See *id.* The NDA must describe the drug's pharmacokinetics and bioavailability (that is, how the drug is expected to react in the human system). See *id.* It must contain a wealth of clinical data from Phase I, II, and III clinical trials on humans. That data must also be accompanied by an integrated summary of the product's effectiveness and safety profile, along with full disclosure of the study results. Finally, the NDA must include both a sample of the product and the product's labeling. See 21 C.F.R. § 314.50(e) (2000).

unchanged in the decades following their implementation and continue to guide both the industry and the FDA in their daily decisions to the present.<sup>42</sup>

Procedurally, the FDA's Center for Drug Evaluation and Research (CDER) reviews and approves NDAs,<sup>43</sup> and then evaluates the drug's proposed labeling.<sup>44</sup> The FDA must find that the results and data submitted in the NDA justify each statement proposed for drug labeling.<sup>45</sup> Federal regulations require dividing the label's content into sections, including a list of the drug's approved indications and usage,<sup>46</sup> contraindications,<sup>47</sup> warnings,<sup>48</sup> precautions,<sup>49</sup> and adverse reactions.<sup>50</sup> The FDA must ap-

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42. See HUTT ET AL., *supra* note 18, at 688. The process from the discovery of a molecule's treatment potential to its submission in an NDA is laborious, long, and expensive. On average, for 10,000 drugs identified as having treatment potential and therefore submitted to laboratory and animal testing, only one might make it through Phase I, II, and III clinical testing on humans and become the subject of an NDA. See PhRMA, Innovation (2008), <http://www.phrma.org/innovation>. The Tufts Center for the Study of Drug Development, for example, calculated that the average cost of bringing a new drug to market in 2001 was \$802,000,000. See Joseph A. DiMasi et al., *The Price of Innovation: New Estimates of Drug Development Costs*, 22 J. HEALTH ECON. 151, 166 (2003) (presenting study by Tufts Center for the Study of Drug Development). In a 2006 study, the Center for the Study of Drug Development pegged the average cost of developing a new biotechnology drug at \$1,200,000,000. See TUFTS CENTER FOR THE STUDY OF DRUG DEVELOPMENT, OUTLOOK 2008, at 2 (2008), available at <http://csdd.tufts.edu/InfoServices/OutlookReports.asp>.

43. 21 U.S.C. § 355(b) (2000). CDER examines six components of the NDA: medical, biopharmaceutical, pharmacological, statistical, chemical, and microbiological. Medical reviewers are responsible for evaluating the clinical sections of submissions and therefore take the lead role in NDA review. See CTR. FOR DRUG EVALUATION & RESEARCH, FOOD & DRUG ADMIN., CDER HANDBOOK 15–19 (1998), available at <http://www.fda.gov/cder/handbook/index.htm> [hereinafter CDER HANDBOOK]. CDER may also host Advisory Committee meetings at this stage to obtain outside advice and opinions from experts. See *id.* at 11.

44. See 21 U.S.C. § 352 (2000); 21 C.F.R. § 201.56 (2008) (general requirements for prescription drug labeling).

45. See 21 C.F.R. § 201.56 (2008).

46. See 21 C.F.R. § 201.57(a)(6)–(8), (c)(4) (2008).

47. See 21 C.F.R. § 201.57(a)(9), (c)(5) (2008) (requiring a description of situations in which the drug should not be used because the risk of use clearly outweighs any possible benefit).

48. See 21 C.F.R. § 201.57(a)(10), (c)(6) (2008) (requiring a description of any serious adverse reactions and potential safety hazards, subsequent limitation in use, and steps that should be taken if they occur).

49. See 21 C.F.R. § 201.57(a)(10), (c)(6), (c)(8) (2008) (requiring a description of any special care to be exercised for the safe and effective use of the drug, including general precautions and information for patients on drug interactions).

50. See 21 C.F.R. § 201.57(a)(11), (c)(7) (2008) (requiring a description of any undesirable effects reasonably associated with the proper use of the drug).

prove the label's content *before* it accepts the NDA and the company begins marketing the drug.

### C. DTC Advertising and Its Regulation Today

The Division of Drug Marketing, Advertising, and Communications (DDMAC), a separate component of CDER, reviews pharmaceutical marketing practices. There are no formal regulations that distinguish DTC advertising from direct-to-physician advertising.<sup>51</sup> Rather, the FDA recognizes three distinct types of advertising, based on the advertisements' content. First, "reminder" advertisements are promotional pieces that call attention to a product or brand name, but contain no reference to the purpose of the drug, its benefits, or risks.<sup>52</sup> Reminder advertisements are exempt from the brief-summary requirement.<sup>53</sup> Second, "help-seeking" advertisements describe a disease or condition and direct the consumer to see his doctor, but do not mention the drug's name.<sup>54</sup> Finally, product-claim advertisements reveal both the product's name and its contraindications.<sup>55</sup> These product-claim advertisements must satisfy the "brief summary" and "fair balance" requirements.<sup>56</sup>

In the twenty years following enactment of the 1962 Amendments, pharmaceutical manufacturers directed advertisements and promotional practices almost exclusively toward physicians.<sup>57</sup> It was not until the early 1980s that manufacturers began to place advertisements for prescription medicines in main-

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51. See Palumbo & Mullins, *supra* note 10, at 429.

52. 21 C.F.R. § 202.1(e)(2)(i) (2008). PhRMA's Guiding Principles urge its members not to engage in this practice. See PhRMA, PHRMA GUIDING PRINCIPLES: DIRECT TO CONSUMER ADVERTISEMENTS ABOUT PRESCRIPTION MEDICINES 4 (2005), <http://www.phrma.org/files/DTCGuidingprinciples.pdf> (Principle 10: "DTC television advertising that identifies a product by name should clearly state the health conditions for which the medicine is approved and the major risks associated with the medicine being advertised.").

53. See 21 C.F.R. § 202.1(e)(2) (2008).

54. Direct-to-Consumer Promotion; Public Hearing, 60 Fed. Reg. 42,581, 42,582 (Aug. 16, 1995).

55. See 21 C.F.R. § 202.1(e)(1) (2008).

56. See 21 C.F.R. § 202.1(e)(5)–(6) (2008) (listing ways in which drug advertisements fail to satisfy fair balance requirements).

57. See KIM SHEEHAN, CONTROVERSIES IN CONTEMPORARY ADVERTISING 209 (2004).

stream print media.<sup>58</sup> Soon after these advertisements began to run, the FDA asked for a voluntary moratorium of the practice.<sup>59</sup>

In 1985, the FDA decided to permit DTC advertising so long as the manufacturer complied with the "brief summary" and "fair balance" requirements applicable to physician-directed advertising.<sup>60</sup> Historically, in print media, the product's approved physician labeling was reprinted in the advertisement to satisfy the "brief summary" requirement. This practice, however, presented challenges for broadcast advertising. A thirty-second TV spot was both too expensive and too short for a manufacturer to read the brief summary or scroll through the product's package insert.<sup>61</sup>

In response to industry inquiry, the FDA held public hearings on DTC broadcast advertising in 1995. The agency issued a Draft Guidance document in 1997, which became its final position in 1999.<sup>62</sup> The Guidance document removed barriers to broadcast advertising largely by transforming the "brief summary" requirement for print advertising into what is now known as the "major statement" requirement for broadcast advertising.<sup>63</sup> Under that requirement, the advertisement need not repeat all potential side effects, contraindications, warnings, and precautions associated with the product, but it must, in consumer-friendly language, disclose the drug's major risks in either the audio or visual component.<sup>64</sup> Further, to make "adequate provision" of the approved product labeling, the Guidance document makes clear that the advertisement must publicize a toll-free telephone number through which the patient can obtain a copy of the product's label, refer the patient to a print advertisement or other non-web-based resource for additional information, include a web address providing access to the product's labeling,

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58. See *id.* at 210; Palumbo & Mullins, *supra* note 10, at 424.

59. See SHEEHAN, *supra* note 57, at 210.

60. Direct-to-Consumer Advertising of Prescription Drugs; Withdrawal of Moratorium, 50 Fed. Reg. 36,677 (Sept. 9, 1985).

61. See SHEEHAN, *supra* note 57, at 210–11.

62. FOOD & DRUG ADMIN., GUIDANCE FOR INDUSTRY: CONSUMER-DIRECTED BROADCAST ADVERTISEMENTS (August 1999) [hereinafter GUIDANCE], available at <http://www.fda.gov/cder/guidance/index.htm>.

63. *Id.* at 1; SHEEHAN, *supra* note 57, at 211.

64. See 21 C.F.R. § 202.1(e)(1) (2008). On September 27, 2007, the President signed the Food and Drug Administration Amendment Acts of 2007, imposing a requirement that the major statement be presented in a "clear, conspicuous and neutral manner." FDA Amendment Act of 2007, Pub. L. No. 110-85, § 503(B), 121 Stat. 823, 940 (to be codified at 21 U.S.C. § 353(b)).

and refer the patient to his doctor or pharmacist.<sup>65</sup> Although the Guidance document does not have binding legal effect, the FDA essentially placed manufacturers on notice that it would not take regulatory action when a broadcast advertisement complies with the Guidance document's terms.<sup>66</sup>

Additionally, as with all advertisements, the broadcast messaging must not be false or misleading in any respect. Beyond assessing the pure content, DDMAC may also consider the form of the audio and video production and presentation (for example, the graphics and superimposition of text, the pacing and clarity of voiceovers, the visual editing, and sound effects or music) to ensure that the advertisement is "fairly balanced" and that risk information is adequately communicated.<sup>67</sup>

Should DDMAC determine that an advertisement or promotional piece in distribution violates the law or FDA guidelines, it sends one of two types of letters to the offender.<sup>68</sup> Minor violations are noted in a Notice of Violation (NOV) letter.<sup>69</sup> A recipient of an NOV letter typically discontinues the offending marketing practice and responds to DDMAC in writing within ten days, informing it of the discontinuation.<sup>70</sup> For more serious violations, DDMAC sends a warning letter.<sup>71</sup> These letters put the recipient on notice of the FDA's intent to initiate further

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65. GUIDANCE, *supra* note 62, at 2–3.

66. See Palumbo & Mullins, *supra* note 10, at 430.

67. On May 8, 2008, Ruth S. Day, Ph.D, testified before the House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, on the field of "cognitive accessibility," which is the study of what people understand and remember after viewing DTC advertising. Dr. Day recommended that the FDA adopt a formal "evidence-based approach" for analyzing the cognitive accessibility of broadcast DTC advertising. See *Direct-to-Consumer Drug Ads: What do People Understand and Remember: Hearing Before Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Commerce*, 110th Cong. (2008) (testimony of Ruth S. Day), available at <http://energycommerce.house.gov/images/stories/Documents/Hearings/PDF/Testimony/OI/110-oi-hrg.050808.Day-testimony.pdf>.

68. See 21 C.F.R. § 312.84(c) (2008) (FDA not approvable for marketing letter); see also Palumbo & Mullins, *supra* note 10, at 429.

69. See Palumbo & Mullins, *supra* note 10, at 429.

70. See 21 C.F.R. § 314.120(a) (FDA "not approvable letter").

71. See Palumbo & Mullins, *supra* note 10, at 429. A study by the General Accounting Office (GAO) found that, in a five-year period between August 1997 and August 2002, the FDA issued eighty-eight NOV and warning letters for violative DTC advertising. See U.S. GEN. ACCOUNTING OFFICE, GAO-03-177, *PRESCRIPTION DRUGS: FDA OVERSIGHT OF DIRECT-TO-CONSUMER ADVERTISING HAS LIMITATIONS* 18 (2002) [hereinafter 2002 GAO REPORT].



regulatory action against the recipient if it refuses to rectify the offending practice promptly. Manufacturers have consistently taken the appropriate corrective action indicated in such letters, without the need for further action from the FDA.<sup>72</sup> In addition, the Food and Drug Administration Amendments Act of 2007 (FDAAA) gave the FDA the authority to impose civil penalties directly for false or misleading advertisements.<sup>73</sup>

Federal law does not currently mandate pre-market review of DTC advertising. Rather, unless the FDA provides otherwise,<sup>74</sup> manufacturers are required to submit their marketing materials to the agency at the time of the product's distribution in the marketplace.<sup>75</sup> Many manufacturers, however, routinely submit proposed advertisements before dissemination on a voluntary basis. This provides the FDA with an opportunity to review advertisements before they are released publicly and to suggest improvements.<sup>76</sup> For example, between 2000 and 2006, the FDA received an average of approximately 150 television advertisements each year for advisory review.<sup>77</sup> In fact, the Pharmaceutical Research and Manufacturers of America (PhRMA), the leading industry group of drug manufacturers, encourages its members to submit all television advertising to the FDA for review before airing.<sup>78</sup> Manufacturers have widely adopted the PhRMA code and continue the longstanding practice of submitting DTC advertisements to the FDA before dissemination.<sup>79</sup>

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72. See 2002 GAO REPORT, *supra* note 71, at 21.

73. FDA Amendments Act of 2007, Pub. L. No. 110-85, § 901, 121 Stat. 823, 939–42 (to be codified at 21 U.S.C. § 353b).

74. The FDAAA provides the FDA with authority to mandate submission of television advertisements not later than forty-five days prior to broadcast. *Id.* at 939–43.

75. See 21 C.F.R. § 202.1(j) (2008).

76. See 21 C.F.R. § 202.1(j)(4) (2008).

77. User Fee Program for Advisory Review of Direct-to-Consumer Television Advertisements for Prescription Drug and Biological Products; Request for Notification of Participation and Number of Advertisements for Review, 72 Fed. Reg. 60,677, 60,678 (Oct. 25, 2007) [hereinafter User Fee Notice].

78. PhRMA, PHRMA GUIDING PRINCIPLES: DIRECT TO CONSUMER ADVERTISEMENTS ABOUT PRESCRIPTION MEDICINES 5 (2005), available at <http://www.phrma.org/FILES/DTCGuidingPrinciples.pdf> (Principle 8).

79. See, e.g., ELI LILLY & CO., PROVIDING VALUE TO PATIENTS AND SOCIETY: LILLY CORPORATE CITIZENSHIP REPORT 2006–07, at 28–29, available at [http://www.lilly.com/pdf/citizenship\\_report\\_0607.pdf](http://www.lilly.com/pdf/citizenship_report_0607.pdf); GLAXOSMITHKLINE, ANSWERING THE QUESTIONS THAT MATTER: CORPORATE RESPONSIBILITY REPORT 2007, at 64, available at <http://www.gsk.com/responsibility/cr-review-2007/downloads/CR-Report-2007.pdf>; MERCK, MERCK'S ALIGNMENT WITH THE "PhRMA GUIDING PRINCIPLES—DIRECT TO

Some critics, including the General Accounting Office (GAO), have highlighted shortcomings in the regulatory process overseeing pharmaceutical marketing and have suggested that DDMAC needs additional resources. In 2002, a GAO study examined two deficiencies in the regulation of DTC advertising: the FDA's inability to be certain that manufacturers submit their advertisements to the agency and the lengthy period before the FDA reviews advertisements and issues warning letters for misleading information.<sup>80</sup> When the GAO revisited the issue four years later, it found that this lag time had worsened considerably, leading to a situation where, more often than not, the publication or broadcast of the misleading advertisement had already concluded before the FDA issued its violation letter.<sup>81</sup> It also noted that the FDA had the capacity to review only a small portion of the increasingly large amount of the DTC materials submitted. Therefore, the FDA closely examined only advertisements for those drugs with the greatest potential to impact the public health.<sup>82</sup> As the FDA recently noted, "[t]he lack of timely, predictable FDA review times for DTC television advertisements has hindered companies' ability to accurately set timeframes for their marketing campaigns and has discouraged companies from taking advantage of the DTC advisory review process."<sup>83</sup>

Congress attempted to address the inability of the FDA to keep pace with the increasing number of DTC advertisements submitted for its review when it enacted FDAAA, which included a new user's fee program to provide the agency with resources to hire additional staff for its voluntary review program.<sup>84</sup> The program would have required any company that intended to submit DTC television advertisements for voluntary FDA review to pay an annual fee to help maintain the program.<sup>85</sup> The Act provided, however, that this new program would not go into effect unless the FDA received \$11,250,000 in

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CONSUMER ADVERTISEMENTS ABOUT PRESCRIPTION MEDICINE" 3, available at [http://www.merck.com/about/public\\_policy/docs/mercks\\_alignment\\_with\\_pharma\\_guiding\\_principles\\_final.pdf](http://www.merck.com/about/public_policy/docs/mercks_alignment_with_pharma_guiding_principles_final.pdf).

80. See 2002 GAO REPORT, *supra* note 71, at 21–23.

81. See 2006 GAO REPORT, *supra* note 4, at 21–27.

82. See *id.* at 17–19.

83. User Fee Notice, *supra* note 77, at 60,678.

84. See FDA Amendments Act of 2007, Pub. L. No. 110-85, §§ 101–109, 121 Stat. 823, 825–42.

85. See *id.*

fees within 120 days of enactment (that is, by January 25, 2008).<sup>86</sup> In January 2008, the FDA announced that because a subsequent appropriation bill did not include a corresponding authorization for the FDA to collect and spend user fees for the purposes of the program, and because the FDA had not collected the mandated minimum level of funds, it would not implement the new program.<sup>87</sup> Therefore, the FDA continues to review advertisements voluntarily submitted for review "in as timely a manner as resources permit."<sup>88</sup>

*D. The Relevance of History to DTC Advertising Today*

The previously discussed history and development of pharmaceutical regulation reveals some interesting insights. First, DTC advertising is not a new phenomenon; in fact, it predates regulation of pharmaceuticals.<sup>89</sup> Second, the major developments in early pharmaceutical regulation, the 1906 Pure Food and Drugs Act and the Federal Food, Drug, and Cosmetic Act of 1938, were born out of responses to public health crises resulting from inadequate testing, not deficiencies specific to DTC advertising.<sup>90</sup> Third, regulation discouraging DTC advertising (by deeming it false) was initially proposed and rejected by Congress in an age when the advertisements were likely to have been in printed materials.<sup>91</sup> This history implies that Congress did not find DTC advertising a significant threat to consumer safety, given the need for a prescribing physician.<sup>92</sup>

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86. *See id.* § 104, 121 Stat. at 837–38.

87. User Fee Program for Advisory Review of Direct-to-Consumer Television Advertisements for Prescription Drugs and Biological Products; Program Will Not Be Implemented, 73 Fed. Reg. 2924 (Jan. 16, 2008).

88. *Id.* The FDA responded in May 2008 to a GAO recommendation and developed criteria to prioritize its review of promotional material for those products that have the greatest potential to negatively affect the public health. But a GAO representative testified before a congressional subcommittee that the FDA still needed to document its application of that criteria and systematically track its review of voluntarily submitted materials in order to improve oversight. U.S. GEN. ACCOUNTING OFFICE, GAO-08-758T, PRESCRIPTION DRUGS: TRENDS IN FDA'S OVERSIGHT OF DIRECT-TO-CONSUMER ADVERTISING 3 (2008).

89. *See supra* Part I.A.

90. *See supra* Part I.A.

91. Palumbo & Mullins, *supra* note 10, at 425 n.18 (quoting S. 1944, 73d Cong. § 9(c) (1933)).

92. *See id.* at 425–26.

Modern regulation of pharmaceuticals follows such sentiment. In developing comprehensive regulation regarding the safety, efficacy, and marketing of a drug, the FDA has refrained from regulation specific to DTC advertising and has instead approached this form of marketing under the same analysis as direct-to-physician advertising.<sup>93</sup> As DTC advertising resurfaced from dormancy and became more mainstream in the early 1980s, the FDA instituted a voluntary moratorium to examine again whether DTC advertising posed a legitimate concern to consumers and found none.<sup>94</sup> Over the past two decades the FDA has clearly recognized, through its Guidance document and other agency statements, that DTC marketing does not pose a heightened risk to consumers, and may actually prove beneficial.<sup>95</sup>

There is, however, a recognized need to provide the FDA with additional staffing so that it may more promptly review advertisements and suggest improvements. Such action can only come from Congress. Despite that particular criticism regarding the regulatory review of DTC advertisements, repeated examination of DTC advertising over the past century has not found that it interferes with the doctor-patient relationship or diminishes the role of the FDA in closely regulating the safety and efficacy of the drug. Because DTC marketing of prescription drugs has not fundamentally altered the playing field, traditional rules of law should remain fully viable.

## II. THE POTENTIAL BENEFITS AND PITFALLS OF DTC ADVERTISING

Reaction to the resurgence of DTC advertising within the modern regulated pharmaceutical environment is mixed. Critics argue that DTC advertising overemphasizes benefits and downplays risks, which might cause patients to believe that a particular medicine works better or more safely than it actually does.<sup>96</sup> Some critics express concern that the presence of DTC

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93. See Palumbo & Mullins, *supra* note 10, at 429.

94. See SHEEHAN, *supra* note 57, at 210.

95. See *id.* at 216.

96. A 2007 study in the *Journal of Health Communication* took issue with the FDA's effectiveness in policing the "fair balance" requirement, finding that the average sixty-second commercial contained less than eight seconds of side-effect information. See Wendy Macias et al., *A Wonderful Life or Diarrhea and Dry Mouth?*

campaigns negatively affect the doctor-patient relationship, prompting patients to pressure their physicians to prescribe unneeded medications or to demand a brand name pharmaceutical over cheaper or safer generic alternatives.<sup>97</sup> Beyond issues with the message itself, critics cite the rapid increase in industry spending on DTC advertising—a 330% rise from \$985 million in 1996 to \$4.2 billion in 2005—as contributing to a contemporaneous rise in drug spending.<sup>98</sup> Critics also perceive an inverse relationship between this increased spending and decreasing regulatory action documenting noncompliance, such as NOV or warning letters, as evidence of an overworked and inefficient FDA.<sup>99</sup>

Proponents counter that DTC advertising fosters healthy physician-patient relationships by providing information to patients that prompts discussion with their physicians. When first surveyed in the 1980s about whether they would value DTC advertising, patients responded that they believed DTC advertising would be useful, but they would still prefer that physicians control prescribing decisions.<sup>100</sup> Twenty years later,

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*Policy Issues of Direct-to-Consumer Drug Advertising on Television*, 22 HEALTH COMM. 241, 247 (2007).

97. See *Public Views of Direct-to-Consumer Prescription Drug Advertising: Hearing Before the H. Subcomm. on Oversight & Investigations, Comm. on Energy & Commerce*, 110th Cong. 1–7 (2008) (statement of Mollyann Brodie, Vice President and Director, Public Opinion and Media Research, Henry J. Kaiser Family Foundation), available at [http://energycommerce.house.gov/cmte\\_mtg/110-oi-hrg.050808.DTC.shtml](http://energycommerce.house.gov/cmte_mtg/110-oi-hrg.050808.DTC.shtml).

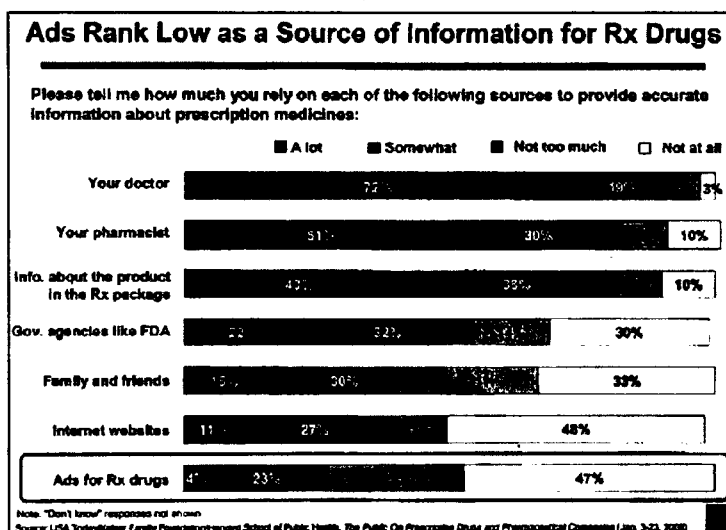
98. See Donohue, *supra* note 1, at 676.

99. See, e.g., *id.* at 676, 679–80 (noting that violation letters sent by the FDA to manufacturers had fallen from 142 in 1997 to only 21 in 2006, and attributing the decrease to policies and understaffing at the FDA that have weakened the FDA's capacity to enforce these regulations); 2006 GAO REPORT, *supra* note 4, at 21–27. Reconciling the debate is beyond the scope of this Article, but it deserves mention that such a theory presupposes that transgressions of advertising regulations remain constant in proportion to spending (that is, violations are occurring at the same rate, but are going undetected), which rejects the notion of applied learning from previous experience or the use of DDMAC's voluntary pre-market advertising review. It should be noted that, after an initial uptick in 1999 in companies seeking FDA input through launch-campaign advisory letters pursuant to the FDA's pre-market voluntary submission process, FDA advisory letters have remained relatively stable from 2000 to 2005. This fact suggests that the industry continues to seek out the FDA's insight and approval before releasing campaigns to the public. See, e.g., U.S. FOOD & DRUG ADMIN., CDER 2005 REPORT TO THE NATION: IMPROVING PUBLIC HEALTH THROUGH HUMAN DRUGS 45 (2005).

100. See SHEEHAN, *supra* note 57, at 210; see also Louis A. Morris et al., *The Attitudes of Consumers toward Direct Advertising of Prescription Drugs*, 101 PUB. HEALTH REP. 82, 87 (1986), cited in Palumbo & Mullins, *supra* note 10, at 424.

in response to one study on consumer perceptions, the majority of patients reported that DTC advertising had allowed them to take a more active role in their own health care and encouraged them to seek medical care from their physicians.<sup>101</sup> Nevertheless, DTC advertising ranked dead last in a recent poll of which sources consumers report relying upon to provide accurate information about prescription medications. Internet websites, family and friends, the FDA, the package label, and pharmacists all ranked progressively higher on the list. In fact, "Your doctor" topped the list overwhelmingly.<sup>102</sup>

Figure 1



Doctors, for their part, greeted DTC advertising with skepticism, but by the early 1990s, the American Academy of Family Physicians expressed an opinion that DTC advertising encourages patients to seek needed medical care.<sup>103</sup> Later, the American Medical Association reversed its blanket policy against DTC advertising in favor of a case-by-case approach.<sup>104</sup> By

101. See SHEEHAN, *supra* note 57, at 215.

102. *Public Views of Direct-to-Consumer Advertising of Prescription Drugs*, *supra* note 97, at 5, 12 fig.7.

103. See SHEEHAN, *supra* note 57, at 210.

104. See *id.* Although it continues to support a case-by-case approach, the AMA remains generally skeptical of DTC advertising. In testimony before Congress in May 2008, it recommended additional research into the effect, if any, of DTC ad-

2002, one report showed that the "overwhelming" majority of physicians polled believed that DTC advertising has had a beneficial effect on the doctor-patient relationship.<sup>105</sup>

In 2003, the FDA published results from what is perhaps the most comprehensive survey to date of physician attitudes toward DTC advertising.<sup>106</sup> The data set included 250 general practitioners and 250 specialists in the fields of dermatology, allergy, endocrinology, and psychiatry.<sup>107</sup> Most doctors polled believed that DTC advertising led patients to ask more thoughtful questions, made patients more aware of possible treatments, made patients more concerned about their health care, prompted better discussions between patients and physicians about health, and thus helped educate patients about their health problems.<sup>108</sup> The survey also found that doctors believe patients understand that they need to consult a healthcare professional about appropriate treatment.<sup>109</sup>

This Article does not attempt to resolve this debate or answer whether DTC advertising is good or bad for the industry, patients, or physicians. But however valid the arguments are on both sides, neither the available data nor current medical practice supports the notion that DTC advertising alters a physician's control of, or ethical and legal responsibility for, the ultimate decision to prescribe medicines to a patient. For

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vertising on the doctor-patient relationship. *Direct-to-Consumer Advertising: Marketing, Education or Deception?: Hearing Before the H. Subcomm. on Oversight & Investigation of the H. Comm. on Energy & Commerce*, 110th Cong. 12 (2008) (statement of Nancy H. Nielson, President Elect, American Medical Association), available at [http://energycommerce.house.gov/cmte\\_mtgs/110-oi-hrg.050808.Nielson-Testimony.pdf](http://energycommerce.house.gov/cmte_mtgs/110-oi-hrg.050808.Nielson-Testimony.pdf). The AMA additionally recommended a set of guidelines for DTC advertising, including a moratorium on DTC advertising of all newly approved drugs until physicians "have been appropriately educated about the drug." *Id.* at 6-7. The AMA recommends that the length of the moratorium be determined by the FDA in consultation with the manufacturer and be dependent upon numerous factors, including the innovative nature of the drug, the severity of the disease the drug is intended to treat, the availability of alternative therapies, and the intensity and the timeliness of education about the drug for physicians who are likely to prescribe it. *See id.*

105. SHEEHAN, *supra* note 57, at 216.

106. KATHRYN J. AIKIN, DIRECT-TO-CONSUMER ADVERTISING OF PRESCRIPTION DRUGS: PHYSICIAN SURVEY PRELIMINARY RESULTS (2003), <http://www.fda.gov/cder/ddmac/globalsummit2003>.

107. *Id.* at 3.

108. *See id.* at 32, 38.

109. *See id.* at 34.

example, the FDA responded to concerns of undue influence in prescribing decisions by asking doctors in its 2003 survey whether a patient's having seen a product advertisement created any problems for the doctor when interacting with that patient. Overwhelmingly, those polled responded that it did not.<sup>110</sup> Of the 18% who did believe that problems arose, most reported that the problem either stemmed from additional time spent with the patient correcting misperceptions about the product or confirming that the patient did not have the condition the drug was designed to treat.<sup>111</sup> When asked whether the patient tried "to influence the course of treatment in a way that would have been harmful to him or her," 91% of doctors polled said no.<sup>112</sup> Furthermore, although some doctors reported moderate to heavy pressure to prescribe medications to their patients, the majority of doctors polled reported that they felt "not at all pressured" to do so.<sup>113</sup> In any event, even those reporting some level of pressure to prescribe still ultimately had to make the decision whether to prescribe individually. Thus, the results of the survey demonstrate that prescribing decisions still rest firmly with the physician and that the patient relies necessarily upon his physician's medical judgment.

### III. TRADITIONAL RULES OF LAW REMAIN VIABLE, SOUND PUBLIC POLICY TODAY

Three traditional rules—the learned intermediary doctrine, regulatory compliance exemptions to consumer protection statutes, and federal preemption—are particularly relevant in evaluating liability related to drug warnings. The learned intermediary doctrine is a judicial doctrine, regulatory compliance is a statutory policy rooted in common law, and federal preemption is a constitutional principle deriving from the Supremacy Clause of the Constitution. Although each originates from a different source, they share a common underlying policy. That policy recognizes that close regulation by the FDA and oversight by individual doctors appropriately preclude holding

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110. *See id.* at 12.

111. *Id.* at 12–13.

112. *Id.* at 21.

113. *Id.* at 22.



pharmaceutical manufacturers liable for alleged flaws in communicating information to individual patients.

A. *Ask Your Doctor: The Learned Intermediary Doctrine*

1. *Learned Intermediary Fundamentals*

The learned intermediary doctrine provides that manufacturers or suppliers of prescription drugs fulfill their duty to warn consumers of the dangerous propensities of their products by conveying accurate warning information to prescribing physicians.<sup>114</sup> It is the physician's duty to evaluate the benefits and risks of the medication as they apply to the individual patient.<sup>115</sup> The rule establishes a manufacturer's legal duty to warn physicians, rather than individual consumers directly.<sup>116</sup>

Several commonsense rationales support the learned intermediary doctrine. First, training and experience place physicians in a better position than the manufacturer to convey complex medical information and terminology to patients.<sup>117</sup> Second, the physician has a relationship with the individual patient, making it possible to evaluate the patient's treatment needs and provide an assessment of the potential benefits and

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114. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 6 (1998) [hereinafter RESTATEMENT (THIRD)].

115. See *Reyes v. Wyeth Labs.*, 498 F.2d 1264, 1276 (5th Cir. 1974) ("Prescription drugs are likely to be complex medicines, esoteric in formula and varied in effect. As a medical expert, the prescribing physician can take into account the propensities of the drug, as well as the susceptibilities of his patient. His is the task of weighing the benefits of any medication against its potential dangers. The choice he makes is an informed one, an individualized medical judgment bottomed on a knowledge of both patient and palliative."); see also *In re Zyprexa Prods. Liab. Litig.*, 489 F. Supp. 2d 230, 266 (E.D.N.Y. 2007) (stating that "[w]hether the physician in fact reads [the drug manufacturer's] warning or passes its contents along to the recipient of the drug is irrelevant" for purposes of the learned intermediary doctrine (quoting *E.R. Squibb & Sons, Inc. v. Farnes*, 697 So. 2d 825, 827 (Fla. 1997))); *West v. Searle & Co.*, 806 S.W.2d 608, 613-14 (Ark. 1991) (stating that physicians must make independent judgments as to whether drugs are beneficial for their patients).

116. See Diane Schmauder Kane, Annotation, *Construction and Application of the Learned-Intermediary Doctrine*, 57 A.L.R.5th 1 (1998).

117. See RESTATEMENT (THIRD), *supra* note 114, § 6 cmt. b ("[O]nly health care professionals are in a position to understand the significance of the risks involved and to assess the relative advantages and disadvantages of a given form of prescription-based therapy."); see also Barbara Pope Flannagan, *Products Liability: The Continued Viability of the Learned Intermediary Rule as it Applies to Product Warnings for Prescription Drugs*, 20 U. RICH. L. REV. 405, 412 (1986).

likely risks specific to the patient's medical and family history.<sup>118</sup> Third, it is more effective and efficient for manufacturers to provide a common set of warnings to an intermediary with more definable knowledge and skill characteristics than to a broad spectrum of consumers. In fact, it is difficult, if not impossible, to convey comprehensive drug warnings to consumers because of the highly technical nature of the information and the various needs of individual patients.<sup>119</sup> The learned intermediary doctrine was established, therefore, in recognition of these significant challenges and the physician's superior position and ability to communicate warnings.<sup>120</sup>

Almost all jurisdictions follow the learned intermediary doctrine with regard to claims involving prescription drugs.<sup>121</sup> The modern doctrine was first expressed by the Eighth Circuit, which recognized that pharmaceutical companies have a duty to warn physicians directly about potential risks of their products,

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118. See *Vitanza v. Upjohn Co.*, 778 A.2d 829, 846 (Conn. 2001) (acknowledging that a physician "is in the best position to convey adequate warnings based upon the highly personal doctor-patient relationship"); see also *West*, 806 S.W.2d at 613 (listing common rationales supporting the doctrine); *Terhune v. A.H. Robins Co.*, 577 P.2d 975, 978 (Wash. 1978) ("The reasons for this rule should be obvious."); David P. Graham & Jeremy C. Vest, *Doctors, Drugs, and Duties to Warn*, 72 DEF. COUNS. J. 380, 381 (2005) ("The assumptions that underlie the doctrine are that patients rely upon the advice of their physicians, and physicians, in light of their experience and expertise, are in a better position than their patients to evaluate and communicate the manufacturers' warnings directly to the patients.").

119. See Monica Renee Matter, *Emerging DTC Advertising of Prescription Drugs and the Learned Intermediary Doctrine*, 69 DEF. COUNS. J. 79, 81 (2002) (discussing common rationales favoring the rule).

120. See, e.g., *Gravis v. Parke-Davis & Co.*, 502 S.W.2d 863, 870 (Tex. Civ. App. 1973) ("The entire system of drug distribution in America is set up so as to place the responsibility of distribution and use upon professional people.").

121. See *In re Norplant Contraceptive Prods. Liab. Litig.*, 215 F. Supp. 2d 795, 806–09 (E.D. Tex. 2002) (concluding that forty-eight states, the District of Columbia, and Puerto Rico have either applied or recognized the learned intermediary doctrine, and providing chart reflecting the same); *Vitanza*, 778 A.2d at 838 n.11 (finding that forty-four other jurisdictions have adopted the learned intermediary doctrine, including lower state courts and federal courts applying state law); *Larkin v. Pfizer, Inc.*, 153 S.W.3d 758, 767 & n.3 (Ky. 2004) (observing that thirty-four states have specifically adopted the learned intermediary doctrine). West Virginia appears to be the only state expressly declining to adopt the learned intermediary doctrine. See *State ex rel. Johnson & Johnson Corp. v. Karl*, 647 S.E.2d 899, 914 (W. Va. 2007). New Jersey does not apply the learned intermediary doctrine where the prescription drug manufacturer attempts to advertise directly to consumers and the consumer relies on that advertisement. See *Perez v. Wyeth Labs.*, 734 A.2d 1245, 1257–58 (N.J. 1999); see also *MacDonald v. Ortho Pharm. Corp.*, 475 N.E.2d 65, 69 (Mass. 1985) (recognizing an exception to the general application of the learned intermediary doctrine for oral contraceptives).

whereas physicians must serve as “learned intermediaries” who interpret this information and advise patients appropriately.<sup>122</sup> It was embraced quickly by other jurisdictions.<sup>123</sup> The doctrine has also come to include prescription medical devices under the same rationale.<sup>124</sup> Although the doctrine finds support in the *Restatement (Second) of Torts* § 388,<sup>125</sup> *Restatement (Third) of Torts: Products Liability* § 6 sets forth its underpinnings more completely.<sup>126</sup> The *Restatement (Third)* specifically addresses liability for sellers of prescription drugs and medical devices, deals with the application of the learned intermediary rule, and sets forth narrow exceptions to the doctrine’s application.<sup>127</sup> It presents the rule as adopted by the majority of jurisdictions, either through judicial pronouncement or statutory enactment.<sup>128</sup>

## 2. Traditional Limited Exceptions to the Rule

The *Restatement (Third)* recognizes a limited set of circumstances in which applying the learned intermediary doctrine may be inappropriate.<sup>129</sup> This may occur when a prescription drug is administered “without the personal intervention or evaluation of a health-care provider.”<sup>130</sup> In such situations, manufacturers are directly responsible for providing patients with warnings and instructions.

Vaccines and other immunizations administered en masse or to the general public present the most common example of this

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122. *Sterling Drug, Inc. v. Cornish*, 370 F.2d 82, 85 (8th Cir. 1966); see also *Hruska v. Parke, Davis & Co.*, 6 F.2d 536, 538 (8th Cir. 1925) (acknowledging public is “not on an equal footing” with prescription drug manufacturers in terms of knowledge); *Marcus v. Specific Pharms.*, 77 N.Y.S.2d 508, 508–10 (Sup. Ct. 1948) (first holding that a manufacturer’s duty to warn was fulfilled by informing the physician).

123. See Kane, *supra* note 116.

124. See, e.g., *Beyette v. Ortho Pharm. Corp.*, 823 F.2d 990, 992 (6th Cir. 1987); *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210, 1227–28 (Kan. 1987); *Terhune v. A. H. Robins Co.*, 577 P.2d 975, 978 (Wash. 1978).

125. See RESTATEMENT (SECOND) OF TORTS § 388 cmt. n (1965) (“Modern life would be intolerable unless one were permitted to rely to a certain extent on others’ doing what they normally do, particularly if it is their duty to do so.”).

126. See RESTATEMENT (THIRD), *supra* note 114, § 6 (1998).

127. *Id.* § 6 cmt. e.

128. See, e.g., MISS. CODE § 11-1-63(c) (2008); N.C. GEN. STAT. § 99B-5(c) (2007); N.J. STAT. § 2A:58C-4 (2008); OHIO REV. CODE § 2307.76 (2008) (codifying the learned intermediary doctrine).

129. See RESTATEMENT (THIRD), *supra* note 114, § 6 cmt. e.

130. *Id.*

exception to the learned intermediary rule.<sup>131</sup> Health care providers typically dispense these treatments in an expedited manner without establishing a doctor-patient relationship or evaluating risks given the patient's medical history. In some instances, the role of the physician may be reduced to that of a delivery mechanism, leaving the position of learned intermediary vacant. Thus, in such rare instances, the manufacturer may reemerge as the entity best suited to warn consumers directly of the risks associated with its vaccine.<sup>132</sup>

Courts deciding whether to apply the exception to the learned intermediary doctrine for mass immunizations have tread carefully, resisting hard-line rules or blanket policy exemptions.<sup>133</sup> For example, a federal court applying Georgia law held that manufacturers of a measles, mumps, and rubella vaccine were not required to warn the vaccine recipients directly where the vaccine was not administered as part of a massive, nationwide immunization program.<sup>134</sup> In that case, the court found that a vaccination program aimed only at select students throughout a county was enough to retain application of the learned intermediary defense.<sup>135</sup> Similarly, a federal court in Oklahoma avoided adopting an over-expansive exception to the rule after a child developed permanent neurological damage after receiving a diphtheria vaccine.<sup>136</sup> Because the child's

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131. See, e.g., *Mazur v. Merck & Co.*, 964 F.2d 1348, 1355 (3d Cir. 1992) (applying the "mass immunization exception" to the learned intermediary doctrine in an action brought against the manufacturer of a measles, mumps, and rubella vaccine (MMR II) by the parents of a child who developed a serious neurological disorder after being inoculated); *Brazzell v. United States*, 788 F.2d 1352, 1357-58 (8th Cir. 1986) (swine flu vaccine); *Petty v. United States*, 740 F.2d 1428, 1438-39 (8th Cir. 1984) (same). The most common example of the mass immunization exception has occurred with polio vaccines. See, e.g., *Plummer v. Lederle Labs.*, 819 F.2d 349, 356 (2d Cir. 1987); *Givens v. Lederle*, 556 F.2d 1341, 1345 (5th Cir. 1977); *Reyes v. Wyeth Labs.*, 498 F.2d 1264, 1276 (5th Cir. 1974); *Davis v. Wyeth Labs.*, 399 F.2d 121, 131 (9th Cir. 1968); see also *Cunningham v. Charles Pfizer & Co.*, 532 P.2d 1377, 1380 (Okla. 1974).

132. See *Brooks v. Medtronic*, 750 F.2d 1227, 1232 (4th Cir. 1984) ("[T]he exception established for the [vaccine] cases is quite narrow and highly fact specific." (quoting *Stanback v. Parke, Davis & Co.*, 657 F.2d 642, 647 (4th Cir. 1981))).

133. See, e.g., *Mazur*, 964 F.2d at 1363 (stating that it is not the size of the immunization program that matters but whether the vaccine is administered "without an individualized medical balancing of the risks and benefits of inoculation").

134. *Walker v. Merck & Co.*, 648 F. Supp. 931, 934-35 (M.D. Ga. 1986), *aff'd*, 831 F.2d 1069 (11th Cir. 1987).

135. See *id.* at 932.

136. *Percival v. Cyanamid Co.*, 689 F. Supp. 1060, 1061-63 (W.D. Okla. 1987).

personal physician administered the vaccine at her office, it was impermissible to apply the exception.<sup>137</sup> Moreover, as these cases illustrate, courts have shown great reluctance to define exceptions to the learned intermediary doctrine broadly, and apply this exception only where immunizations are conducted in an "assembly-line" or "clinic-like" fashion where no individualized medical judgment is rendered.<sup>138</sup> An additional consideration arises because, as a matter of public policy, placing special liability on manufacturers who develop vaccines might have adverse consequences for public health.<sup>139</sup>

A minority of courts have adopted an even narrower exception to the learned intermediary doctrine with regard to oral contraceptives.<sup>140</sup> These courts have permitted an exception for birth control pills because they believe that a unique set of circumstances separates oral contraceptives from other prescription drugs.<sup>141</sup> For instance, the Massachusetts Supreme Judicial Court reasoned that:

Whereas a patient's involvement in decision-making concerning use of a prescription drug necessary to treat a malady is typically minimal or nonexistent, the healthy, young consumer of oral contraceptives is usually actively involved in the decision to use "the pill," as opposed to other available birth control products, and the prescribing physician is relegated to a relatively passive role.<sup>142</sup>

The court went on to conclude that oral contraceptives "stand[] apart" from ordinary prescription drugs, permitting liability

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137. See *id.* at 1062.

138. See, e.g., *Mazur*, 964 F.2d at 1363.

139. See Victor E. Schwartz & Liberty Mahshigian, *National Childhood Vaccine Injury Act of 1986: An Ad Hoc Remedy or a Window for the Future?*, 48 OHIO ST. L.J. 387, 394 (1987) (discussing the availability of vaccines as one of the public policy reasons underlying Congress's enactment of a no-fault system for compensation of childhood vaccine-related injuries).

140. See, e.g., *Odgers v. Ortho Pharm. Corp.*, 609 F. Supp. 867, 873-75 (E.D. Mich. 1985); *Stephens v. G.D. Searle & Co.*, 602 F. Supp. 379, 380-81 (E.D. Mich. 1985); *Lukaszewicz v. Ortho Pharm. Corp.*, 510 F. Supp. 961, 964-65 (E.D. Wis. 1981), *amended on other grounds*, 532 F. Supp. 211 (E.D. Wis. 1981); *MacDonald v. Ortho Pharm. Corp.*, 475 N.E.2d 65, 69-70 (Mass. 1985). *But see* *Reaves v. Ortho Pharm. Corp.*, 765 F. Supp. 1287, 1291 (E.D. Mich. 1991) (holding the learned intermediary doctrine applicable in cases involving oral contraceptives because oral contraceptives do not significantly differ from other prescription drugs).

141. See, e.g., *MacDonald*, 475 N.E.2d at 69.

142. *Id.*

when a manufacturer fails to convey an adequate warning directly to consumers.<sup>143</sup>

There is considerable judicial disagreement over the merits of allowing an exception for oral contraceptives.<sup>144</sup> This debate has also spread to contraceptive intrauterine devices (IUDs), which a few jurisdictions have exempted from the doctrine by applying a similar rationale as that used to exclude drug contraceptives.<sup>145</sup> Courts opposed to this minority approach have generally acknowledged the more "elective" nature of treatment for contraceptives, yet strongly relied on the principle that "[i]n the final analysis it is the physician who ultimately prescribes the drug or device."<sup>146</sup> For this reason, courts have rejected further exceptions to the learned intermediary rule for other prescription treatments with characteristics arguably similar to prescription contraceptives,<sup>147</sup> while declining to apply the learned intermediary rule to nonprescription contraceptives.<sup>148</sup>

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143. *Id.* at 70.

144. See *Martin v. Ortho Pharm. Corp.*, 661 N.E.2d 352, 357 (Ill. 1996) (concluding that the learned intermediary doctrine relieved manufacturer of duty to warn consumers that its contraceptives could cause physical deformities in children whose mothers ingested it during pregnancy); *McEwen v. Ortho Pharm. Corp.*, 528 P.2d 522 (Or. 1974) (finding the same for contraceptive warnings related to circulatory and visual damage); see also *In re Norplant Contraceptive Prods. Liab. Litig.*, 955 F. Supp. 700, 709 (E.D. Tex. 1997) (applying Texas law); *MacPherson v. Searle & Co.*, 775 F. Supp. 417, 425-26 (D.D.C. 1991) (applying District of Columbia law); *Zanzuri v. G.D. Searle & Co.*, 748 F. Supp. 1511, 1514-15 (S.D. Fla. 1990) (applying Florida law); *Goodson v. Searle Labs.*, 471 F. Supp. 546, 549 (D. Conn. 1978) (applying Connecticut law); *Chambers v. G.D. Searle*, 441 F. Supp. 377, 381 (D. Md. 1975), *aff'd*, 567 F.2d 269 (4th Cir. 1977).

145. See, e.g., *Hill v. Searle Labs., Inc.*, 884 F.2d 1064, 1070 (8th Cir. 1989) ("[W]e believe that IUDs, like other forms of birth control, are atypical from most prescription drug products because the treating physician generally does not make an intervening, individualized medical judgment in the birth control decision.").

146. *Lacy v. G.D. Searle & Co.*, 567 A.2d 398, 400 (Del. 1989) (applying the learned intermediary doctrine to IUD manufacturer where patient was required to undergo surgical removal of her ovaries and fallopian tubes after the IUD perforated her uterus).

147. See *Doe v. Solvay Pharm., Inc.*, 350 F. Supp. 2d 257, 273 (D. Me. 2004) (rejecting application of learned intermediary exception for oral contraceptives to failure-to-warn claim brought by patient against manufacturer of prescription drug developed for treatment of obsessive-compulsive disorder (OCD)).

148. See *Mitchell v. VLI Corp.*, 786 F. Supp. 966, 970 (M.D. Fla. 1992) (concluding that the learned intermediary doctrine did not apply in products liability action brought by user of a nonprescription contraceptive sponge); cf. *Prager v. Allergan, Inc.*, No. 89-C-6721, 1990 WL 70875, at \*4 (N.D. Ill. May 2, 1990) (holding that doctrine did not apply to manufacturer of a nonprescription contact lens solution that allegedly caused plaintiff permanent eye damage).

3. *A Few Recent Decisions Chip Away at the Learned Intermediary Rule*

Jurisprudence keeping exceptions to the learned intermediary doctrine very limited has remained remarkably consistent since the rule's inception. The debate over the scope of the traditional exceptions is more a product of reasonable disagreement over the physician's role in issuing one unique type of prescription than any challenge to the basic functioning of the doctrine.<sup>149</sup> In fact, the debate regarding courts' aversion to expanding exceptions for mass immunizations not conducted in "clinic like" conditions and contraceptives illustrates just how solidified the doctrine has become. In the past decade, however, Oklahoma has recognized a narrow exception to the doctrine and state supreme courts in New Jersey and West Virginia have made a sudden, radical departure from this long-established judicial rule.

In 1997, Oklahoma recognized a very limited exception to the learned intermediary doctrine in a failure-to-warn claim involving a prescription nicotine patch. In *Edwards v. Basel Pharmaceuticals*, the Oklahoma Supreme Court held that an exception to the rule applied where the FDA mandated that manufacturers, through labeling their products, directly communicate warnings to patients.<sup>150</sup> In such situations, the court ruled, "an exception to the 'learned intermediary doctrine' has occurred and the manufacturer is not automatically shielded from any liability by properly warning the prescribing physician."<sup>151</sup> Rather, the court declared that when the FDA requires manufacturers to provide DTC information, the warning must adequately explain to the user the possible danger associated with the product.<sup>152</sup> The Oklahoma Supreme Court's decision does not abrogate the learned intermediary doctrine on the basis of DTC advertising, but only in those rare instances in which the FDA *mandates* communication of warnings directly from manufacturer to patient.

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149. See *supra* notes 140–48 and accompanying text.

150. *Edwards v. Basel Pharms.*, 933 P.2d 298, 301 (Okla. 1997).

151. *Id.* at 303.

152. See *id.*

The first true schism occurred in 1999 with the New Jersey Supreme Court's decision in *Perez v. Wyeth Labs., Inc.*<sup>153</sup> *Perez* involved a prescription contraceptive called Norplant, a "hybrid" medical device consisting of a drug capsule that is surgically implanted in the patient.<sup>154</sup> The plaintiffs alleged inadequate DTC warnings concerning the possibility of pain and other side effects.<sup>155</sup> In reversing an intermediate appellate court ruling, the New Jersey Supreme Court went beyond adopting the minority approach of exempting contraceptives, and created a broader exception to the learned intermediary doctrine for prescription drugs or devices marketed through DTC advertising.<sup>156</sup> This about-face was largely premised on the court's belief that "[o]ur medical-legal jurisprudence is based on images of health care that no longer exist."<sup>157</sup> DTC marketing, the court explained, fundamentally changed the medical landscape through radio, television, internet, and print advertisements such that it was no longer justified for consumers to rely exclusively on their physicians for risk information concerning a prescription drug or device.<sup>158</sup> As a result, the court held that the doctrine no longer provided full protection for pharmaceutical manufacturers that provided accurate information to physicians on the benefits and risks of a drug.

For almost a decade, Oklahoma and New Jersey stood alone in permitting a DTC-marketing exception to the learned intermediary doctrine.<sup>159</sup> Courts applying the doctrine during this

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153. 734 A.2d 1245 (N.J. 1999). Until 2007, the closest resemblance to the *Perez* ruling came in an Oklahoma Supreme Court ruling more than a decade earlier which recognized a narrow exception to the learned intermediary doctrine where the FDA mandated communication of a particular warning directly to the patient as well as to the physician. See *McKee v. Moore*, 648 P.2d 21, 25 (Okla. 1982); see also *Edwards*, 933 P.2d at 303 (FDA compliance does not necessarily satisfy state requirements which may or may not conform to the learned intermediary rule); *Tansy v. Dacomed Corp.*, 890 P.2d 881, 886 (Okla. 1994) (applying the exception to a medical device). This exception for FDA-required patient warnings is not based on an impression of an altered medical landscape, nor does it apply to all prescription drugs. Rather, it is tied to compliance with existing laws applicable to a limited subset of prescription drugs. See *Edwards*, 933 P.2d at 301.

154. *Perez*, 734 A.2d at 1251.

155. See *id.* at 1248.

156. See *id.* at 1247.

157. *Id.* at 1246.

158. See *id.* at 1247.

159. See *In re Meridia Prods. Liab. Litig.*, 328 F. Supp. 2d 791, 812 n.19 (N.D. Ohio 2004) ("In the intervening period [after *Perez*], no other state has followed



period repeatedly rejected attempts to create such an exception.<sup>160</sup> Then, in 2007, another crack appeared in the dam. In *State ex rel. Johnson & Johnson Corp. v. Karl*, the West Virginia Supreme Court of Appeals arrived at the same result as the New Jersey Supreme Court with regard to DTC marketing, but followed a different approach, wholly rejecting the learned intermediary doctrine.<sup>161</sup>

Before 2007, the West Virginia high court had not considered application of the doctrine. Deciding the case as one of first impression, the court found the “justifications for the learned intermediary doctrine to be largely outdated and unpersuasive.”<sup>162</sup> Specifically, the court named DTC marketing as the impetus for its holding, stating that the “Norman Rockwell image of the family doctor no longer exists”<sup>163</sup> and that the doctor-patient relationship has been transformed such that “all of the [doctrine’s] premises are absent.”<sup>164</sup> Although the court acknowledged that four state supreme courts had adopted the now “widely accepted” doctrine during the very same decade in which DTC advertising proliferated, it determined that these decisions did not adequately consider changes occurring in the pharmaceutical industry.<sup>165</sup>

In addition, the West Virginia court found traditional exceptions to the learned intermediary doctrine to be unwieldy, stating, “Given the plethora of exceptions to the learned interme-

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New Jersey’s lead.”); see also Corey Schaecher, Comment, “Ask Your Doctor if This Product is Right for You”: *Perez v. Wyeth Laboratories, Inc., Direct-to-Consumer Advertising and the Future of the Learned Intermediary Doctrine in the Face of the Flood of Vioxx® Claims*, 26 ST. LOUIS U. PUB. L. REV. 421, 443 (2007) (stating that post-*Perez* courts have been “reluctant, at best, . . . to delineate an exception”).

160. See, e.g., *In re Meridia*, 328 F. Supp. 2d at 812 n.19 (“The Court thus could not apply *Perez*’s logic even if it desired to do so.”); *In re Norplant Contraceptive Prods. Liab. Litig.*, 215 F. Supp. 2d 795, at 827 (E.D. Tex. 2002) (“This argument . . . lacks merit in all jurisdictions, except New Jersey. . . . [A]part from New Jersey, direct-to-consumer advertising does not negate the applicability of the learned intermediary doctrine.”); *Vitanza v. Upjohn Co.*, 778 A.2d 829 (Conn. 2001); *McCombs v. Synthes (U.S.A.)*, 587 S.E.2d 594 (Ga. 2003); *Larkin v. Pfizer, Inc.*, 153 S.W.3d 758 (Ky. 2004); *Freeman v. Hoffman-La Roche, Inc.*, 618 N.W.2d 827 (Neb. 2000).

161. *State ex rel. Johnson & Johnson Corp. v. Karl*, 647 S.E.2d 899 (W. Va. 2007).

162. *Id.* at 906.

163. *Id.* at 910 (quoting Lars Noah, *Advertising Prescription Drugs to Consumers: Assessing the Regulatory and Liability Issues*, 32 GA. L. REV. 141, 160–61 n.78 (1997)).

164. *Id.* at 911.

165. See *id.* at 908–09.

diary doctrine, we ascertain no benefit in adopting a doctrine that would require the simultaneous adoption of numerous exceptions in order to be justly utilized."<sup>166</sup> Based on these rationales, the court concluded that, under West Virginia law, the learned intermediary doctrine did not apply to warnings relating to pharmaceutical products. West Virginia law provides, therefore, that manufacturers are directly liable for conveying warnings and may not rely on physicians to transmit correct drug information to patients.

The court clearly was incorrect, however, when it spoke of a "plethora" of exceptions to the rule. Courts have recognized only three: mass immunizations, prescription contraceptives—followed by only a minority of courts—and the uncommon situation where the FDA explicitly requires a DTC warning. The absolute rule drastically expands the analysis of *Perez* by making West Virginia the only state expressly to reject the learned intermediary doctrine.

#### 4. *Exceptions for DTC Marketing Represent Unsound Policy*

*Perez* and *Karl* each dramatically depart from the traditional rule of law relating to prescription drug warnings. These departures are unsupported by precedent, practice, or sound public policy. Established exceptions to the learned intermediary doctrine remain few and narrowly designed. *Perez*, however, creates a gaping exception for DTC marketing. The primary justification for this exception is that increasingly common DTC advertisements fundamentally change the physician-patient relationship.<sup>167</sup> Yet the ethical and legal obligations of the medical community with regard to communicating drug warnings are unchanged and show no indication of abrogation. As the dissent in *Karl* further explained: "[B]y attaching undue importance to the effects of direct marketing, the majority downplays the continuing and vital role that a physician plays in the decision as to which prescription drugs are appropriate for a given patient based upon that particular individual's specific medical needs."<sup>168</sup>

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166. *Id.* at 913.

167. See *supra* notes 153–58 and accompanying text.

168. *Karl*, 647 S.E.2d at 917 (Albright, J., dissenting).

Comparatively, a DTC marketing exception does not comport with the traditional learned intermediary doctrine exceptions. A DTC marketing exception is open-ended, theoretically encompassing all drugs. The three established exceptions represent a small fraction of prescription drugs where it is apparent the physician does not provide an individualized medical assessment. This is simply not the case with all DTC-marketed prescription drugs. Physicians have a legal and ethical duty to provide an individualized medical assessment before prescribing a drug regardless of how often it is advertised on television, radio, or any other media.<sup>169</sup> Suggesting that the playing field has changed to the extent physicians can no longer be fully relied upon to discuss with their patients the benefits and risks of a drug presents an untenable and illogical assertion when juxtaposed with the fact that no court has made any attempt to modify this basic duty of physicians.

The relatively recent development of the *Restatement (Third) of Torts: Products Liability*, § 6, and subsequent case law further demonstrate the continued viability of the learned intermediary doctrine's application to DTC-marketed prescription drugs. An early draft of the *Restatement (Third)* section relating to pharmaceutical manufacturer liability included an exception to the doctrine where "the manufacturer advertised or otherwise promoted the drug or medical device directly to users and consumers."<sup>170</sup> This black letter exception in Council Draft 1 was promptly deleted a few months later by the Reporters in Council Draft 1A.<sup>171</sup> The Reporters explained that the change was a

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169. See Am. Med. Ass'n, Council on Ethical & Judicial Affairs, Code of Medical Ethics, Direct-to-Consumer Advertising of Prescription Drugs, Op. 5-015, at 126 (2006-2007) ("Physicians must maintain professional standards of informed consent when prescribing. When a patient comes to a physician with a request for a drug he or she has seen advertised, the physician and the patient should engage in a dialogue that would assess and enhance the patient's understanding of the treatment. Although physicians should not be biased against drugs that are advertised, physicians should resist commercially induced pressure to prescribe drugs that may not be indicated. Physicians should deny requests for inappropriate prescriptions and educate patients as to why certain advertised drugs may not be suitable treatment options, providing, when available, information on the cost effectiveness of different options.").

170. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 103 (Council Draft No. 1, 1993); see also Noah, *supra* note 163, at 162-63 (detailing the Restatement Reporters' changes regarding DTC advertising).

171. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 4(b)(3) (Council Draft No. 1A, 1994).

result of Council discussions that "demonstrated concern about creating a wholly new common law duty to warn when there was no case law to support it."<sup>172</sup>

Comment e accompanying the amended draft explained that the DTC marketing exception merged into the draft's learned intermediary exception for FDA-required warnings.<sup>173</sup> Practically speaking, however, the deletion marked a clear retreat from acknowledging the third exception to the rule. By the time the Council issued Tentative Draft No. 1 later that year—four years before the final *Restatement* draft was published—both the DTC-marketing exception and the doctrine's inapplicability where the FDA has required direct-to-patient warnings were completely eliminated.<sup>174</sup> Only the exception for mass immunizations withstood the scrutiny of the Council. There was also no revival by the Reporters of the *Restatement*, the Advisory Committee, or the articulate plaintiffs' and defense counsel membership at the ALI of the express DTC marketing exception in any of the subsequent *Restatement* drafts.<sup>175</sup> Instead, the final version of comment e inserts a catch-all that "leaves to developing case law" the determination of whether any other exceptions to the learned intermediary doctrine exist.<sup>176</sup>

In the decade following the issuance of the *Restatement* (Third), it is notable that no state court except the New Jersey Supreme Court in *Perez* created an express DTC marketing exception to its learned intermediary rule. On the contrary, over the same period, four state supreme courts joined the growing list of high courts to adopt expressly the *Restatement* version of

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172. *Id.*, Memorandum at 2.

173. *See id.* ("We have removed from the black letter a special exception to the learned intermediary rule for direct advertising to patients. Instead we have amended comment e to indicate that, where government agencies mandate that advertisements carry warnings to patients, the learned intermediary rule does not apply.").

174. The learned intermediary exception relevant to advertisements was amended such that liability could exist if "[r]easonable instructions or warnings regarding foreseeable risks of harm posed by the drug or medical device were not provided directly to the patient when the manufacturer knew or had reason to know that no medical provider would be in the position" to reduce the risks of harm through appropriate warnings or instructions." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 4(b)(3) (Tentative Draft No. 1, 1994).

175. *See* Noah, *supra* note 163, at 166.

176. RESTATEMENT (THIRD), *supra* note 114, at § 6 cmt. e.

the rule.<sup>177</sup> Further, sound public policy supporting the doctrine has led to its significant expansion in other ways. For example, some courts have extended the doctrine beyond the doctor-patient relationship to the role of a nurse<sup>178</sup> or applied it to veterinarians.<sup>179</sup> The doctrine has also expanded outside the medical community and into the workplace where courts routinely analyze the rule in conjunction with the bulk-supplier and sophisticated-user defenses. These defenses incorporate similar rationales to relieve industrial manufacturers and intermediaries of a duty to warn directly end-user workers and to impart that duty on the most knowledgeable party. That party is usually the purchaser or employer who knows the use for the materials and the associated risks and can best communicate the warning and provide protective equipment.<sup>180</sup>

Such extensions of the principles underlying the learned intermediary doctrine, in addition to courts' general repudiation of additional exceptions when left to "developing case law," clearly

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177. See *Vitanza v. Upjohn Co.*, 778 A.2d 829 (Conn. 2001); *McCombs v. Synthes (U.S.A.)*, 587 S.E.2d 594 (Ga. 2003); *Larkin v. Pfizer, Inc.*, 153 S.W.3d 758 (Ky. 2004); *Freeman v. Hoffman-La Roche, Inc.*, 618 N.W.2d 827 (Neb. 2000).

178. See *Rohrbough v. Rohrbough v. Wyeth Labs.*, 719 F. Supp. 470, 478 (N.D. W. Va. 1989) (finding that a registered nurse who administered a Diphtheria and Tetanus Toxoids and Pertussis Vaccine (DTP) in a public health clinic qualified as a learned intermediary), *aff'd on other grounds* 916 F.2d 970 (4th Cir. 1990); *Walker v. Merck & Co.*, 648 F. Supp. 931, 934 (M.D. Ga. 1986); *Singleton v. Airco, Inc.*, 314 S.E.2d 680, 682 (Ga. Ct. App. 1984) (implying a nurse anesthetist qualified as a learned intermediary).

179. See *Haste v. Am. Home Prods. Corp.*, 577 F.2d 1122, 1124 (10th Cir. 1978), *cert. denied* 439 U.S. 955 (1978) (suggesting a veterinarian could be a learned intermediary in product liability action brought against the manufacturer of an animal vaccine).

180. See, e.g., *Smith v. Walter C. Best, Inc.*, 927 F.2d 736, 739 (3d Cir. 1990) (using the term "knowledgeable purchaser"); *Higgins v. E.I. DuPont de Nemours & Co.*, 671 F. Supp. 1055, 1061 (D. Md. 1987) (referring to a "knowledgeable industrial purchaser"); *Phillips v. A.P. Green Refractories Co.*, 630 A.2d 874, 883 (Pa. Super. Ct. 1993) (using the term "knowledgeable employer"); see also Keith Laughery, *Warnings in the Workplace: Expanding the Learned Intermediary Rule to Include Employers in the Context of Product Manufacture/Employer/Employee Relationship*, 46 S. TEX. L. REV. 627 (2005) (advocating expansion of the doctrine in certain manufacturing relationships); Victor E. Schwartz & Christopher E. Appel, *Effective Communication of Warnings in the Workplace: Avoiding Injuries in Working with Industrial Materials*, 73 MO. L. REV. 1 (2008) (discussing the parallels and doctrinal interplay of the learned intermediary rule with the sophisticated user doctrine in the case of industrial materials); Carole A. Cheney, Comment, *Not Just For Doctors: Applying the Learned Intermediary Doctrine to the Relationship Between Chemical Manufacturers, Industrial Employers, and Employees*, 85 NW. U. L. REV. 562, 575 (1991) (discussing the mixed results of the learned intermediary doctrine outside of the prescription drug context).

support the continued viability of the rule. Courts and commentators have long recognized that physicians are in the best position to determine the appropriateness, effectiveness, and risks of a drug based on a patient's medical and family history.<sup>181</sup> Physicians' legal and ethical duty to warn patients adequately about any treatment, including prescription drugs, extends from this relationship. DTC advertising does not change the calculus. To find otherwise would presume that the physician's legal and ethical duties to warn either no longer exist or are so altered that a physician need not exercise any individualized medical judgment when determining a treatment course.<sup>182</sup> This proposition would turn the law, and medical practice, on its head. It would require redefining the physician's duty to warn and effectively lessen the duty requirements and ethical obligations of doctors in the name of strengthening patient care. Not surprisingly, no case law appears to advocate lessening the duty of physicians to warn; if anything, the physician's duty to warn has become more comprehensive.<sup>183</sup>

In addition to placing the responsibility of translating drug warnings on the more able physician, the learned intermediary doctrine achieves other important practical policy objectives. The broad range and complexities of potential prescription drug users make it ill-advised, and perhaps impossible, to tailor comprehensive warnings to consumers. Differences in patients' medical histories, ages, education levels, and drug interactions with current treatments are only a few of the multitude of barriers that a pharmaceutical manufacturer would have to overcome if directly liable for warnings both to doctors and to consumers. Liability for two types of warnings could serve to eliminate DTC marketing because no prescription drug company could warn effectively. The result would impede the at-

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181. See *supra* notes 117–120 and accompanying text.

182. See *State ex rel. Johnson & Johnson Co. v. Karl*, 647 S.E.2d 899, 917 (W. Va. 2007) (Albright, J., dissenting) ("But to presume, as the majority appears to, that the mere presence of pharmaceutical advertising in our society relegates the role of the physician to a mere dispensary of prescriptions is simply not true.").

183. The Massachusetts Supreme Judicial Court, for example, recently held that a physician could be liable to third parties injured as a result of the failure to warn a patient. See *Coombes v. Florio*, 877 N.E.2d 567, 571–72 (Mass. 2007) (holding that a doctor may be liable when his patient, who alleged he was not adequately warned that the medication he was on could cause drowsiness or fainting, injured the plaintiff in an automobile accident).

tempts of many consumers to take a more active role in their personal health. The extended liability would also likely increase drug prices, hampering the accessibility of the drugs.<sup>184</sup> Worse, if a majority of courts held drug manufacturers liable for DTC advertisements, it could create a self-fulfilling prophecy whereby consumers, aware of this obligation, begin to rely solely on the less comprehensive DTC warnings and physicians take fewer steps to evaluate treatments individually because there is shared liability with manufacturers.

As the saying goes, "A little knowledge can be a dangerous thing." With prescription drugs, it can turn into a deadly thing. For that reason, liability for prescription drug warnings to consumers is entrusted to physicians and not to less comprehensive DTC advertisements. Rather, DTC advertisements caution to "see your doctor" or "consult a physician" so that the patient can take on a more active role while the doctor calculates the array of treatment risks. Because the learned intermediary doctrine establishes liability rules to facilitate this practice and improve health care, it is as viable in today's world of DTC marketing as it ever was.

#### *B. Effect of Compliance with FDA Requirements on Liability*

Whereas the learned intermediary doctrine places the duty to warn patients of the risks of drugs on physicians, other common law and statutory enactments consider the deference warnings should receive when they are reviewed and approved by government regulators.

##### *1. Common Law Principles*

In the absence of a statute instructing courts how to weigh compliance with a government safety standard or government approval of a product or service, states vary on how they consider such evidence. Most courts find that compliance with government standards is one of many factors to be considered by the jury in determining whether or not a prod-

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184. See *Brown v. Superior Court*, 751 P.2d 470, 478-79 (Cal. 1988) (expressing concern that increased liability would drive prices of drugs too high and make them less available).

uct is unreasonably dangerous.<sup>185</sup> These courts reason that government regulations provide only "minimum standards," and, therefore, are not dispositive on the issue of liability for design or failure to warn.<sup>186</sup> Although most jurisdictions consider a violation of a safety regulation as evidence that a product is defective as a matter of law, they do not accord evidence of compliance with government regulations similarly deferential treatment.<sup>187</sup>

In 1991, the American Law Institute (ALI) published a Reporter's study recommending that compliance with regulatory requirements imposed by a government agency preclude tort liability in certain situations. Under the Reporter's study recommendations, tort liability would be precluded when: (1) a legislature has placed the risk at issue under the authority of a specialized administrative agency; (2) that agency has established and periodically revises regulatory safety controls; (3) the manufacturer or other entity complied with the relevant regulatory standards; and (4) the manufacturer or other entity disclosed to the agency any material information in its possession, or of which it has reason to be aware, concerning the products' risks and means of controlling them.<sup>188</sup>

The *Restatement (Third)* incorporates a similar approach. It suggests that a product should not be considered defective as a matter of law in the following circumstances:

[W]hen the safety statute or regulation was promulgated recently, thus supplying currency to the standard therein established; when the specific standard addresses the very issue of product design or warning presented in the case before the court; and when the court is confident that the deliberative process by which the safety standard was established was full, fair, and thorough and reflected substantial expertise.<sup>189</sup>

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185. See Richard C. Ausness, *The Case for a "Strong" Regulatory Compliance Defense*, 55 MD. L. REV. 1210, 1241 (1996).

186. See *id.* at 1241-47 (1996) (providing examples of cases in which courts gave little weight to federal safety regulations spanning a variety of areas, such as flammability standards for clothing, pesticide warnings, automobile design, prescription drug warnings, aircraft design, and workplace safety standards).

187. See *id.*

188. See 2 AM. LAW INST., REPORTER'S STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 95-97 (1991); see also Richard B. Stewart, *Regulatory Compliance Preclusion of Tort Liability: Limiting the Dual-Track System*, 88 GEO. L.J. 2167, 2168-70 (2000).

189. RESTATEMENT (THIRD), *supra* note 114, at § 4 cmt. e.



The *Restatement (Third)* also acknowledges that this liability protection would not apply "when the deliberative process that led to the safety standard . . . was tainted by the supplying of false information to, or the withholding of necessary and valid information from, the agency that promulgated the standard or certified or approved the product."<sup>190</sup>

The *Restatement (Third)* recognizes that courts frequently cite compliance with safety regulations as a factor used to justify a directed verdict for a defendant.<sup>191</sup> In some cases, courts have accorded weight to government safety standards and approvals, even if they find compliance is not conclusive of liability.<sup>192</sup> Courts occasionally find that meeting a safety standard set by government regulations precludes tort liability.<sup>193</sup> For example, the Maryland Court of Appeals has recognized that "where no special circumstances require extra caution, a court may find that conformity to the statutory standard amounts to due care as a matter of law."<sup>194</sup>

## 2. *Statutory Consideration of the Effect of Regulatory Compliance on Liability*

Aside from these common law principles, three types of state statutes impact liability related to the marketing of pharmaceutical products. The first comes into play in product liability cases and provides a presumption that a product approved by a government agency is not defective. The second type of these laws, also applicable in product liability actions, precludes an award of punitive damages with respect to injuries from FDA-approved drugs, with limited exceptions. The third includes provisions which place conduct that is closely regulated or ap-

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190. *Id.*

191. *See id.* § 4 Reporters' Note cmt. d (citing as an example *Hawkins v. Evans Cooperage Co.*, 766 F.2d 904, 909 (5th Cir. 1985)).

192. *See, e.g., Sims v. Washex Mach. Corp.*, 932 S.W.2d 559, 565 (Tex. App. 1995) ("Compliance with government regulations is strong evidence, although not conclusive, that a machine was not defectively designed.").

193. *See, e.g., Lorenz v. Celotex Corp.*, 896 F.2d 148, 152 (5th Cir. 1990) (compliance with safety regulation is strong and substantial evidence of lack of defect); *Dentson v. Eddins & Lee Bus Sales, Inc.*, 491 So. 2d 942, 944 (Ala. 1986) (ruling that a school bus that is not equipped with seatbelts is not defective when the legislature has not required seatbelts); *Ramirez v. Plough, Inc.*, 863 P.2d 167, 176 (Cal. 1993) (concluding that "the prudent course is to adopt for tort purposes the existing legislative and administrative standard of care").

194. *Beatty v. Trailmaster Prods., Inc.*, 625 A.2d 1005, 1014 (Md. 1993).

proved by government agencies beyond the scope of more general state statutes prohibiting deceptive advertising.

*a. Presumption of Nondefectiveness*

Seven states provide that compliance with federal or state government safety regulations creates a rebuttable presumption that a product is not defective.<sup>195</sup> The relevant statutes respect the decision making of federal and state regulatory agencies charged with protecting public safety in tort lawsuits. Such laws are broadly applicable to any product governed by government safety regulations and have been invoked in cases involving a wide range of products including ladders,<sup>196</sup> nail guns,<sup>197</sup> cleaning products,<sup>198</sup> clothing,<sup>199</sup> airplanes,<sup>200</sup> and automobiles.<sup>201</sup> The statutes generally provide a presumption that a product is not unreasonably dangerous if it meets safety re-

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195. See *infra* note 203 and accompanying text.

196. See *States v. R.D. Werner Co.*, 799 P.2d 427, 430 (Colo. Ct. App. 1990) (ruling that the trial court did not err by admitting expert testimony on a ladder's compliance with federal regulations).

197. See *Slisze v. Stanley-Bostitch*, 979 P.2d 317, 321 (Utah 1999) (ruling that federal OSHA standards regulating the design of a pneumatic nailer were admissible as government standards and established a rebuttable presumption of nondefectiveness as they provided "a legitimate source for determining the standard of reasonable care").

198. See *Uptain v. Huntington Lab, Inc.*, 685 P.2d 218, 222 (Colo. Ct. App. 1984) (finding that manufacturer of a cleaning compound was entitled to presumption of nondefectiveness where an expert testified that the product label's warnings complied with federal and local laws and was approved by the Environmental Protection Agency).

199. See *Alvarado v. J.C. Penney Co.*, 735 F. Supp. 371, 372-74 (D. Kan. 1990). In a case involving a nightgown and robe that were ignited by an open-flame gas heater, the court held that the regulatory compliance provision of the Kansas Products Liability Act did not create a conclusive presumption and thus a constitutional challenge by plaintiffs was moot. See *id.*

200. See *Champlain Enters., Inc. v. United States*, 957 F. Supp. 26, 28 (N.D.N.Y. 1997) (ruling that the regulatory compliance provision of the Kansas Products Liability Act would provide an airplane manufacturer with a defense against liability if it established that the aircraft complied with government safety standards, unless the plaintiff can show that "a reasonable prudent product seller could and would have taken additional precautions").

201. See *Brand v. Mazda Motor Corp.*, 978 F. Supp. 1382, 1387-88, 1391-93 (D. Kan. 1997) (ruling that automobile manufacturer's compliance with federal regulatory standards was not dispositive of liability or punitive damages absent clear and convincing evidence that the manufacturer acted with reckless indifference to consumer safety).

quirements, thus reducing the potential for a finding of liability. For example, since 1977 Colorado law has provided:

In any product liability action, it shall be rebuttably presumed that the product which caused the injury, death, or property damage was not defective and that the manufacturer or seller thereof was not negligent if the product . . . [c]omplied with, at the time of sale by the manufacturer, any applicable code, standard, or regulation adopted or promulgated by the United States or by this state.<sup>202</sup>

Kansas, Kentucky, Michigan, Tennessee, Texas, and Utah have chosen similar routes.<sup>203</sup> These laws assure that courts allow juries to hear and appropriately consider a product's compliance with government standards when they consider whether the product is defective.

Such laws appear to include claims challenging the sufficiency of a pharmaceutical product's labeling and warnings, including failure-to-warn claims associated with DTC marketing. Curiously, there is very little case law applying the statutory presumptions of nondefectiveness to FDA-approved warnings.<sup>204</sup>

*b. Preclusion of Punitive Damages for FDA-Approved Pharmaceuticals*

Special considerations come into play when lawsuits charge that a prescription drug manufacturer acted with such malice in offering a product to patients that it should be subject to punitive damages even though the FDA approval process includes a rigorous review that can span thousands of hours over more than a decade.<sup>205</sup>

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202. COLO. REV. STAT. § 13-21-403(1) (2008).

203. See KAN. STAT. § 60-3304(a) (2007); KY. REV. STAT. § 411.310(2) (2008); MICH. COMP. LAWS § 600.2946(4) (2000); TENN. CODE § 29-28-104 (2008); TEX. CIV. PRAC. & REM. CODE § 82.008 (2008); UTAH CODE § 78B-6-703 (2008).

204. See, e.g., *Kernke v. The Menninger Clinic, Inc.*, 173 F. Supp. 2d 1117, 1121-22 (D. Kan. 2001) (finding insufficient evidence to overcome Kansas's presumption of nondefectiveness and raise a jury question with respect to an FDA-approved clinical trial of an experimental treatment for schizophrenia). At least two additional states, Arkansas and Washington, specifically provide by statute that parties may introduce evidence of regulatory compliance to show that a product is not defective or that its warnings are not inadequate. See ARK. CODE § 16-116-105(a) (2007); WASH. REV. CODE § 7.72.050(1) (2008). These statutes do not assign any particular evidentiary weight to compliance with safety standards.

205. See Henry I. Miller, *Failed FDA Reform*, 21 REGULATION 24, 24 (1998) (attributing an increase in cost for new drug development and approval from \$359 mil-

For this reason, five states have enacted statutes that preclude punitive damage liability when the manufacturer received FDA approval for the product at issue. New Jersey, Oregon, and Ohio were the first states to adopt such laws.<sup>206</sup> Arizona and Utah followed when they passed laws addressing punitive damages in cases involving FDA-approved or licensed products.<sup>207</sup> Additionally, Michigan, a state that does not recognize punitive damages, limits manufacturer liability for compensatory damages in product liability actions involving FDA-approved drugs. Michigan law defers to the federal agency's comprehensive regulatory process by providing a rebuttable presumption that a drug, including its labeling and packaging, is not defective or unreasonably dangerous if the drug is approved for safety and efficacy by the FDA.<sup>208</sup>

There are variations as to the scope of these laws, such as whether the limitation on liability applies solely to prescription drugs or to other FDA-approved products as well. Generally, each law includes exceptions permitting full liability in three circumstances: (1) if the drug was sold after an FDA product recall or withdrawal of approval; (2) if the defendant knowingly withheld material information from or misrepresented material information to the FDA; or (3) if the defendant bribed a public official. Ohio law further permits punitive damages upon a finding that the manufacturer acted in "flagrant disregard of the safety of persons who might be harmed by the product" and provides that the court is to decide the amount of punitive damages upon a jury verdict finding punitive dam-

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lion to \$500 million—in pretax 1990 dollars—between 1990 and 1993, and an increase in the time for approval from 8.1 years to 15.2 years since the 1960s, to the "FDA's regulatory zeal").

206. See N.J. STAT. § 2A:58C-5c (2008); OHIO REV. CODE § 2307.80(C) (2008); OR. REV. STAT. § 30.927 (2007). In 2005, the Ohio legislature expanded coverage of the statute to include medical devices and over-the-counter drugs in addition to prescription drugs. OHIO LAWS FILE 144 (Am. Sub. S.B. 80) (amending OHIO REV. CODE § 2307.80) (effective Apr. 7, 2005).

207. See ARIZ. REV. STAT. § 12-701(A) (2009); UTAH CODE § 78B-8-203(1) (2008).

208. See MICH. COMP. LAWS § 600.2946(5) (2000). The Supreme Court of the United States recently found that an exception in the Michigan law which preserves liability if the drug company withheld or misrepresented information that would have altered the FDA's decision to approve the drug product (i.e., "fraud-on-the-FDA") was valid and not preempted. *Warner-Lambert Co. v. Kent*, 128 S. Ct. 1168 (2008).

ages appropriate.<sup>209</sup> The laws also differ on the burden of proof required to overcome the limitation on liability.<sup>210</sup>

It is inaccurate, however, to call this an “FDA-approval” defense. The defense neither completely eliminates liability (except in Michigan, with limited exceptions), nor results in the elimination of punitive damages simply based on FDA approval. FDA approval of a prescription drug is insufficient to merit such treatment unless the manufacturer follows FDA rules and submits the extensive test results required by FDA regulations. In addition, FDA regulations require submission of certain information after approval of the drug, such as adverse reaction reports and new developments in scientific knowledge on the drug, which allows the agency to determine whether it should withdraw its approval and require the manufacturer to withdraw the product.<sup>211</sup>

Protection from punitive damages would only apply when the manufacturer has met all of these requirements. Thus, these laws encourage pharmaceutical companies to disclose fully all pre- and post-marketing data and to meet or exceed the agency’s requirements in order to qualify for protection from extensive punitive damages should it later be found that the manufacturer failed to warn of known risk.

*c. Placing Regulated Conduct Beyond the Scope of Consumer Protection Laws*

Product liability claims against pharmaceutical manufacturers are generally brought on behalf of plaintiffs who have experienced physical injuries. Increasingly, lawyers are alleging claims under state consumer protection laws.<sup>212</sup> Although these types of claims appear to be increasing across the board, pharmaceutical manufacturers are a principal target.<sup>213</sup>

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209. See OHIO REV. CODE § 2307.80(B)–(C) (2008).

210. Compare OR. REV. STAT. § 30.927 (2007) (requiring “clear and convincing” evidence of the misconduct), with OHIO REV. CODE § 2307.80(C) (2008) (providing a preponderance of the evidence standard).

211. See 21 C.F.R. § 314.80(b)–(c) (2008).

212. See generally James P. Muehlberger & Cary Silverman, *Lawsuits Without Injury: The Rise of Consumer Protection Claims*, LITIG. WATCH, Oct. 2006, at 4.

213. See *id.*

Typically, lawyers bring Consumer Protection Act (CPA) claims involving prescription drugs as class actions on behalf of a group of individuals who purchased the drug but did not suffer any ill effects. These lawsuits usually allege that the company promoted a drug as safe and effective, when in fact either the product was not as effective as consumers believed or the advertising failed to disclose a known risk associated with the drug. Claims may allege that the company's aggressive advertising of the drug resulted in artificial inflation of the product's price beyond its actual value. Damages sought are usually either a complete refund of the purchase price (on behalf of thousands of consumers) or the difference between the sale price and the hypothetical actual value. In recent years, such claims have been made involving Claritin,<sup>214</sup> OxyContin,<sup>215</sup> Prempro,<sup>216</sup> Rezulin,<sup>217</sup> and Vioxx,<sup>218</sup> among other products.

State consumer protection laws were once primarily used by government regulators to attack truly deceptive practices and by consumers to bring small claims to get reimbursement for being duped at the cash register, but now they are routinely tacked on to substantial lawsuits.<sup>219</sup> These laws are particularly attractive for private claims because they often provide for

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214. See *N.J. Citizen Action v. Schering-Plough Corp.*, 842 A.2d 174, 177 (N.J. Super. Ct. App. Div. 2003) (holding plaintiffs who claimed allergy medication was not as effective as advertised failed to establish a causal nexus between representations and any loss suffered under the New Jersey Consumer Fraud Act).

215. See *Williams v. Purdue Pharma Co.*, 297 F. Supp. 2d 171, 177–78 (dismissing District of Columbia's Consumer Protection Procedures Act claim that the manufacturer over-promoted the drug as providing "smooth and sustained" pain relief for twelve hours with little chance of addiction, which allowed the manufacturer artificially to inflate its prices).

216. See *In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555, 566–68 (E.D. Ark. 2005) (denying certification of a consumer-protection class due to material variations in the consumer laws of the twenty-nine states at issue and the need to show individual plaintiffs relied on the allegedly deceptive advertisement and were injured as a result).

217. See *In re W. Va. Rezulin Litig.*, 585 S.E.2d 52, 62–65 (W. Va. 2003) (ruling that the statutory requirement that a plaintiff show an "ascertainable loss" under West Virginia Consumer Credit and Protection Act did not require a showing of actual damages and finding that plaintiffs needed only to allege that they received a product that was different or inferior to that which they believed they purchased).

218. See *Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co.*, 929 A.2d 1076, 1088 (N.J. 2007).

219. See Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 KAN. L. REV. 1, 32–33 (2005).

minimum awards set by statute in absence of proof of injury, treble damages, and attorneys' fees.<sup>220</sup>

Some have argued that the scope of CPAs was never meant to include FDA-approved drugs.<sup>221</sup> That is why approximately two-thirds of CPAs exclude from their scope conduct regulated by state or federal government agencies.<sup>222</sup> The clear public policy behind these provisions is that CPAs were meant to fill a "legal gap" by protecting consumers where product safety was not already closely monitored and regulated by the government.<sup>223</sup> These provisions are only infrequently applied in cases involving pharmaceutical marketing. Instead, courts appear more frequently to apply principles of conflict preemption in claims challenging drug warnings.<sup>224</sup>

### C. Conflicts with Federal Authority: Preemption

The constitutional principle of preemption provides a final safeguard in the development and communication of drug warnings. Under the Supremacy Clause of the United States Constitution, state law must yield to federal law when the two conflict.<sup>225</sup> Acts of Congress or agencies empowered to act on Congress's behalf override any state law that is inconsistent with the exercise of federal power.<sup>226</sup> In the prescription drug context, the FDA acting pursuant to the FDCA is such an agency, able to exercise federal power.<sup>227</sup> In some instances,

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220. See *id.* at 22–27.

221. See, e.g., Victor E. Schwartz, Cary Silverman & Christopher E. Appel, "That's Unfair!" Says Who—The Government or Litigant? *Consumer Protection Claims Involving Regulated Conduct*, 47 WASHBURN L.J. 93, 119 (2007).

222. See *id.* at 102. Regulatory-compliance exemptions to state consumer laws vary from state to state but generally fit within three categories: (1) rules of construction suggesting or requiring that courts interpret the state consumer law consistently with the interpretations and policy of the FTC; (2) exemptions for authorized or permitted conduct; (3) exemptions applicable to specific regulated industries or conduct. See *id.* at 102–17.

223. *Id.* at 106 (quoting *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667 (N.D. Ga. 1983)).

224. See *id.* at 119–22; see also Muehlberger & Silverman, *supra* note 212, at 5–6.

225. U.S. CONST. art. VI, cl. 2.

226. See *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986) ("Pre-emption may result not only from action taken by Congress itself; a federal agency action within the scope of its congressionally delegated authority may pre-empt state regulation.").

227. See 21 U.S.C. § 393(b) (2006) (charging the FDA with ensuring that drugs are safe and effective).

preemption establishes an affirmative defense for drug manufacturers, in effect barring state tort actions that rely on court decisions contrary to FDA decisions.

### 1. *Methods of Preemption*

There are several types of preemption. The most straightforward, known as "express preemption," occurs where a federal law preempts state statutes and common law within the text of the statute. For example, the Medical Device Amendments to the FDCA contain an express preemption provision barring certain state actions where the device complies with FDA regulations.<sup>228</sup> This practice has the benefit of reducing uncertainty over Congressional intent; it may still, however, leave questions over the scope of the preemption.<sup>229</sup>

In other cases, preemption can be implied through the purpose or structure of the federal law.<sup>230</sup> Such "implied preemption" occurs in three situations: (1) "field preemption," in which Congress intends to occupy an entire regulatory field, leaving no room for state lawmaking;<sup>231</sup> (2) "conflict preemption," in which "compliance with both federal and state regulations is a physical impossibility";<sup>232</sup> and (3) "obstacle preemption," in which state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>233</sup> In practice, only the latter two forms apply to prescription drugs as no court

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228. See 21 U.S.C. § 360k(a) (2006) (providing that a state shall not "establish or continue in effect with respect to a device intended for human use any requirement—(1) which is different from, or in addition to, any requirement applicable under [federal law] to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under" relevant federal law).

229. See, e.g., *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1006–08 (2008) (discussing the scope of the MDA's express preemption provision regarding medical device compliance with FDA pre-market approval process); *Spietsma v. Mercury Marine*, 537 U.S. 51, 67–68 (2002) (analyzing the confines of an express preemption provision in the Federal Boat Safety Act).

230. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) ("Even without an express provision for preemption, we have found that state law must yield to a congressional Act . . .").

231. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230–31 (1947).

232. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963); see also *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

233. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869–74 (2000); see also *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).



has yet found implied field preemption for the FDA's regulation of drugs and medical devices.<sup>234</sup> These two forms are generally joined together by courts and commentators under the term "conflict preemption" despite distinct inquiries of analysis.<sup>235</sup> Because express preemption is relatively clear cut in most instances and field preemption is not yet recognized for the FDA's regulatory coverage, implied conflict preemption principles represent the common method for recognizing preemption in pharmaceutical regulations.

## 2. *The FDA's Changing Priorities in a DTC Environment*

In recent years, the FDA has increasingly recognized implied conflict preemption of state tort claims as a result of its regulations and decision making.<sup>236</sup> Since 2000, the agency has filed a number of amicus curiae briefs arguing that its regulatory interpretations support a finding of preemption.<sup>237</sup> As amicus, the FDA takes the clear position that, under the agency's comprehensive regulatory scheme, a drug manufacturer cannot unilaterally strengthen a drug warning without FDA approval.<sup>238</sup> This view represents the agency's "authority to implement the statute," its "thorough understanding of its own regulation,"

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234. See James O'Reilly, *A State of Extinction: Does Food and Drug Administration Approval of a Prescription Drug Label Extinguish State Claims for Inadequate Warning?*, 58 FOOD & DRUG L.J. 287, 291 (arguing that it is unlikely that an implied field preemption claim could prevail in the prescription drug field).

235. See, e.g., *Crosby*, 530 U.S. at 372; see also Christine H. Kim, *The Case for Preemption of Prescription Drug Failure-to-Warn Claims*, 62 FOOD & DRUG L.J. 399, 402 (2007) (separating the three distinct forms of implied preemption).

236. See Kim, *supra* note 235, at 400–01 (discussing the FDA's increased amicus curiae filings in federal preemption cases); Mark C. Levy & Gregory J. Wartman, *Amicus Curiae Efforts to Reform Product Liability at the Food and Drug Administration: FDA's Influence on Federal Preemption of Class III Medical Devices and Pharmaceuticals*, 60 FOOD & DRUG L.J. 495, 497–99 (2005); Catherine M. Sharkey, *Federalism in Action: FDA Regulatory Preemption in Pharmaceutical Cases in State Versus Federal Courts*, 15 J.L. & POL'Y 1013, 1032–34 (2007).

237. See, e.g., Corrected Amicus Brief for the United States, *Kallas v. Pfizer, Inc.*, No. 04-00998 (D. Utah Sept. 29, 2005); see also Sharkey, *supra* note 236, at 1038 (estimating that the FDA is directly involved in one quarter of federal court drug preemption cases since 2000).

238. See *Colacicco v. Apotex, Inc.*, 432 F. Supp. 2d 514, 528 (E.D. Pa. 2006) (citing 21 C.F.R. § 314.150).

and its "uniquely qualified" position to "comprehend the likely impact of state requirements."<sup>239</sup>

In 2006, the FDA issued a Preamble to a rule updating and strengthening prescription drug labeling requirements, which expressed its view that several types of product liability claims were preempted by federal regulation.<sup>240</sup> The agency explained that these claims either stood as an obstacle to carrying out its mission or conflicted with the FDA's decision-making authority. Specifically, the Preamble states that "FDA approval of labeling [under the new guidelines] . . . preempts conflicting or contrary State law, regulations, or decisions of a court of law for purposes of product liability litigation."<sup>241</sup> The Preamble emphasizes the agency's "statutorily prescribed role as the expert Federal agency responsible for evaluating and regulating drugs,"<sup>242</sup> and cautions that state tort actions can "encourage, and in fact require, lay judges and juries to second guess the assessment of benefits versus risks of a specific drug" and create "pressure on manufacturers to attempt to add warnings . . . [and] to propose 'defensive labeling' . . . which, if implemented, could result in scientifically unsubstantiated warnings and underutilization of beneficial treatments."<sup>243</sup> The Preamble cites six instances where preemption should be implied.<sup>244</sup> Hence, although still acknowledging that "FDA labeling requirements represent a minimum safety standard," the FDA interpreted its comprehensive regulatory procedures as creating "both a 'floor' and a 'ceiling'" for the imposition of liability.<sup>245</sup>

The Preamble sparked debate over the FDA's role in regulating drugs<sup>246</sup> and the relative deference a court should afford an

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239. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 863 (2000) (internal quotation marks omitted).

240. See Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3933-34 (Jan. 24, 2006) (effective date June 30, 2006) [hereinafter "FDA Preamble"].

241. *Id.*

242. *Id.* at 3935.

243. *Id.*

244. *Id.* at 3935-36.

245. *Id.* at 3935.

246. See, e.g., W. Wylie Blair, *Implied Preemption of State Tort Law Claims Against Prescription Drug Manufacturers Based on FDA Approval*, 27 J. LEGAL MED. 289, 301 (2006) (proposing amendment of the Food, Drug, and Cosmetic Act, enactment of state statutes, or the use of judicial intervention to adopt the FDA's interpretation of the scope of implied preemption); Teresa Curtin & Ellen Relkin, *Preamble Pre-*

agency's interpretation of the scope of preemption as expressed in a preamble.<sup>247</sup> Courts have varied in the deference given to the FDA's view.<sup>248</sup> In past decisions, the Supreme Court has expressed the view that agency statements warrant some degree of deference. For example, in *Medtronic, Inc. v. Lohr*, a medical device case, Justice Breyer's concurrence noted, "in the absence of a clear congressional command as to preemption, courts may infer that the relevant administrative agency possesses a degree of leeway to determine which rules, regulations, or other administrative actions will have pre-emptive effect."<sup>249</sup> Likewise, in *Hillsborough County v. Automated Medical Laboratories, Inc.*, the Court recognized that "because agencies normally address problems in a detailed manner and can speak

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*emption and the Challenged Role of Failure to Warn and Defective Design Pharmaceutical Cases in Revealing Scientific Fraud, Marketing Mischief, and Conflicts of Interest*, 35 HOFFSTRA L. REV. 1773, 1778 (2007) (juxtaposing the FDA's preemption position with deficiencies in the agency's post-market regulatory scheme and suggesting a possible retreat from the FDA's strong stance on implied preemption); Margaret Gilhooley, *Addressing Potential Drug Risks: The Limits of Testing, Risk Signals, Preemption, and the Drug Reform Legislation*, 59 S.C. L. REV. 347, 388 (2008) (recommending the FDA change its policy and require that drug sponsors petition the agency for a statement of preemptive effect on the need for a warning).

247. Compare Howard L. Dorfman et al., *Presumption of Innocence: FDA's Authority to Regulate the Specifics of Prescription Drug Labeling and the Preemption Debate*, 61 FOOD & DRUG L.J. 585, 610–11 (2006) (advocating substantial, or *Chevron* level, deference to the Preamble), with Leslie C. Kendrick, *FDA's Regulation of Prescription Drug Labeling: A Role for Implied Preemption*, 62 FOOD & DRUG L.J. 227, 247 (2007) (concluding that the Preamble warrants low level or *Skidmore* deference). See also Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 243–45 (2007) (examining increased use of preemption by federal agencies and corresponding judicial deference to agency determinations).

248. Compare *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, No. 05-1699, 2006 WL 2374742 (N.D. Cal. Aug. 16, 2006) (same *Celebrex*), *Conte v. Wyeth, Inc.*, No. 04-437382, 2006 WL 2692469 (Cal. App. Dep't Super. Ct. Sept. 14, 2006) (same *metoclopramide*), and *Abramowitz v. Cephalon, Inc.*, No. BER-L-617-04, 2006 WL 560639 (N.J. Super. Ct. Law Div. Mar. 3, 2006) (finding implied preemption for FDA's approval of risks associated with pain-management drug *Actiq*), with *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85 (2d Cir. 2006), *aff'd sub. nom.*, *Warner-Lambert Co. v. Kent*, 128 S. Ct. 1168 (2008), *Weiss v. Fujisawa Pharm. Co.*, 464 F. Supp. 2d 666 (E.D. Ky. 2006), *Jackson v. Pfizer, Inc.*, 432 F. Supp. 2d 964 (D. Neb. 2006), and *Levine v. Wyeth*, 944 A.2d 179 (Vt. 2006), *cert. granted*, 128 S. Ct. 1118 (2008).

249. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 505 (1996) (Breyer, J., concurring); see also *Chevron v. Nat'l Res. Def. Council*, 467 U.S. 837, 863–64 (1984) ("The fact that the agency has from time to time changed its interpretation . . . does not . . . lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone.").

through a variety of means, including regulations, preambles, interpretative statements, and responses to comments, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive."<sup>250</sup>

Although the Court has not yet directly addressed the preemptive effect of the FDA's regulation of prescription drugs or the level of deference to be accorded to the FDA's view, the Court's consideration of *Levine v. Wyeth* is likely to shine significant light on these issues as well as the modern role of the FDA.<sup>251</sup> In *Levine*, the plaintiff went to the hospital for treatment of a serious migraine headache and, after injection with the drug Phenergan, was left with injuries that led to the amputation of her arm.<sup>252</sup> The injury occurred as a result of direct intravenous (IV) injection, a risk the FDA had closely considered when deeming the anti-nausea medication safe for use.<sup>253</sup> The agency approved a warning cautioning against inadvertent injection and providing instructions to minimize the risk but chose not to prohibit IV push as a means of administration.<sup>254</sup> In fact, Wyeth asked the FDA in 2000 to alter the warning to place greater emphasis on the risk at issue, but the FDA indicated the warning should remain unaltered.<sup>255</sup> Wyeth acquiesced and the warning was unchanged leading up to the state lawsuit.

The Vermont Supreme Court found that FDA compliance is only a minimum standard and referred to FDA approval as simply a "first step" in pharmaceutical labeling.<sup>256</sup> The court rejected both conflict and obstacle preemption, concluding that the manufacturer was "free" to supplement or strengthen

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250. *Hillsborough County*, 471 U.S. 707, 718 (1985); see also *Dowhal v. Smith-Kline Beecham Consumer*, 88 P.3d 1, 5–6, 9–10 (Cal. 2004) (according deference to FDA position expressed in letters issued in response to a manufacturer inquiry and citizen petition stating that California law was preempted to the extent it required warnings on nicotine replacement devices that conflicted with the FDA's determination that a manufacturer could include only approved warnings).

251. *Levine v. Wyeth*, 944 A.2d 179 (Vt. 2006), *cert. granted*, 128 S. Ct. 1118 (2008) (No. 06-1249). The Court also decided two other cases this term considering preemption in the FDA context. See *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008); *Warner-Lambert Co. v. Kent*, 128 S. Ct. 1168 (2008).

252. See *Levine*, 944 A.2d at 182.

253. See *id.* at 183.

254. See *id.* at 189.

255. See *id.* at 188.

256. *Id.*

warnings at any time.<sup>257</sup> The court also acknowledged the FDA Preamble, yet held that “irrespective of the level of deference [it] might apply, the statement would not affect the outcome of [the] appeal,” and further stated that the agency’s interpretation was undeserving of any deference.<sup>258</sup>

The Solicitor General, in a brief as *amicus curiae* filed at the invitation of the U.S. Supreme Court, disagreed with the Vermont ruling.<sup>259</sup> The Solicitor recognized that labeling is an inextricable component of the approval process, noting that the FDA may convey to physicians and their patients the conditions under which the potential benefits of the product exceed its risks, while not unnecessarily deterring beneficial uses.<sup>260</sup> “If manufacturers were free to make unilateral changes to labeling the day after FDA’s approval, based on information that was previously available to FDA, the approval process would be greatly undermined and the agency’s careful balancing of risks and benefits thwarted.”<sup>261</sup> Having granted certiorari, the Court will decide whether FDA-approved warnings are merely a floor, as suggested by the Vermont Supreme Court, or both floor and ceiling, as argued by the Solicitor General.<sup>262</sup>

Other courts have found that state tort law claims challenging conduct in compliance with FDA requirements are preempted. For instance, a federal district court in Pennsylvania considered state claims for failure to warn relating to an anti-depression and anti-anxiety drug’s (Paxil) risk of suicide, and found them to be preempted.<sup>263</sup> The case, which also involved the drug’s generic versions, examined the FDA’s position on preemption, holding that it is “abundantly clear” that such evidence of intent is entitled to “significant deference.”<sup>264</sup> Similarly, a federal district court in California reached a similar de-

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257. *Id.* at 194.

258. *Id.* at 192.

259. See Brief for the United States as Amicus Curiae Supporting Petitioner, *Wyeth v. Levine*, No. 06-1249 (U.S. filed Dec. 2007), available at <http://www.usdoj.gov/osg/briefs/2007/3mer/1ami/2006-1249.mer.ami.pdf>.

260. *Id.* at 9–11.

261. *Id.* at 9.

262. See *id.* at 11.

263. See *Colacicco v. Apotex, Inc.*, 432 F. Supp. 2d 514 (E.D. Pa. 2006).

264. *Id.* at 529; see also *Sykes v. Glaxo-SmithKline*, 484 F. Supp. 2d 289, 308–10 (E.D. Pa. 2007) (preempting state tort actions against pediatric vaccine manufacturers under the National Childhood Vaccine Injury Compensation Act).

termination and preempted state claims for failure to warn of the drug Celebrex's cardiovascular risks.<sup>265</sup>

Armed with evidence of the FDA's understanding of the scope of preemption, a growing number of courts acknowledge implied conflict preemption in drug warnings. Although this development is gradual and uneven, it signals a renewed viability of implied preemption as a final, constitutional check on the sufficiency of drug warnings.

Federal law may not only preclude state product liability claims, but it may also preempt CPA claims. For example, in *Pennsylvania Employees Benefit Trust Fund v. Zeneca, Inc.*, the plaintiffs claimed that the manufacturer of Nexium violated the Delaware Consumer Fraud Act by advertising that Nexium was superior to Prilosec.<sup>266</sup> Both drugs treat acid reflux disease and frequent heartburn. Delaware's consumer protection law exempts advertising or mechanizing practices that comply with the rules and regulations of the FTC, but does not contain a general regulatory compliance exemption for conduct in compliance with the rules of other government agencies.<sup>267</sup> The Third Circuit, although noting that the FTC and FDA initially had concurrent jurisdiction over prescription drug advertising, declined to extend the clear statutory language to conduct that now falls exclusively within the FDA's jurisdiction.<sup>268</sup> The court found, however, that the purpose of the Food, Drug, and Cosmetic Act "would be frustrated if states were allowed to interpose consumer fraud laws that permitted plaintiffs to question the veracity of statements approved by the FDA."<sup>269</sup> Thus, the court found claims under Delaware's consumer protection law challenging labeling or advertising of FDA-approved prescription drugs implicitly preempted.<sup>270</sup>

### 3. Public Policy Supports Expanding Scope of Preemption

The FDA's interpretation of the scope of implied preemption appears cognizant of the bigger picture unfolding within the

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265. See *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, MDL No. 1699, 2006 WL 2374742, at \*9 (N.D. Cal. Aug. 16, 2006).

266. 499 F.3d 239, 241 (3d Cir. 2007).

267. See DEL. CODE tit. 6 § 2513(b) (2009).

268. See *Pennsylvania Employees*, 499 F.3d at 243.

269. *Id.* at 251.

270. See *id.* at 252.

pharmaceutical industry: As the scale and complexity of pharmaceutical production reaches new heights, the need for comprehensive federal regulation becomes increasingly imperative.<sup>271</sup> Greater recognition of federal preemption helps to achieve the objectives of such regulation by assuring definitive and uniform application. Further, preemption serves public policy goals of predictability and fundamental fairness by informing pharmaceutical participants of their complete set of legal obligations rather than simply setting a floor and forcing manufacturers to abide by fifty different state law interpretations.<sup>272</sup>

From a practical standpoint, the FDA's interpretation is a logical, perhaps inevitable, step toward meeting its congressional mandate as the federal agency responsible for regulating drugs.<sup>273</sup> The FDCA, originally enacted in 1938, does not contain express preemption language with regard to drug regulation.<sup>274</sup> Hence, implied conflict preemption is necessary for the FDA to assert its regulatory authority, provide definitive standards, and safeguard drug manufacturers when they comply with existing regulations.

In comparison, the MDA, enacted over a half century after the FDCA, does contain an express preemption provision for medical devices.<sup>275</sup> Given the similarities established in other contexts, such as application of the learned intermediary rule, between prescription drugs and prescription medical devices,<sup>276</sup> there appears to be little justification for such a discrepancy if the FDA was not supposed to preempt implicitly state laws regarding drug warnings. Rather, the FDA's stronger endorsement of implied preemption seems to align

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271. See Richard Epstein, *Why the FDA Must Preempt Tort Litigation: A Critique of Chevron Deference and a Response to Richard Nagareda*, 1 J. TORT L. 1, 1 (2006) ("[F]ederal preemption of state tort actions for pharmaceuticals is long overdue, both under current law and as a matter of sound legal policy.").

272. See *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001) ("As a practical matter, complying with the FDA's detailed regulatory regime in the shadow of 50 States' tort regimes will dramatically increase the burdens facing potential applicants—burdens not contemplated by Congress in enacting the FDCA . . .").

273. See FDA Preamble, *supra* note 240, at 3934 ("In order to more fully address the comments expressing concern about the product liability implications of revising the labeling for prescription drugs, we believe it would be useful to set forth in some detail the arguments made in those amicus briefs.").

274. See 21 U.S.C. § 301 (2006).

275. See 21 U.S.C. § 360k(a) (2006).

276. See *supra* Part III.A.

preemption principles between these Acts, promoting the policy goal of consistency among laws.

Growth in DTC marketing plays an important part in the changing landscape of drug regulation and the modern role of the FDA. Although the dynamics of the physician-patient relationship remain unaffected by DTC marketing, the scale of the marketing efforts is national and warrants comprehensive federal regulation. Many states have long recognized the policy benefits of a uniform federal system of regulation and apply state law regulatory compliance exceptions to further this result.<sup>277</sup> Where the scope of these regulatory exemptions is limited, constitutional principles of preemption should apply to preclude most state tort claims based on design, failure to warn, and consumer protection acts if the drug manufacturer strictly complies with federal law.

### CONCLUSION

The debate on whether DTC advertising encourages individuals to seek effective treatment for health conditions or pushes them to pressure their doctors for unnecessary designer medications is likely to rage on far into the future. The answer to that question is beyond the scope of this Article. What is clear, however, is that despite increasing DTC advertising, the basic relationship between pharmaceutical manufacturers and the medical community with regard to drug warnings remains virtually unchanged. After the FDA approves a prescription drug as safe and effective, patients must still consult with a physician before obtaining the medication. Physicians, based on the specific medical history and individual characteristics of each patient, must adequately inform their patients of potential side effects and evaluate other relevant risks before pursuing a treatment course. The role, and indeed the objective, of DTC advertising in this doctor-patient relationship is to prompt the patient to question his doctor about potential drug treatments. Even though all

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277. See *supra* Part III.B; see also Dorfman et al., *supra* note 247, at 622 ("[T]he public policy balance weighs in favor of a uniform federal scheme to provide for the introduction of urgently needed medical therapies without compromising FDA's role of ensuring that prescription drug labels are accurate, contain appropriate and scientifically sound precautionary language with regard to adverse events, and allow for clear understanding by the recipients.").



advertisements direct patients to, “ask [their] doctor about” the drug in question, it remains the physician’s ultimate responsibility to evaluate whether that drug is the most effective, or even a beneficial, treatment. DTC advertising can never replace or undermine the personal relationship between a physician and a patient and the communication of the risks and benefits of a drug discussed in the doctor’s office. That many patients are able to become more informed about possible treatments through DTC advertising and take a more active role in improving their health should be viewed as a considerable benefit to the healthcare system—one that in no way undercuts the traditional rules of law related to drug warnings.<sup>278</sup>

All this is not to say, however, that the regulation of DTC advertising is without any gaps or weaknesses. Regulation could potentially be improved if the FDA considered making pre-dissemination submission of DTC advertisements for the agency’s review mandatory, rather than voluntary, and requiring affirmative FDA approval before permitting advertisements to air. The practicality, effectiveness, and fairness of such a requirement, however, would largely depend on whether Congress provided the FDA with sufficient resources to review promptly a surge in submissions, because, according to the GAO, the process at present already takes too long.

Despite the potential benefit of the aforementioned changes, this Article has shown that the learned intermediary doctrine retains its viability in our current post-DTC world. Most state courts continue to apply the doctrine fully, despite aberrations such as the recent West Virginia Supreme Court of Appeals decision or more limited exclusions for common oral contraceptives. Moreover, this Article has also shown that extensive federal regulation of pharmaceutical products, including DTC advertising, should preclude state product liability and consumer protection claims, whether on the basis of common-law compliance with standards defenses, statutory exemption, or

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278. See, e.g., Jennifer Girod, *The Learned Intermediary Doctrine: An Efficient Protection for Patients, Past and Present*, 40 IND. L. REV. 397, 398, 416 (2007) (discussing the potential benefits of DTC advertising); Jack B. Harrison & Mina J. Jerrerson, “Some Accurate Information is Better Than No Information at All”: Arguments Against An Exception to the Learned Intermediary Doctrine Based on Direct-to-Consumer Advertising, 78 OR. L. REV. 605, 606 (1999) (“DTC advertising increases consumer awareness of illnesses and their symptoms, empowers consumers to take charge of their healthcare decisions, and enhances the quality of the dialogue between physicians and patients.”).

federal preemption. These measures are all supported by sound public policy, particularly where there is tension between the FDA's reasoned decision making and the theory of the lawsuit.

# RETURNING TO THE *PRUNEYARD*: THE UNCONSTITUTIONALITY OF STATE-SANCTIONED TRESPASS IN THE NAME OF SPEECH

GREGORY C. SISK\*

*In PruneYard Shopping Center v. Robins,*<sup>1</sup> the United States Supreme Court held that the owner of a private shopping center who was required by a state court to grant political solicitation and speaking rights to strangers had thereby suffered neither a constitutional taking of private property without compensation under the Fifth Amendment nor a deprivation of the owner's own free speech rights under the First Amendment. Revisiting this subject more than a quarter-century later, this Essay argues that the *PruneYard* decision never should have been read as an open invitation to the states to impose constitutional obligations upon private landowners regardless of the offensiveness of the speech being expressed over the owner's objection or the permanence and breadth of the government-commandeered access to the property. Moreover, the Supreme Court's decisions over the past quarter-century confirm that imposing a permanent and continuous free-speech easement on private property is a taking for which compensation is due. A judicially created right of trespass in the name of free speech cannot be squared with federal constitutional protections of expressive autonomy and private property.

## I. INTRODUCTION AND BACKGROUND

Nearly thirty years ago, the California judiciary construed its state constitution's "liberty of speech" clause to require certain private citizens to allow strangers access to private property as a

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\* Orestes A. Brownson Professor of Law, University of St. Thomas School of Law (Minnesota), gcsisk@stthomas.edu.

1. 447 U.S. 74 (1980). In keeping with the usage of the Supreme Court, this Essay will refer to this case as *PruneYard*. The California Supreme Court decision, *Robins v. PruneYard Shopping Center*, 592 P.2d 341 (Cal. 1979), *aff'd sub nom. PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), will be referred to as *PruneYard*, with a lowercase "y."

venue for expressing political opinions. In *Robins v. Pruneyard Shopping Center*, a bare 4-3 majority of the California Supreme Court held that a group soliciting signatures for a political petition had a state constitutional right to do so in the common areas of the privately owned PruneYard Shopping Center, despite the center's uniform policy prohibiting solicitation inside the mall.<sup>2</sup> The court rendered this decision, which found no support in the text, structure, or drafting history of the California Constitution,<sup>3</sup> "during the closing days of an era of an expansionist and free-wheeling approach to constitutional interpretation."<sup>4</sup>

As a radical departure from the Lockean concept of rights as a check on government power, the California *Pruneyard* decision has found few admirers among the courts. The United States Supreme Court long since confirmed that it is "commonplace that the [federal] constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state."<sup>5</sup> Likewise, a substantial majority of states<sup>6</sup> have adhered to the traditional understanding that constitutional rights limit the *government's* power to interfere with our *freedoms*; they do *not* disturb the freedom of *private citizens*.<sup>7</sup> Thus, nearly every state supreme

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2. See *Pruneyard*, 592 P.2d at 341-42, 347-48.

3. For an extended critique of the California Supreme Court's decision in *Pruneyard* as a policy decision untethered to the constitutional text, history, context, and developed legal reasoning, together with a careful analysis of the typical state liberty of speech clause and an examination of original historical sources on state constitutional drafting, see generally Gregory C. Sisk, *Uprooting the Pruneyard*, 38 RUTGERS L.J. 1145 (2007).

4. *Id.* at 1146.

5. *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) (holding that a claim of constitutional right did not justify entry onto private property because the conduct of a private shopping center did not constitute state action).

6. For examples of state court decisions rejecting the application of state constitutional liberty of speech provisions against private citizens, see *Cologne v. Westfarms Assocs.*, 469 A.2d 1201, 1210 (Conn. 1984); *City of West Des Moines v. Engler*, 641 N.W.2d 803, 806 (Iowa 2002); *Woodland v. Mich. Citizens Lobby*, 378 N.W.2d 337, 347-48 (Mich. 1985); *State v. Wicklund*, 589 N.W.2d 793, 803 (Minn. 1999); *SHAD Alliance v. Smith Haven Mall*, 488 N.E.2d 1211, 1218 (N.Y. 1985); *Jacobs v. Major*, 407 N.W.2d 832, 848 (Wis. 1987). For a discussion of state court responses to the *Pruneyard* decision, see generally Sisk, *supra* note 3, at 1151-53.

7. See 2 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE* § 16.1, at 994 (4th ed. 2007) (explaining that the Federal Bill of Rights "has been viewed only to limit the freedom of the government when dealing with individuals"). On the purpose and philosophical foundation of constitutional rights in the American historical context, applying to state constitutional drafting as well, see generally Sisk, *supra* note 3, at 1160-63.

court to address the matter has refused to convert the shield of state constitutional rights against government power into a sword that one private citizen could wield against another.<sup>8</sup>

New Jersey, however, not only has followed California in enforcing state constitutional duties to facilitate speech against private landowners<sup>9</sup> but has become “a much more zealous disciple than the teacher.”<sup>10</sup> Ranging well beyond the large shopping center context, New Jersey has aggressively extended the judicially created right of constitutional trespass in the name of free speech to private universities,<sup>11</sup> private residential communities,<sup>12</sup> and even the corridors of privately owned residential buildings.<sup>13</sup>

As recently as 2007, the California Supreme Court in *Fashion Valley Mall LLC v. National Labor Relations Board*<sup>14</sup> declined the invitation to overrule *PruneYard* (by the same single-vote margin

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8. See *Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 780 P.2d 1282, 1286 (Wash. 1989) (holding that an entitlement to intrude onto private property for political expression over the objection of the owner would be “an entirely new kind of free speech right—one that can be used not only as a shield by private individuals against actions of the state but also as a sword against other private individuals” (emphasis in original)).

9. See *N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757 (N.J. 1994). In addition, based upon special state constitutional election or initiative clauses, two states have held that the fundamental right to free elections outweighs property rights, and thus signatures for initiative or candidate election petitions may be solicited at private shopping centers. See *Batchelder v. Allied Stores Int'l, Inc.*, 445 N.E.2d 590, 595–96 (Mass. 1983); *Alderwood Assocs. v. Wash. Envtl. Council*, 635 P.2d 108, 115–17 (Wash. 1981) (plurality opinion). But see *Stranahan v. Fred Meyer, Inc.*, 11 P.3d 228, 237–44 (Or. 2000) (overruling prior decision upholding a right to gather ballot petition signatures on private property and describing that earlier decision as having failed to “adhere to [the] usual methodology of examining the text, history, and case law surrounding an original [state] constitutional provision”).

10. *Sisk*, *supra* note 3, at 1205; see also *id.* at 1205–12 (describing intrusive expansion of constitutional duties into the private sector in New Jersey).

11. See *State v. Schmid*, 423 A.2d 615, 631–33 (N.J. 1980).

12. See *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 929 A.2d 1060, 1072–74 (N.J. 2007) (holding that homeowner association regulations on posting of signs and use of a community room passed muster under a constitutional scrutiny involving “the general balancing of expressional rights and private property interests” but explaining that the ruling “does not suggest . . . that residents of a homeowners' association may never successfully seek constitutional redress against a governing association that unreasonably infringes their free speech rights”).

13. See *Guttenberg Taxpayers & Rentpayers Ass'n v. Galaxy Towers Condominium Ass'n*, 688 A.2d 156 (N.J. Super. Ct. Ch. Div. 1996), *aff'd*, 688 A.2d 108 (N.J. Super. Ct. App. Div. 1996).

14. 172 P.3d 742 (Cal. 2007).

as in the original decision). A few years earlier, a plurality of the court had acknowledged the severe criticism of the *Pruneyard* decision, recognizing that most other states had rejected it and that it had no basis in the text, history, or structure of the California Constitution.<sup>15</sup> In *Fashion Valley Mall*, however, a majority of the California Supreme Court recited the *Pruneyard* line of cases, without adding to or reevaluating the abbreviated *Pruneyard* reasoning. The court restated that "[a] shopping mall is a public forum in which persons may reasonably exercise their right to free speech guaranteed by article I, section 2 of the California Constitution."<sup>16</sup> Three justices dissented, arguing that "*Pruneyard* was wrong when decided" and that "jurisdictions throughout the nation have overwhelmingly rejected it."<sup>17</sup> The dissent urged that "[t]he time has come to recognize that we are virtually alone, and that *Pruneyard* was ill-conceived."<sup>18</sup>

Thus, although generally discredited as an anachronistic vestige of an activist period in constitutional jurisprudence, the *Pruneyard* decision staggers forward into the new century. In California and New Jersey, which represent nearly fifteen percent of the nation's population, a judicially invented liberty of speech right to occupy another's private property persists. Moreover, whenever someone advocates "transport[ing] constitutional norms into the private sector,"<sup>19</sup> the *Pruneyard* decision remains as "a jurisprudential attractive nuisance for deformed constitutional interpretation."<sup>20</sup>

Unfortunately, when the United States Supreme Court first addressed the issue of state appropriation of private property as a political speech easement nearly three decades ago, it failed to nip the scheme in the bud. Instead, the Court ruled

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15. *Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n*, 29 P.3d 797, 801-06 (Cal. 2001) (plurality opinion).

16. *Fashion Valley Mall*, 172 P.3d at 745-54.

17. *Id.* at 754-55 (Chin, J., dissenting).

18. *Id.* at 759. The dissent further observed that "the *Pruneyard* court made no effort to find anything in the text of article I, section 2, subdivision (a) of the California Constitution, its historical sources, or the process that led to its adoption, that suggests any intent to extend its terms to private property." *Id.* at 760.

19. Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1541 (1998) (criticizing attempts to "transport constitutional norms into the private sector").

20. Sisk, *supra* note 3, at 1213.

that California's state constitutional edict was within the permissible range of state police power to regulate private property, at least in the particular circumstances of that case.

In *PruneYard Shopping Center v. Robins*,<sup>21</sup> the Supreme Court reaffirmed its precedents refusing to enforce federal constitutional rights against private entities.<sup>22</sup> The Court reiterated that "property does not 'lose its private character merely because the public is generally invited to use it for designated purposes,' and that '[t]he essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center.'"<sup>23</sup> The *PruneYard* Court nonetheless acknowledged "the authority of [California] to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution," including adopting "reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision."<sup>24</sup> On the particular facts of the case, the Court rejected claims that there had been a constitutional taking of the shopping center owner's property without compensation in violation of the Fifth and Fourteenth Amendments.<sup>25</sup> The Court also found that requiring the owner to facilitate the expressions of others did not violate the owner's First and Fourteenth Amendment free speech rights.<sup>26</sup>

The Supreme Court's *PruneYard* decision should not be misread to invite the states to impose constitutional obligations upon private landowners, regardless of the speech's offensiveness or the permanence and breadth of the involuntary access to the property.<sup>27</sup> Moreover, as free speech and takings jurisprudence has matured during the past twenty-five years, the constitutional legitimacy of state-sanctioned trespass in the name of speech has become increasingly difficult to sustain.<sup>28</sup>

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21. 447 U.S. 74 (1980).

22. *Id.* at 81.

23. *Id.* (quoting *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972)).

24. *Id.*

25. *See id.* at 82-83.

26. *Id.* at 88.

27. *See infra* Parts II & III.

28. *See infra* Parts II & III.

In the critical light of subsequent developments, the time has come to renew the expressive and private property rights of landowners against intrusions by others.

## II. FORCING PRIVATE LANDOWNERS TO BE INSTRUMENTS FOR OFFENSIVE EXPRESSION INFRINGES FREE SPEECH RIGHTS

Although ignored by the California Supreme Court,<sup>29</sup> private landowners suffer a loss of their free speech rights when forced to open their doors to controversial social or political expression, including opinions that they—or, in the case of commercial enterprises, their customers—may find offensive. As Justice Powell said in his concurring opinion in *PruneYard*, “[a] person who has merely invited the public onto his property for commercial purposes cannot fairly be said to have relinquished his right to decline ‘to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.’”<sup>30</sup>

Although the Supreme Court did not find that California’s imposition of state constitutional duties upon a shopping center owner transgressed the First Amendment, the particular owner in that case had not specifically objected to the message being presented.<sup>31</sup> In subsequent First Amendment decisions, the Supreme Court has emphasized that the absence of an objection by the shopping center owner in *PruneYard* was crucial to understanding the limited scope of that decision. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*,<sup>32</sup> the Court noted that, because the mall owner in *PruneYard* never alleged offense, the distribution of pamphlets did not threaten the principle of speaker’s autonomy.<sup>33</sup> Likewise, in *Pacific Gas*

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29. See *Robins v. PruneYard Shopping Ctr.*, 592 P.2d 341 (Cal. 1979); see also *Golden Gateway Ctr. v. Golden Gateway Tenants Ass’n*, 29 P.3d 797, 801 n.3 (Cal. 2001) (plurality opinion) (observing that the *PruneYard* opinion had not considered the free speech rights of the shopping center owner).

30. *PruneYard*, 447 U.S. at 97–98 (Powell, J., concurring in part and in the judgment) (quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)).

31. *Id.* at 101; see also Eule & Varat, *supra* note 19, at 1568 (explaining that the owner of the shopping center in *PruneYard* “never contended that the students’ message offended him” and never made the “case that anyone had or might likely attribute their message to him”).

32. 515 U.S. 557 (1995).

33. *Id.* at 579–80; see also Eule & Varat, *supra* note 19, at 1609 (explaining that *Hurley* distinguished *PruneYard* “because in *PruneYard* there was no threat to



& Electric Co. v. Public Utilities Commission,<sup>34</sup> a plurality observed that “[n]otably absent from *PruneYard* was any concern that [requiring] access” to the shopping center for others to speak had negatively affected the owner’s own right to speak.<sup>35</sup> Accordingly, the decision was never “a blanket approval for state efforts to transform privately owned commercial property into public forums.”<sup>36</sup>

Moreover, the Supreme Court has reinforced the First Amendment guarantee against forcing one citizen to accommodate the divergent viewpoint of another, even in the context of public activities. In *Hurley*, the Court unanimously held that a Massachusetts state court decision violated the First Amendment by requiring the private organizers of Boston’s St. Patrick’s Day parade to allow a gay rights organization to participate. The Court reasoned that the expressional choices of the private organizers must be respected even though the parade was a public event.<sup>37</sup> The Court emphasized that the choice of a private person or organization “not to propound a particular point of view . . . is presumed to lie beyond the government’s power to control.”<sup>38</sup> The Court further confirmed its freedom from forced expression jurisprudence in *Boy Scouts of America v. Dale*<sup>39</sup> by overturning the New Jersey Supreme Court’s requirement that the Boy Scouts place a gay rights activist in a leadership position despite the organization’s objection to homosexual conduct.<sup>40</sup> Again, notwithstanding the organization’s large size and generally inclusive nature, the Court held that the First Amendment precluded imposition of a viewpoint the group may not wish to express.<sup>41</sup>

The experiences of the past three decades have demonstrated the degree to which forcing private landowners to allow ex-

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speaker autonomy, given the lack of concern that compelled access might affect the shopping center owner’s right to speak and his lack of objection to the speech”).

34. 475 U.S. 1 (1986) (plurality opinion).

35. *Id.* at 12.

36. *PruneYard*, 447 U.S. at 101 (Powell, J., concurring in part and in the judgment).

37. *Hurley*, 515 U.S. at 573–75.

38. *Id.* at 575.

39. 530 U.S. 640 (2000).

40. *See id.* at 643–44.

41. *Id.* at 646–61.

pression of controversial opinions on their property intrudes on their rights. For example, in *Cologne v. Westfarm Associates*,<sup>42</sup> the Connecticut Supreme Court refused to impose such free speech rules on shopping malls. The court discussed the injustice of requiring the owner to allow controversial political groups to demonstrate on his property, regardless of the potential harm to his commercial interests and the "substantial risks of property destruction and liability" to injured persons.<sup>43</sup> Indeed, while the appeal was pending in the Connecticut case, the Ku Klux Klan sought to hold a demonstration in the mall, which in turn provoked a disruptive anti-Klan rally that required police from numerous surrounding communities to restore order and forced stores in the mall to close for the day.<sup>44</sup> Similarly, in refusing to impose free speech duties on shopping centers in *Jacobs v. Major*,<sup>45</sup> the Wisconsin Supreme Court observed that, when the political activists "perform[ed] a choreographed depiction of the results of nuclear warfare" and distributed leaflets in the mall, "several stores within the mall suffered identifiable reductions in sales that day."<sup>46</sup>

The more extreme and vigorous the speech, the greater the resulting abuse of the landowner's hospitality and the more substantial the interference with the owner's private autonomy. Forcing a shopping center to serve as a public forum for controversial speech interferes with the merchant's own marketing message. Indeed, California obliges the commercial landowner to serve as the host for his own roasting. Holding that a shopping center's "purpose to maximize the profits of its merchants is not compelling," the California Supreme Court overturned mall rules that precluded "messages critical of the mall or its tenants."<sup>47</sup> Under this ruling, a shopping center must open its doors even to those who enter to urge a boycott of one or more

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42. 469 A.2d 1201 (Conn. 1984).

43. *Id.* at 1210.

44. *Id.* at 1205.

45. 407 N.W.2d 832 (Wis. 1987).

46. *Id.* at 834-35.

47. *Fashion Valley Mall LLC v. NLRB*, 172 P.3d 742, 754 (2007); *see also* *United Bhd. of Carpenters & Joiners of Am. Local 848 v. NLRB*, 540 F.3d 957, 965 (9th Cir. 2008) (relying on California state law in holding that a shopping center could not restrict "messages critical of the mall or its tenants").

stores, which is patently offensive to the landowner and a hard slap to the merchant's face.<sup>48</sup>

Any landowner would also feel obliged to respond to controversial speech to distance himself from it and, in the case of offensive speech, to express disgust and opposition. The First Amendment protects not only speech, but the choice not to speak.<sup>49</sup> That right to remain silent becomes hollow if a landowner must make his property a platform for expression he finds offensive. In *Pacific Gas & Electric Co. v. Public Utilities Commission*,<sup>50</sup> the Supreme Court invalidated a state commission order compelling a privately owned utility company to include a third party's newsletter in its billing envelopes to customers, saying that the utility "may be forced either to appear to agree with [the views expressed in the third party's newsletter] or to respond."<sup>51</sup>

To be sure, the *PruneYard* Court observed that the owner of a shopping center "can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand."<sup>52</sup> Such an "involuntary disclaimer"<sup>53</sup> is an intrusion, if a minimal one, on the right to remain silent. This intrusion is present even in a case like *PruneYard*, where the message was well received by shoppers and the owner had no substantive objection to the speech. But when the expression is offensive, odious, or inflammatory in content or form, passive dissociation would be neither a morally appropriate nor a commercially viable option for the owner. Such circumstances compel a more affirmative response from the owner, thereby intruding into his free speech autonomy.

Nor is a private landowner obliged to share the views of the general public, much less the opinions of those seeking access

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48. See *Fashion Valley Mall*, 172 P.3d at 751-52.

49. See *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 11 (1986) (plurality opinion) (stating that the First Amendment protects the choice of "what to leave unsaid"); see also *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995) (holding that protected speech includes the private speaker's right "to shape its expression by speaking on one subject while remaining silent on another").

50. 475 U.S. 1 (1986) (plurality opinion).

51. *Id.* at 15.

52. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980).

53. Frederick W. Schoepflin, Comment, Speech Activists in Shopping Centers: Must Property Rights Give Way to Free Expression?, 64 WASH. L. REV. 133, 144 (1989).

to the property, regarding what expression is offensive. As a fundamental aspect of freedom, we each are at liberty to make our own judgments in that regard. In *Dale*, the United States Supreme Court emphasized that, as a basic premise of First Amendment rights, individuals and entities may reach their own conclusions without someone else dictating what are permissible viewpoints: "It is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent."<sup>54</sup>

Although a shopping center may not be a typical expressive entity,<sup>55</sup> the imposition of controversial and even extreme positions through the guise of diverting its commercial property for others' expressive use would effectively convert the owner into a political actor. The shopping center owner who is required to accommodate the expression of others would be forced to make judgments about "the graphic portrayal on a placard," "the strong language in a leaflet," or "the appropriateness of a costume or clothing," as well as "a host of content-based questions."<sup>56</sup> The private landowner thus would be conscripted into the role of public moderator among contending political or social advocates as well as sometime-commentator on controversial issues being expressed on the site. No citizen is obligated to accept such a "value-laden" assignment.<sup>57</sup>

The First Amendment argument against coerced access to private property for expressive purposes by strangers has been weakened but not overwhelmed by the Supreme Court's 2006 decision in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*.<sup>58</sup> In *FAIR*,<sup>59</sup> the Court rejected the Free Speech Clause objections of a consortium of law schools and law facul-

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54. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 651 (2000).

55. *But see Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 15 (1986) (upholding the right of a private utility not to be a platform for another's speech even though a publicly-owned utility is also not a typical expressive entity).

56. *See N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757, 792-93 (N.J. 1994) (Garibaldi, J., dissenting) (quoting from an appellate brief examples of problems that mall owners would face and arguing that "private-property owners should not be forced to decide those value-laden questions").

57. *See id.*

58. 547 U.S. 47 (2006).

59. *Id.* at 51.

ties to the Solomon Amendment,<sup>60</sup> a federal statute that required institutions of higher education either to allow military recruiters equal access to campus facilities on the same terms as other employers, or to surrender certain federal funding. The Court unanimously agreed that requiring universities to open their campuses to military recruiters did not interfere with the rights of law schools to express their opposition to federal policies regarding homosexuals in the military.<sup>61</sup>

The *FAIR* Court distinguished compelled-speech cases such as *Hurley* and *Pacific Gas & Electric* on the basis that “the complaining speaker’s own message [in those cases] was affected by the speech it was forced to accommodate.”<sup>62</sup> In response to the argument that allowing access to military recruiters may mean that law schools will be perceived as supporting military policies regarding homosexuals, the Court cited the *PruneYard* decision.<sup>63</sup> As described by the *FAIR* Court, when upholding a state requirement that a shopping center owner allow “certain expressive activities by others on its property,” the *PruneYard* opinion had “explained that there was little likelihood that the views of those engaging in the expressive activities would be identified with the owner, who remained free to disassociate himself from those views and who was ‘not . . . being compelled to affirm [a] belief in any governmentally prescribed position or view.’”<sup>64</sup> Likewise, the *FAIR* Court assured, law students would not likely attribute any speech by military recruiters to the law school.<sup>65</sup>

A cursory read of *FAIR* and its positive citation of *PruneYard* seems to undermine the position that a private entity has a strong First Amendment claim when the government compels it to grant access to others. But *FAIR* does not eliminate the well established right not to be compelled to speak and to refuse to serve as

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60. 10 U.S.C. § 983 (2006).

61. *FAIR*, 547 U.S. at 52 n.1, 71 (describing 10 U.S.C. § 654 (2006) as providing that “a person generally may not serve in the Armed Forces if he has engaged in homosexual acts, stated that he is a homosexual, or married a person of the same sex”).

62. *Id.* at 63.

63. *Id.* at 65.

64. *Id.* (quoting *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980)).

65. *Id.*

an instrument for controversial political speech. *FAIR* does not dictate a single constitutional answer for all circumstances.

Upon closer study, three factors are essential to understanding the *FAIR* decision: the military recruitment purpose and judicial deference to the military, the incidental and minimal expressive implications raised by ordering equal access for military recruiters, and the limited nature of the intrusion occasioned by those recruiters' transient presence on campus. So appreciated, the Court's rationale in *FAIR* leaves the door open, if not quite as widely as before, to reexamining the constitutional legitimacy of the government's conversion of private property into a venue for controversial speech by strangers. The military recruitment purpose behind the limited access to university campuses approved in *FAIR* was very different from the agenda for a general transformation of commercial property into a political stage that *PruneYard* presented. The Court perceived the employment interview activities in *FAIR* to have only an incidental expressive quality, in contrast with the primary and deliberate expressive nature of the speech for which the landowner was required to provide a platform in *PruneYard*. The scope and duration of mandated access also varies from *FAIR* to *PruneYard*, differences that concretely and significantly shape the extent of the intrusion on private landowner expressive rights. Let us examine each of these three factors in more detail.

First, in *FAIR*, requiring equal access as a condition of receiving federal funding allowed the armed forces to recruit on campus, not to engage generally in propaganda for military policies through a university platform. The Supreme Court introduced the First Amendment section of its opinion by emphasizing that "[t]he Constitution grants Congress the power to 'provide for the common Defence,' '[t]o raise and support Armies,' and '[t]o provide and maintain a Navy.'"<sup>66</sup> Although acknowledging First Amendment constraints, the Court insisted that the legislation's purpose remained important when

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66. *Id.* at 58 (quoting U.S. CONST. art. I, § 8, cls. 1, 12–13); see also John F. O'Connor, *Statistics and the Military Deference Doctrine: A Response to Professor Lichtman*, 66 MD. L. REV. 668, 704 (2007) (noting that the *FAIR* Court "began its constitutional analysis by extolling the virtues of the military deference doctrine when Congress legislates pursuant to its constitutional power to raise and support armies").

"determining its constitutionality" because "'judicial deference . . . is at its apogee' when Congress legislates under its authority to raise and support armies."<sup>67</sup>

The cornerstone of the *FAIR* decision is the constitutionally ratified and compelling public policy of raising armed forces and the Court's traditional deference on military matters. As commentators have noted, the *FAIR* Court "invoked the military deference doctrine as its first step in constitutional analysis"<sup>68</sup> and "deference to the military is a tidal wave in *FAIR*."<sup>69</sup> Throughout its analysis, the *FAIR* Court never lost sight of the specific purpose of limited access to campuses for military recruiters accomplished through the Solomon Amendment. As the Court explained, "[m]ilitary recruiting promotes the substantial Government interest in raising and supporting the Armed Forces—an objective that would be achieved less effectively if the military were forced to recruit on less favorable terms than other employers."<sup>70</sup> As time passes, the *FAIR* decision likely will be appreciated as grounded in the military recruitment context, justified by the special rule of deference to the military,<sup>71</sup> and reflecting the Court's resistance to the law

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67. *FAIR*, 547 U.S. at 58 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)).

68. O'Connor, *supra* note 66, at 705.

69. Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1119 (2008).

70. *FAIR*, 547 U.S. at 67; see also Andrew P. Morriss, The Market for Legal Education & Freedom of Association: Why the "Solomon Amendment" is Constitutional and Law Schools Are Not Expressive Associations, 14 WM. & MARY BILL RTS. J. 415, 459–60 (2005) (arguing that, without the Solomon Amendment, "the law schools' cartelization of legal education has resulted in reducing opportunities for students to interview with military recruiters").

71. Commentators have argued that the *FAIR* decision can best be reconciled with longstanding First Amendment doctrine established in the Court's other decisions by reading the *FAIR* opinion as having been written "in the shadow of the military deference doctrine." See Horwitz, *supra* note 69, at 1109, 1113 (noting also that "much of *FAIR*'s seemingly reasonable opinion conflicts with or unsettles current First Amendment doctrine"); see also Erwin Chemerinsky, *Why the Supreme Court was Wrong About the Solomon Amendment*, 1 DUKE J. CONST. L. & PUB. POL'Y 259, 261 (2006) (arguing "that the decision must be understood as part of the Supreme Court's historic—and misguided—deference to the military, especially in wartime"); cf. Dale Carpenter, *Unanimously Wrong*, 2006 CATO SUP. CT. REV. 217, 233 (noting that an important part of the cultural backdrop to *FAIR* was "the needs of the military to recruit the best and brightest in a time of war and uncertainty about national security").

schools' concerted attempts "to make it difficult for their students to be recruited by the military."<sup>72</sup>

The forced conversion of private property into a political forum for outsiders presented in *PruneYard* was not justified by a compelling government interest comparable to building the armed forces, much less a substantial government policy grounded in the very text of the Federal Constitution. Nor does the military deference doctrine, which set the framework for the constitutional analysis in *FAIR*,<sup>73</sup> have any application in the *PruneYard* setting.

Second, the *FAIR* Court emphasized that the case involved the conduct of allowing access to military recruiters on campus, only minimally affecting speech.<sup>74</sup> In summary, the Court stated that "[a]s a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*."<sup>75</sup> In response to the expressed fears of the law school and faculty plaintiffs that their political opposition to military policies on homosexuals would be undermined by the presence of recruiters on campus, the Court said that "[n]othing about recruiting suggests that law schools agree with any speech by recruiters."<sup>76</sup> Unlike the parade in *Hurley* or

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72. See Marci Hamilton, *Is the Solomon Amendment Constitutional? The Supreme Court Looks at the Law that Prohibits Federal Aid If a School Refuses to Permit Military Recruiters on Campus*, FINDLAW'S WRIT, May 5, 2005, <http://writ.news.findlaw.com/hamilton/20050505.html> (arguing that the *FAIR* suit was a "political tactic," not a genuine First Amendment case, by "law schools and their liberal faculty members to try to undermine the policy [of the military on homosexuals]—and to make their point—[by] mak[ing] it difficult for their students to be recruited by the military"); see also Horwitz, *supra* note 69, at 1134 (suggesting that "at least some of the law school plaintiffs in *FAIR*" were motivated "more by the desire to oust the military from campus than by any serious consideration of their academic missions as law schools").

73. See Horwitz, *supra* note 69, at 1118 (describing the "deference to the military" claim as "the most crucial to the Court's opinion" in *FAIR*).

74. See Vikram Amar & Alan Brownstein, *A Different Take on the Supreme Court's Recent Decision Concerning Law Schools' First Amendment Rights and Campus Military Recruitment*, FINDLAW'S WRIT, Mar. 17, 2006, [http://writ.news.findlaw.com/commentary/20060317\\_brownstein.html](http://writ.news.findlaw.com/commentary/20060317_brownstein.html) (noting that "the speech dimension of recruitment is often incidental to the non-speech hiring objective of the government").

75. *FAIR*, 547 U.S. at 60.

76. *Id.* at 65.



the newsletter in *Pacific Gas & Electric*, "host[ing] interviews and recruiting receptions" is not "inherently expressive."<sup>77</sup>

Moreover, the schools' acceptance of many other diverse employers with a wide variety of viewpoints undermines the apprehension that students would attribute any statements by military recruiters to the law schools. Military recruiters are entitled to no greater access than any other employer.<sup>78</sup> The Solomon Amendment requires granting access to government agents for the distinct purpose of military recruiting, in the same manner as other employers gain access to university facilities to seek employees. The government cannot invade the university setting to promote its military policies, and any governmental speech that has such an effect is incidental to military recruiting.

Although any statements by military recruiters touching on political matters would be incidental and subsidiary to the non-expressive conduct of interviewing students, inviting outsiders to engage in speech on political matters was the very point of the coerced access to private property in *PruneYard*. The "expressive quality"<sup>79</sup> of political solicitation, literature distribution, and speech allowed within the conscripted venue of the mall is indisputable. The quintessential purpose of the state-mandated right of access by trespassers to private property in *PruneYard* was to gain a forum for expression of political and other ideas. That fact connects the *PruneYard* scenario directly to First Amendment principles about compelled speech and association, in a manner that was wholly missing in *FAIR*.

Third, in *FAIR*, "the recruiters' presence is only temporary and episodic."<sup>80</sup> Access to campus by any employer, military or otherwise, tends to be infrequent and sporadic, usually amounting to nothing more than a single visit each year. General school policies that restrict the use of facilities by on-campus interviewers further confine that access. In *PruneYard*, by contrast, access to the private property as a political forum is perpetual and

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77. *Id.* at 63–64.

78. See Hamilton, *supra* note 72 (describing the Solomon Amendment as "just requir[ing] the academy to give the military a seat at the table—among all the other legal employers who may visit, including, say, the ACLU—to meet with students who are interested in interviewing with them").

79. *FAIR*, 547 U.S. at 64 (stating that "recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper").

80. Carpenter, *supra* note 71, at 223.

constant. Moreover, through the Solomon Amendment at issue in *FAIR*, "Congress required only that law schools that provide some employer services do so on an equal basis for military recruiters. . . . Law schools are under no obligation to provide any employer with access."<sup>81</sup> By contrast, in *PruneYard*, the shopping center owner was not simply obliged to afford equal treatment to all those who entered the premises. The landowner was forced to allow special access to political activists who wished to convert his place of business into a political forum, even if he had uniformly and non-discriminatorily barred all political activity and solicitations.

Under the California approach tolerated in *PruneYard*, a landowner is compelled to provide the theatrical stage for a rotating cast of outside political actors performing an interminable series of dramatic scenes. The nature of the compelled access and the regular dedication of the property to political speech make it much more likely that the public will hold the landowner accountable for the viewpoints of the organizations occupying the property.

To appreciate fully the crucial differences between *FAIR* and *PruneYard* with respect to First Amendment principles, consider this variation on the *FAIR* scenario. Suppose Congress were not only to mandate that military recruiters have equal access to university campuses, but also to require the university to provide equal time to a military spokesperson whenever a speaker on campus criticized military policies. Inviting such a response on campus may be a commendable example of academic freedom. A private university remains entitled, however, to use speaking engagements to promote a particular mission, and even a public university may allocate speaking invitations according to its priorities.

If Congress demanded that institutions of higher education grant a privileged right of access to a government mouthpiece whenever other speakers challenged public policies, even as a condition to federal funding, it is inconceivable that the Supreme Court would turn away free speech objections as readily as in *FAIR*. By the same token, compelling a private landowner to provide a perpetual forum for the expression of political

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81. Morriss, *supra* note 70, at 437.

ideas is difficult to square with modern appreciation for robust rights of speech and association.

III. THE COMPELLED DEDICATION OF PRIVATE PROPERTY  
TO USE AS A PUBLIC FREE SPEECH EASEMENT  
CONSTITUTES A TAKING OF PROPERTY

The two brightest and most securely fixed stars in the often cloudy firmament of the United States Supreme Court's "takings" jurisprudence are the principles that the *right to exclude* others is a fundamental element of the property right, the deprivation of which is a serious trespass upon a defining feature of private property, and that *physical invasion* of private property by the government or by others with the express leave of the government constitutes a taking of property by the government, for which the Fifth and Fourteenth Amendments of the Constitution require just compensation.<sup>82</sup>

First, as Professor Richard Epstein has explained, "[t]he notion of exclusive possession" of property is "implicit in the basic conception of private property."<sup>83</sup> The character of private property depends upon the owner's power of sole possession. In *Kaiser Aetna v. United States*,<sup>84</sup> the Supreme Court affirmed that "the right to exclude" had universally been recognized as a "fundamental element of the property right."<sup>85</sup> In *Kaiser*, the Court held that a government-ordered right of public access to a privately owned marina that had been improved to create a link to navigable waters constituted a taking.<sup>86</sup> In so holding, the Court confirmed "the right to exclude others" as "one of the most essential sticks in the bundle of rights that are commonly characterized as property."<sup>87</sup> In *Loretto v. Teleprompter*

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82. See generally David L. Callies & J. David Breemer, *The Right to Exclude Others From Private Property: A Fundamental Constitutional Right*, 3 WASH. U. J.L. & POL'Y 39, 39-51 (2000).

83. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 63 (1985) [hereinafter EPSTEIN, *TAKINGS*]; see also Richard A. Epstein, *Takings, Exclusivity and Speech: The Legacy of PruneYard v. Robins*, 64 U. CHI. L. REV. 21, 22 (1997) [hereinafter Epstein, *Takings, Exclusivity and Speech*] ("The normal rules of private law treat the right to exclude as an indispensable element of property.").

84. 444 U.S. 164 (1979).

85. *Id.* at 179-80.

86. *Id.* at 170-80.

87. *Id.* at 176; accord *Hodel v. Irving*, 481 U.S. 704, 716 (1987).

*Manhattan CATV Corp.*,<sup>88</sup> the Court likewise characterized the "power to exclude" as having "traditionally been considered one of the most treasured strands in an owner's bundle of property rights."<sup>89</sup>

Second, as reiterated in *Loretto*, the Supreme Court has "emphasized that physical *invasion* cases are special" and "that any permanent physical *occupation* is a taking."<sup>90</sup> In holding that government-authorized placement of television cables and a cable box on the rooftop of a privately owned multi-unit apartment building constituted a taking, the Court added that "an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property."<sup>91</sup> In both *Loretto* and *Kaiser*,<sup>92</sup> the Court recognized that the government's grant to other private parties of access to private property necessarily is attributable to the government and demands compensation.<sup>93</sup> In *Lucas v. South Carolina Coastal Council*, which was not itself a physical invasion case,<sup>94</sup> the Court summarized its decisions as holding that, "[i]n general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation."<sup>95</sup>

These binary stellar principles of takings jurisprudence are well illustrated by the easement cases, which are especially pertinent to the present subject of government conversion of private property into a forum for speech by others. In *Nollan v. California Coastal Commission*,<sup>96</sup> the Court held that a government demand for a permanent passage across private beachfront property to allow others to access public beaches consti-

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88. 458 U.S. 419 (1982).

89. *Id.* at 435.

90. *Id.* at 432.

91. *Id.* at 436 (emphasis in original).

92. *Kaiser*, 444 U.S. at 180 (characterizing the imposition of a right of public access as "an actual physical invasion of the privately owned marina").

93. See Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 301 (1992) (observing that "the Court has been quite willing to find a taking where the effect of the government regulation is not just to restrict the owner's control over her own property, but to transfer the right to use the property to a third party").

94. 505 U.S. 1003 (1992) (involving a regulation barring construction of any permanent structures on beachfront property).

95. *Id.* at 1015.

96. 483 U.S. 825 (1987).

tuted a compensable taking.<sup>97</sup> Given that “the appropriation of a public easement across a landowner’s premises” would plainly constitute a compensable taking,<sup>98</sup> the city’s demand for the easement as a condition for issuing a building permit likewise was a taking because the condition did not relate to the purpose for the building permit requirement.<sup>99</sup> If the state wished to provide “a continuous strip of publicly accessible beach along the coast,” it was obliged to pay for it.<sup>100</sup>

In *Dolan v. City of Tigard*,<sup>101</sup> the Court held that a city’s demand that a private hardware store owner create a public greenway and pathway in exchange for a permit to expand his business and build a parking lot constituted a compensable taking.<sup>102</sup> Once again, the Court emphasized “the loss of [the owner’s] ability to exclude others,”<sup>103</sup> which the Court characterized as “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”<sup>104</sup>

Whatever the vagaries and uncertainties of takings law in general, the Supreme Court has consistently emphasized the vital power to exclude and the protection against physical invasion. The notable exception, of course, is the Court’s 1980 decision in *PruneYard*.<sup>105</sup> The *PruneYard* decision rested uneasily within the Court’s case law from the beginning, coming just six months after the Court in *Kaiser* had insisted upon compensation for governmentally compelled access to a private marina. Eight years earlier, in *Lloyd Corp. v. Tanner*,<sup>106</sup> the Court had characterized the argument for a First Amendment right of expression at a shopping center as a request for “dedication of

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97. *Id.* at 838–42; see also *Preseault v. Interstate Commerce Comm’n*, 494 U.S. 1, 24 (1990) (O’Connor, J., concurring) (emphasizing in the context of converting a railroad right-of-way to public biking trails that appropriation of a public easement on private property amounts to a compensable taking).

98. *Nollan*, 483 U.S. at 831.

99. *Id.* at 834–41.

100. *Id.* at 841–42.

101. 512 U.S. 374 (1994).

102. See *id.* at 383–96.

103. *Id.* at 393.

104. *Id.* (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

105. See Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 141 n.55 (2000) (saying that, in *PruneYard*, the Supreme Court “equivocated on the strength of its convictions” about the fundamental nature of the right to exclude as an element of the property right).

106. 407 U.S. 551 (1972).

private property to public use,"<sup>107</sup> language that rings with takings connotation.

Furthermore, the dubious continuing validity of *PruneYard* becomes starkly apparent when set beside subsequent decisions. The Supreme Court has significantly expanded its interpretation of property rights under the Fifth Amendment, broadening the circumstances under which the public owes compensation for intrusions on private property.<sup>108</sup>

In the light of the principles established over the past quarter-century, an invasion sanctioned by the coercive power of state government into the physical space of a shopping center fits the definition of a compensable taking to a "T." As in *Kaiser*, the "imposition of [a free speech] servitude . . . will result in an actual physical invasion" of the private shopping center by the individuals entering the enclosure to express political or social opinions.<sup>109</sup> As in *Loretto*, "a stranger directly invades and occupies the [shopping] owner's property"<sup>110</sup> to accost customers and to deliver speeches or distribute leaflets. However "minor" some may see the coerced grant of expressive access, it constitutes a "permanent physical occupation of an owner's property."<sup>111</sup> As explained in *Lucas*, "no matter how minute the intrusion" of the trespasser may appear or "how weighty the public purpose," compensation is required.<sup>112</sup> As in *Nollan*, "the appropriation of a public easement across a landowner's premises"<sup>113</sup> is a taking for which compensation is due. These principles should apply equally when the public purpose is the expansion of political or social advocacy.

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107. *Id.* at 569.

108. See Jonathan L. Swichar, Recent Decision, *New Jersey Supreme Court Opens Shopping Center Doors to Increased First Amendment Activity*—New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 69 TEMP. L. REV. 963, 983 (1996) (arguing that more recent Supreme Court decisions have "expanded the definition of an unconstitutional taking under the Fifth Amendment," unlike *PruneYard*); see also Schoepflin, *supra* note 53, at 148 (citing recent Supreme Court decisions as holding "that a state must provide compensation when it either requires owners to allow permanent physical occupation of property or imposes a permanent right of public access to the property" (citations omitted)).

109. See *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979).

110. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982) (emphasis in original).

111. *Id.* at 421.

112. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

113. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987).

To be sure, while formulating a categorical approach toward physical invasions of property, the Supreme Court has paused from time to time to make perfunctory and increasingly strained efforts to distinguish *PruneYard* from more recent cases involving governmentally mandated grants of easements on private property. For example, the Court suggested in *Loretto* that *PruneYard* involved only a "temporary physical invasion,"<sup>114</sup> presumably because the trespassing speaker was not a permanent fixture in the shopping center. But the *Loretto* Court's own description of precedent contradicted that distinction when it cited the scenario presented in *United States v. Causby* of "frequent flights" by government military aircraft low to the ground over a chicken farm as an example of "a permanent physical occupation."<sup>115</sup> In *Causby*, no single aircraft eternally hovered over the property, nor did flyovers occur at every minute of the day. Likewise, in *Kaiser*, specific individuals taking advantage of the government grant of public access to the marina undoubtedly engaged in a "temporary occupation" and did not remain permanently moored in the privately owned pond.

In cases like *Causby* and *Kaiser*, as well as *PruneYard*, the government's occupation of private property by conferring an ongoing entitlement to public access was permanent. In any event, the *Loretto* Court's proffered distinction of *PruneYard* became untenable with *Nollan*, which found a taking "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises."<sup>116</sup>

In a cursory (and perhaps half-hearted) footnote, the *Nollan* opinion also attempted to distinguish *PruneYard*, observing that the shopping center owner there "had already opened his property to the general public," and that "permanent access

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114. *Loretto*, 458 U.S. at 434.

115. *Id.* at 430–31 (citing *United States v. Causby*, 328 U.S. 256, 261, 264–65 (1946)).

116. *Nollan*, 483 U.S. at 832; see also Alan E. Brownstein & Stephen M. Hankins, *Pruning PruneYard: Limiting Free Speech Rights Under State Constitutions on the Property of Private Medical Clinics Providing Abortion Services*, 24 U.C. DAVIS L. REV. 1073, 1161 (1991) (acknowledging that "Nollan's language substantially expands the definition of a permanent physical occupation past the narrow parameters" of *Loretto*).

was not required" in *PruneYard*.<sup>117</sup> The first point is unpersuasive, and the second is simply mistaken.

Taking the *Nollan* footnote points in reverse order, the commandeered access to the shopping center in *PruneYard* was indeed permanent in the crucial sense that it occurred continuously and did not expire. Admittedly, the shopping center owner could adopt certain time, place, and manner restrictions on outside speakers, which the *Dolan* opinion considered crucial to the holding in *PruneYard*.<sup>118</sup> The mall's ability to close its doors at night, prohibit other disruptive behavior, and limit the number of outside speakers at any one time hardly makes the free speech easement any less interminable.

The rulings in *Nollan* and *Dolan* surely would not have turned the other way had the government restricted the easements to daytime use, limited the noise produced, or capped the number of public users at any one time.<sup>119</sup> Indeed, the right of access in *Nollan* was not "continuous in literal terms," because "[p]art of the year the easement would be under water because the mean high tide mark reaches the sea wall and the width of the easement collapses into nonexistence during that period."<sup>120</sup> In both *Nollan* and *Dolan*, the continuous and enduring nature of the governmentally imposed physical occupation made all the difference. There is thus no relevant distinction from the facts in *PruneYard*.<sup>121</sup>

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117. *Nollan*, 483 U.S. at 832 n.1.

118. See *Dolan v. City of Tigard*, 512 U.S. 374, 394 (1994).

119. See Brownstein & Hankins, *supra* note 116, at 1162 (acknowledging that, "standing alone," a distinction based upon the non-specificity or flexibility of the access granted in *PruneYard* is doubtful as "it suggests that a Coastal Commission order requiring a beach front lot owner to generally open her property to public use subject to reasonable time, place, and manner restrictions would not be a taking, although that kind of invasion would be far more burdensome to the owner than the limited easement at issue in *Nollan*").

120. *Id.* at 1161 (citing *Nollan*, 483 U.S. at 853-54 (Brennan, J., dissenting) (citing factual record)).

121. See Epstein, *Takings, Exclusivity and Speech*, *supra* note 83, at 36 ("*PruneYard* strips away the exclusive right of use and converts a private shopping center into a limited commons.").



As to the first footnote point in *Nollan*,<sup>122</sup> a merchant's invitation to the public does not amount to a surrender of the essential right to exclude, but rather "creates only a license which may be revoked."<sup>123</sup> As Justice White said in his dissent in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*,<sup>124</sup> which the Supreme Court subsequently cited with approval when it reversed course and rejected free speech rights on private property in *Lloyd Corp.*,<sup>125</sup> "[t]he public is invited to the premises but only in order to do business with those who maintain establishments there. The invitation is to shop for the products which are sold."<sup>126</sup>

The salience of the limited nature of this license granted to the public, and its essential link to the commercial purpose of the owner, requires an appreciation of the nature of a shopping center. A shopping mall exists only through the efforts of the entrepreneur who formulates the idea, the architect who drafts the plans, and a construction company that employs workers and hires subcontractors to build the facility. The architect, the contractors, and the workers receive payment for their efforts, not from the government, but from the developer who creates the mall. The developer or owner bears that financial burden as an investment in the mall's future commercial success, and not to contribute the fruit of his labors to support the political protests or social movements of others. To convert the investment and labor of the owners, merchants, and employees to the personal use of those who seek a political platform, but who have contributed nothing to the center's creation and commercial survival, constitutes an expropriation of private property.

Moreover, if a shopping center is pressed into service as a public forum, the owner would have to assume the additional burdens of providing security for political protests, allocating limited space to competing special interest groups, suffering

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122. See Brownstein & Hankins, *supra* note 116, at 1162 (arguing that this second distinguishing consideration is more compelling because "[i]t is difficult to argue that a shopping center owner has been dispossessed by a permanent occupation when a few leafletters are permitted to mingle with shoppers and browsers").

123. *State v. Wicklund*, 589 N.W.2d 793, 802 (Minn. 1999); see also EPSTEIN, TAKINGS, *supra* note 83, at 65 ("Whatever the status of others [who were invited to the property], there is no invitation to these plaintiffs [who wish to engage in political advocacy at the mall].").

124. 391 U.S. 308, 337-40 (1968) (White, J., dissenting).

125. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 565 (1972).

126. *Logan Valley*, 391 U.S. at 338 (White, J., dissenting).

potential liability if patrons are injured during a disruptive demonstration, and clarifying that the owner and merchants do not support extremist viewpoints,<sup>127</sup> all at the risk of offended customers and lost sales. The owner would not only lose the essential right to exclude others, but would also suffer the further insult and injury of bearing the expenses and potential liabilities occasioned by that trespass.

Nor does the Supreme Court's decision in *FAIR* reflect any retreat from the Court's precedents requiring compensation when the government imposes an easement.<sup>128</sup> The plaintiffs in *FAIR*—many of whom were public rather than private institutions<sup>129</sup>—never suggested that the brief and sporadic entry of military recruiters on campus amounted to a taking of private property. The Court thus did not address any Fifth Amendment implications. In any event, in *FAIR*, the “occupancy” of an interview room for a day or two by military recruiters was so “transient and relatively inconsequential” that, at most, it might constitute a common-law trespass but likely would not amount to a compensable taking by the government.<sup>130</sup> From the perspective of Fifth Amendment doctrine, the government's permanent imposition of an easement on private property to provide a regular venue for political speech moves the analysis to an entirely different level.

In sum, the government's permanent dedication of private property to the expressive use of third parties constitutes a taking. The *PruneYard* opinion did not really deny this fact. In-

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127. See *supra* notes 42–53 and accompanying text.

128. For a discussion of *FAIR*'s implications for the First Amendment rights of private landowners, see *supra* notes 58–81 and accompanying text.

129. SolomonResponse.org, *FAIR Participating Schools*, [http://www.law.georgetown.edu/solomon/participating\\_schools.html](http://www.law.georgetown.edu/solomon/participating_schools.html) (last visited July 9, 2008).

130. See *Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991) (explaining that “those governmental activities which involve an occupancy that is transient and relatively inconsequential” would “properly . . . be viewed as no more than a common law trespass *quare clausum fregit*,” rather than a compensable taking which would involve a more substantial physical occupancy of private property); see also S. Jay Plager, *Money and Power: Observations on the Jurisdiction of the U.S. Court of Federal Claims*, 17 FED. CIR. B.J. 371, 376 (2008) (explaining the difference between a noncompensable common-law trespass by a government agent and a compensable taking under the Fifth Amendment by drawing “a distinction between the government truck that one day parks on your land while the driver eats his lunch, and the regular parking of trucks overnight because the spot was convenient”).

deed, the *PruneYard* Court acknowledged that “there has literally been a ‘taking’ of that right” to exclude others,<sup>131</sup> but then justified the state-mandated invasion with the *non sequitur*<sup>132</sup> that the taking did not “unreasonably impair the value or use of their property as a shopping center.”<sup>133</sup> As shown above, subsequent precedent has toppled the central pillar of *PruneYard* by upsetting the holding that the owners had failed to prove “that the ‘right to exclude others’ is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a ‘taking.’”<sup>134</sup> That an ongoing physical taking may be minute in size, minimal in appearance, or negligible in harm no longer immunizes the government from its constitutional duty of just compensation.

As the Supreme Court recently stated in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,<sup>135</sup> “[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.”<sup>136</sup> Accordingly, case law has long since superseded the odd case out of *PruneYard*. Today, the governmentally encouraged physical invasion by strangers onto private property for speech, distribution of flyers, or any other purpose that the owner does not authorize is a classic example of a *per se* taking.<sup>137</sup>

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131. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 (1980).

132. See EPSTEIN, TAKINGS, *supra* note 83, at 65 (explaining that, with respect to *PruneYard*, “any demonstration about the negligible impairment of the appellants’ rights is wholly beside the point,” because “[t]he entire matter of ‘investment backed expectations’ does not go to the taking issue as such; it only goes to the issue of reliance damages, when, as, and if relevant”).

133. *PruneYard*, 447 U.S. at 83. Now that California mandates access even to those who wish to directly picket particular stores or call for boycotts of merchants in the mall, see *supra* notes 47–48 and accompanying text, we have yet another reason to question the *PruneYard* Court’s suggestion that this state-sanctioned behavior does not “unreasonably impair the value or use of their property as a shopping center.”

134. *PruneYard*, 447 U.S. at 84.

135. 535 U.S. 302 (2002).

136. *Id.* at 322 (emphasis added).

137. See *id.* (explaining that the jurisprudence of “physical takings . . . for the most part, involves the straightforward application of *per se* rules”); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (declaring physical invasions of property to be one of those “categories” in which a taking is declared and compensation mandated “without case-specific inquiry into the public interest advanced in support of the restraint”).

## CONCLUSION

By turning aside federal free speech and taking challenges to California's innovative assignment of constitutional duties to private property owners for the benefit of strangers in *PruneYard*, the United States Supreme Court relaxed the fundamental constitutional guarantees of expressive autonomy and private property against governmental invasion. Even then, the Supreme Court's *PruneYard* ruling was narrower and more tightly bound to the factual circumstances of that case than is often recognized.

From the beginning of the jurisprudential journey three decades ago, a state court's coerced appropriation of one person's private property for the expressive use of another private person approached the outer parameters of legitimate governmental interference with federal free speech and property rights. Given the Supreme Court's increased emphasis on speaker autonomy and freedom of association in recent years, we should expect a greater recognition of the intrusion occasioned by forcing private persons to make their property a stage for political theater by outside actors. Even more clearly, the Supreme Court's doctrinal invigoration of property rights further erodes *PruneYard*. A state court declaration of a permanent easement on private property for third-party political speech is the exercise of eminent domain for which the state must pay. A right to trespass onto the land of another in the name of speech is nothing less than a taking of private property by another name.

# LESSONS FROM THE RISE OF LEGAL CONSERVATISM

ILYA SOMIN\*

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## INTRODUCTION

Steven Teles's *The Rise of the Conservative Legal Movement*<sup>1</sup> represents the best and most thorough attempt to document the spectacular growth of conservative efforts to influence the law since the 1970s. Both scholars and legal activists have much to learn from his careful account of this important episode in legal history.

Part I of this Review briefly summarizes Teles's analysis. Part II considers its lessons for scholarly understanding of legal change. Teles's most important claim is that effective institutionalization of legal change requires not only a demand for reform by voters or interest groups, but also a supply of trained

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\* Visiting Assistant Professor, University of Pennsylvania Law School; Assistant Professor, George Mason University School of Law. I would like to thank Steven Teles for helpful comments.

1. STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2007).

advocates, public interest law firms, and judges willing and able to influence the law in the direction desired by an insurgent political movement. As Teles effectively demonstrates, public demand for legal change does not in itself generate the needed supply of institutional resources. Through his analysis of the growth of conservative and libertarian organizations such as the Federalist Society, the Institute for Justice (IJ), and the Center for Individual Rights (CIR), Teles chronicles the difficulties faced by the legal right in its attempts to create the cadre of lawyers and institutions they needed to challenge liberal dominance over the law. The successes and failures of this effort are instructive.

Part II also briefly discusses a few limitations of Teles's argument. Perhaps the most important shortcoming is his neglect of social conservatives' efforts at law reform. Most of Teles's account focuses on libertarian organizations that sought to use judicial review to limit the power of government. Social conservatives, by contrast, sought to undo judicial constraints on government power for the purpose of using the state to advance conservative ends, most notably, banning abortion and pornography. Fuller consideration of the social conservative experience is needed to test the generalizability of Teles's conclusions.

Finally, Part III shifts gears and addresses some of the lessons of Teles's account for libertarians and conservatives who wish to strengthen judicial limits on government intervention in the economy. To succeed, pro-market public interest organizations must keep their distance from business interests. In addition, Teles shows that pro-market legal activists have not done enough to promote follow-up litigation to exploit and enforce major precedential victories. On this point, as on others, legal activists of the right can learn from their left-of-center counterparts.

For the sake of full disclosure, I should mention my connections with several of the organizations Teles examines. I am a member of the Federalist Society and have served on the Executive Committee of its Federalism and Separation of Powers practice group (an unpaid position) for the last two years. I have also written several pro bono amicus briefs and served as a student law clerk for the Institute for Justice, a libertarian public interest firm that figures prominently in Teles's book. Finally, I am a professor at George Mason University School of Law, which Teles

discusses because of its role in promoting libertarian-leaning law and economics scholarship in the academy.<sup>2</sup>

I am too young to have played much role in the origins and development of any of these organizations and therefore have no direct reputational stake in any of the points Teles makes about these historic events. Although I was asked to write this Review in part because of my role as an “insider” in some of the organizations Teles analyzes, I am in fact more of an outsider when it comes to almost all the events on which Teles focuses. Still, readers must decide for themselves whether they believe my “insider” status compromises the scholarly objectivity of this review.

### I. THE CONSERVATIVE-LIBERTARIAN CHALLENGE TO THE LEGAL LEFT

Traditional American conservative legal thought suffered a crushing blow during the Great Depression and New Deal era. The Depression seemed to discredit free market ideology, and the appointment of numerous liberal Democratic judges during the twenty-year period of Democratic political dominance from 1933 to 1953 ensured that the federal judiciary was overwhelmingly hostile to property rights and economic liberty claims.<sup>3</sup> During the 1950s, the Supreme Court issued several decisions eliminating much of the modest protection for economic liberties and property rights that had survived the Depression and New Deal.<sup>4</sup> Over the next two decades, liberal activist lawyers in the academy and the legal profession built up an extensive network of public interest organizations and supportive pro bono advocates that promoted left-of-center causes through litigation.<sup>5</sup> The network garnered support from sympa-

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2. See TELES, *supra* note 1, at 207–19.

3. See, e.g., SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 30–44 (1997) (noting that deference to government economic regulation was a major criterion for Franklin Roosevelt in picking judges).

4. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (foreclosing nearly all challenges to “economic” regulations under the Due Process Clause of the Fourteenth Amendment); *Berman v. Parker*, 348 U.S. 26 (1954) (holding that almost any governmental purpose was sufficient to justify the use of eminent domain under the Fifth Amendment).

5. See TELES, *supra* note 1, at ch. 2.

thetic officials in government bureaucracy and an overwhelmingly liberal legal academy, which helped transmit liberal ideas about the role of law and interest students in promoting liberal legal causes. During this era, conservatives and libertarians had little in the way of a parallel legal network of their own.

Beginning in the late 1960s, a political backlash arose against the perceived excesses of liberal jurisprudence. Indignation at "activist" liberal judges helped elect Richard Nixon and Ronald Reagan to the presidency and also aided many lesser-known conservative politicians. As Teles documents, however, conservatives found it difficult to translate electoral success into legal change. Without a cadre of elite conservative lawyers willing to move the law in their preferred direction, conservatives could not easily find judicial appointees who could reliably be counted to vote their way. Without a network of public interest groups and other litigators, they could not easily bring cases to establish conservative-leaning precedents. Finally, the dominance of liberals in the academic and intellectual worlds ensured that conservative and libertarian views of the law seemed unjust and disreputable to most legal professionals, impeding their potential acceptance among lawyers and other influential elites.<sup>6</sup> As Teles emphasizes, the "liberal legal network" of entrenched elites in the judiciary, academy, government bureaucracy, organized bar, and public interest law ensured that the liberal reforms could not easily be challenged or reversed.

To counter liberal dominance in the legal system, conservatives and libertarians sought to build up their own alternative network of lawyers, activists, and academics. Teles's book is the most complete account of this effort to date. In the field of public interest law, right-of-center activists set up such organizations as the Institute for Justice and the Center for Individual Rights, each of which went on to win important victories in state and federal courts.<sup>7</sup> The Federalist Society, established in 1982, was intended to influence the battle of ideas in the academic world and the legal profession.<sup>8</sup> Both the Society and other conservative and libertarian organizations sought to increase the presence of right-of-center speakers and scholars in the academy,

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6. Teles discusses these points extensively. *See id.* at chs. 1–2.

7. *See id.* at ch. 7.

8. *See id.* at ch. 5.



providing scholarships and networking opportunities for young conservatives and libertarians seeking to pursue academic careers. Libertarian-leaning law and economics scholars established new research centers intended to challenge traditional liberal legal thought with interdisciplinary scholarship.<sup>9</sup>

Despite stereotypes of a “vast right-wing conspiracy,” Teles shows that many of these efforts were started by individual “organizational entrepreneurs” rather than a centralized network. For example, a handful of law students at Yale and the University of Chicago founded the Federalist Society at a time when they were “a small minority” in “what they saw as a hostile institution” dominated by the political left.<sup>10</sup> Major right-of-center public interest firms such as the Institute for Justice and Center for Individual Rights had comparably humble origins, both being established by a handful of activist lawyers with only modest initial funding.<sup>11</sup> Conservative and libertarian efforts to challenge the legal left were often poorly coordinated and vulnerable to a variety of tactical and strategic pitfalls, many of which Teles describes in detail.

Some of the more effective conservative-libertarian organizations succeeded in part because they limited their focus and deliberately avoided excessive involvement in judicial nominations and contentious political issues. For example, the leaders of the Federalist Society consciously focused solely on networking and sponsoring speaker events, panels, and conferences. They avoided involvement in battles over judicial nominations, litigation, and political campaigns because they believed that this kind of activity would likely divide the Society’s membership along ideological lines (conservatives versus libertarians) and detract from its primary mission.<sup>12</sup>

Overall, Teles demonstrates that conservatives and libertarians were at least partly successful in their efforts to challenge the legal left. Unlike forty years ago—when the political left overwhelmingly dominated the federal judiciary, the organized legal profession, public interest law, and the academy—today there is sharp competition between left and right in all of

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9. *See id.* at chs. 4, 6.

10. *Id.* at 137–39.

11. *See id.* at 222–25, 237–44.

12. *See id.* at 152–62.

these arenas. At the same time, legal liberals still retain important advantages over conservatives in many fields, including the academy—where the vast majority of law professors remain on the political left<sup>13</sup>—and public interest law—where the liberal network remains much stronger than its conservative-libertarian counterpart.<sup>14</sup>

## II. LESSONS FOR THE STUDY OF LEGAL CHANGE

### A. *The Demand and Supply of Resources for Legal Change*

Perhaps the most important among Teles's interesting findings is that political "demand" for legal change is not by itself sufficient to supply it. Traditional scholarship on the political role of courts generally assumes that they are highly responsive to dominant political coalitions that can appoint judges and write new statutes.<sup>15</sup>

Teles argues convincingly that political demand for legal change does not necessarily generate supply. The "liberal legal network" he describes had partially succeeded in entrenching liberal policies and precedents against political challenge, even when conservatives achieved electoral victories.<sup>16</sup> Liberal influence over the law was facilitated by judges, elite lawyers, public interest law firms, and academics, all of whom enjoy a high degree of insulation from electoral pressure. Even if conservatives could succeed in changing the ideological orientation of the judges who staff the courts, change in legal doctrine and prece-

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13. See, e.g., John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167 (2005) (documenting the predominantly liberal political leanings of elite law school faculty).

14. See, e.g., TELES, *supra* note 1, at 249–57.

15. For a classic early article arguing that courts have little power to resist public opinion and broad social trends, see Robert A. Dahl, *Decision-making in a Democracy: The Supreme Court as a National Policy-maker*, 6 J. PUB. L. 279 (1957). For more recent works advancing a similar thesis, see, for example, MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004). For a critique of some of these works' assumptions and conclusions, see GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); David E. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 YALE L.J. 591 (2004) (reviewing MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004)).

16. See TELES, *supra* note 1, at ch. 1.

dent requires finding capable litigants and lawyers to bring the appropriate cases over a sustained period of time.<sup>17</sup> To challenge the liberal legal network with any hope of success, conservatives had to develop a competing network of their own.

In principle, an emerging political coalition can simply allocate resources to build the legal network it needs. Demand could efficiently and swiftly stimulate supply. As Teles shows, however, this smooth demand-supply relationship does not necessarily occur. It took conservatives and libertarians many years to develop the institutions needed to mount an effective challenge to legal liberalism, and in some ways the task remains incomplete even today.<sup>18</sup> The Federalist Society was not founded until 1982, fourteen years after Richard Nixon's 1968 electoral victory, which was driven in part by public anger at "activist" liberal judges. Conservatives failed to develop effective public interest law firms until the rise of IJ and CIR in the early 1990s, some twenty years after conservative and libertarian activists first recognized the need for such institutions.<sup>19</sup>

The liberal legal network the right sought to challenge took many years to develop. In retrospect, it is not surprising that it took conservatives and libertarians substantial time and effort to rival it. Both the liberal legal network and its conservative-libertarian counterpart are "public goods" for their respective political movements.<sup>20</sup> Once such a network develops, movement supporters can enjoy its benefits even if they have not contributed to its establishment and maintenance. As a result, one can expect an undersupply of "legal network" goods, for much the same reasons why other public goods such as clean air may be undersupplied by the market. Many of those who benefit from the good have incentives to "free ride" on its production. Only a small proportion of conservatives and libertarians actively contributed to the establishment of the legal network described in Teles's book, just as only a small proportion

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17. See *id.* at 11–12; see also CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998) (emphasizing the importance of strategic litigation in bringing about legal change).

18. See *infra* Part III.

19. See TELES, *supra* note 1, at chs. 3, 7.

20. For classic discussions of public goods, see JAMES M. BUCHANAN, *THE DEMAND AND SUPPLY OF PUBLIC GOODS* (1968) and MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (rev. ed. 1971).

of the nation's liberals contributed to the earlier establishment of the liberal legal network. Given this structure of incentives, the surprising fact is not that these networks took so long to develop, but that they were established on such a large scale at all.

*B. Limitations of Teles's Analysis*

Perhaps the most important shortcoming of Teles's work is that it is not a truly complete discussion of the subject implied by its title. Indeed, the book might have been more accurately entitled *The Rise of the Libertarian Legal Movement*. With the exception of the Federalist Society—which, as Teles notes, deliberately maintains “big tent” neutrality between libertarians and conservatives<sup>21</sup>—most of the major institutions profiled in the book are either explicitly libertarian (such as IJ) or primarily focused on advancing the libertarian elements of the conservative agenda (such as CIR and various law and economics programs). As Teles notes, legal mobilization by “religious right” social conservatives has been discussed by previous scholars.<sup>22</sup> But there is still a need for a comparative analysis of the full range of right-of-center legal movements over the last several decades.

Teles pays little attention to right-of-center movements and legal institutions motivated primarily by religious considerations or to the social conservative backlash against liberal efforts to use the courts to protect “obscene” speech, extend abortion rights, and limit government “entanglement” with religion. Teles does note that these causes have gained relatively less ground in the academic and public interest worlds than have libertarian ones, and he suggests that courts might be better vehicles for efforts to limit government power (as libertarians seek to do) than for efforts to expand or protect it (as social conservatives wish to do in those areas where they disagree with libertarians).<sup>23</sup> This is an intriguing thesis, but it warrants a more systematic discussion than Teles provides. A greater focus on social conservative legal movements might have enriched Teles's analysis and provided a good comparative foil for assessing the more libertarian organizations on which he focuses. To the ex-

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21. See TELES, *supra* note 1, at 143–44, 152–57.

22. See *id.* at 287 n.8 (citing STEVEN BROWN, TRUMPETING RELIGION: THE CHRISTIAN RIGHT, THE FREE SPEECH CLAUSE, AND THE COURTS (2003)).

23. See *id.* at 231–32.

tent that Teles is right to believe that social conservatives have had less success in the courts than libertarians, a sound theory of legal change should be able to explain why.

Teles also fails to address some factors that might have reinforced his thesis. As mentioned above, he does not sufficiently consider that the creation of a conservative legal network was a public good for the conservative movement and thus likely to be undersupplied.<sup>24</sup> Teles does briefly mention public goods theory, noting the role of the Federalist Society in providing public goods for the conservative legal movement, as well as the earlier role of foundations in supplying public goods for legal liberals.<sup>25</sup> But he does not consider the more general role of public goods problems as an obstacle to the growth of legal movements and to their ability to translate political success into legal change. Fuller analysis of this point might have enriched his discussion of the organizational challenges facing conservative and libertarian legal activists as well as their liberal adversaries.

Similarly, Teles correctly recognizes that courts are to some extent protected against electoral pressure because the law is “[c]omplex, technical, and professionalized,” and therefore heavily influenced by specialized professional elites whom voters cannot easily remove.<sup>26</sup> This does not, however, fully explain why electoral outcomes often fail to change legal institutions more than they do. After all, voters could potentially support candidates who promise to pass legislation restricting judicial power, appoint new judges with a different ideology, and defund bureaucrats and other officials who resist the voters’ policy preferences. Teles ignores the crucial point that most voters remain “rationally ignorant” about politics and therefore know very little about political issues, especially complex and technical ones such as the development of legal doctrine.<sup>27</sup> Thus, they often find it difficult to tell whether elected officials have fully implemented their policy preferences. Public ignorance allows

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24. See *supra* Part II.A.

25. TELES, *supra* note 1, at 44, 136.

26. *Id.* at 9.

27. See, e.g., Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287 (2004) (documenting widespread political ignorance and its implications for judicial review).

government officials greater autonomy from voters, enabling policies to persist even in the face of potentially hostile public opinion.<sup>28</sup> This insulation from democratic responsiveness is particularly prevalent in highly technical fields such as constitutional law, where ordinary voters likely encounter great difficulty in understanding how the relevant issues work and determining the true impact of court decisions. Scholars of legal change who seek to build on Teles's pathbreaking work should take the role of public ignorance into account in seeking to explain the timing and direction of activist-driven legal reform.

### III. LESSONS FOR CONSERVATIVE AND LIBERTARIAN LEGAL ACTIVISTS

Organizations such as IJ and CIR have achieved some impressive victories. IJ's Supreme Court cases include *Granholt v. Heald*,<sup>29</sup> holding that the Dormant Commerce Clause forbade states from banning interstate importation of wine for the purpose of protecting in-state wine producers from competition, and *Kelo v. City of New London*,<sup>30</sup> in which IJ attempted to reverse nearly fifty years of Fifth Amendment Takings Clause precedent allowing government to condemn virtually any property it wanted to acquire. CIR's Supreme Court cases include *Rosenberger v. Rectors and Visitors of University of Virginia*,<sup>31</sup> a crucial case that proscribed state universities from discriminating against student religious organizations in funding decisions, *United States v. Morrison*,<sup>32</sup> a major precedent limiting federal power under the Commerce Clause, and the companion affirmative action cases *Grutter v. Bollinger*<sup>33</sup> and *Gratz v. Bollinger*.<sup>34</sup>

Teles does an excellent job of explaining the growth of non-liberal public interest law. He notes that the success of libertar-

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28. See, e.g., Samuel DeCanio, *Bringing the State Back in . . . Again*, 14 CRITICAL REV. 139 (2000); Samuel DeCanio, *State Autonomy and American Political Development: How Mass Democracy Promoted State Power*, 19 STUD. IN AM. POL. DEV. 117 (2005).

29. 544 U.S. 460 (2005).

30. 545 U.S. 469 (2005). For a detailed analysis of *Kelo* and its relationship to earlier precedent, see Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 225-44 (2007).

31. 515 U.S. 819 (1995).

32. 529 U.S. 598 (2000).

33. 539 U.S. 306 (2003).

34. 539 U.S. 244 (2003).

ian and conservative public interest law groups was not fore-ordained. Indeed, early efforts in the 1970s and early 1980s were mostly dismal failures. How did the founders of IJ and CIR turn things around? Teles notes two important causes: The second generation of libertarian public interest firms first learned from the strategies of their liberal predecessors and then distanced themselves from business interests.<sup>35</sup> Despite important successes, Teles also notes some major continuing shortcomings of the libertarian public interest movement.

*A. Learning from the Left*

IJ founders Clint Bolick and William Mellor deliberately copied the successful tactics of the NAACP Legal Defense Fund (LDF).<sup>36</sup> Like the LDF, IJ seeks sympathetic clients—often minority homeowners or entrepreneurial small businesses—for its economic liberties and property rights cases.<sup>37</sup> This is part of IJ's more general strategy of fighting in the court of public opinion as much as in the courtroom. Even when IJ loses a case in court, as happened in *Kelo*, it sometimes makes long-term gains by generating a political backlash and by undermining the prior elite consensus supporting status quo jurisprudence. The effort to seek sympathetic clients and influence public opinion was consciously copied from similar initiatives by the NAACP during the years leading up to its 1954 victory in *Brown v. Board of Education*.<sup>38</sup>

By contrast, Teles argues that CIR pursues a more narrowly "legalistic" approach, seeking to make the strongest possible legal case, with relatively little attention to the attractiveness of the client or to public relations concerns.<sup>39</sup> This strategy resembles the tactics employed by the ACLU in its early years. For example, CIR's clients in *United States v. Morrison* were rapists,<sup>40</sup> a type of case IJ might have been reluctant to take.

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35. See TELES, *supra* note 1, at ch. 7.

36. See *id.* at 245–46. As Bolick told Teles: "We borrow heavily and consciously from the Left for our litigation strategies, mainly from the [NAACP] LDF in its campaign to overturn *Plessy*." *Id.* at 245.

37. See *id.* at 244–45.

38. 347 U.S. 483 (1954).

39. *Id.* at 246–47.

40. See *United States v. Morrison*, 529 U.S. 598, 602–03 (2000) (describing the facts of the case).

Which strategy is better? Both have been successful to a degree and there is no need to make a categorical choice. IJ rightly emphasizes the importance of public relations and sympathetic clients. CIR, however, correctly recognizes that you can sometimes win important cases even with unattractive clients. Sometimes, clients who will look unsympathetic in the press have the strongest legal cases. Overall, however, it seems that IJ has been somewhat more successful. Although CIR has won as many or more important courtroom victories, IJ has been more effective in leveraging its courtroom victories—and even its defeats—into actual change in the real world. For example, IJ's campaign against eminent domain has almost certainly had more effect in constraining the powers of government than CIR's effort to curtail government-sponsored affirmative action, which ended in a painful Supreme Court defeat in *Grutter v. Bollinger* that generated only a limited political backlash. Although Michigan did later enact a ban on affirmative action by referendum<sup>41</sup>—CIR's case was a challenge to affirmative action at the University of Michigan—the vote spurred little in the way of a nationwide reaction. In the aftermath of IJ's defeat in *Kelo*, by contrast, forty-three states have enacted laws restricting the use of eminent domain, a bigger legislative reaction than that generated by any other Supreme Court decision in American history.<sup>42</sup> Although many of the new laws will likely prove ineffective in constraining takings, several states have passed strong reforms and others may end up doing so in the future.<sup>43</sup> IJ's strategy takes more account of the reality that the impact of judicial decisions is often determined as much outside the courtroom as within it. On the other hand, CIR is able to take advantage of strong legal cases with unsympathetic clients. Sometimes, it may be difficult to find a case with comparable legal merit where the client is more appealing.

The general lesson is that conservative and libertarian legal activists have much to learn from their liberal counterparts.

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41. See Scott Jaschik, *Michigan Votes Down Affirmative Action*, INSIDE HIGHER ED., Nov. 8, 2006, <http://www.insidehighered.com/news/2006/11/08/michigan>.

42. See Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. (forthcoming 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=976298](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=976298).

43. See *id.*



Despite the efforts of IJ and CIR, it may well be that this insight has not yet been fully exploited.

*B. Independence from Business Interests*

Libertarian and conservative public interest law firms are sometimes denounced as mere shills for business interests. Ironically, Teles shows that these groups had to reduce their ties to business before they could achieve any real success. Early conservative public interest firms established in the 1970s usually had close ties to business groups such as state chambers of commerce, and were often funded by corporations.<sup>44</sup> This created two serious problems. First, the press and public opinion could stigmatize the groups as the shills they to a certain extent were.<sup>45</sup> Second, and even more important, business interests often conflict with the conservative and libertarian agenda of limiting government power and protecting free markets. Many businesses actively support government regulations that suppress their competitors or grant them special privileges and favors. Teles shows that early conservative public interest firms sometimes had to drop promising economic liberties cases because they conflicted with the self-interest of powerful business backers. For example, the Mountain States Legal Foundation, an early pro-free-market public interest firm, was forced to drop a challenge to the Denver cable television monopoly because one of its business backers was "the potential head" of the monopoly and stood to benefit financially from its perpetuation.<sup>46</sup>

IJ, CIR, and other "second generation" libertarian public interest firms learned from this mistake. Instead of depending on business groups for funding, they relied mostly on donations from ideologically motivated individuals and foundations, backers who mostly lacked a narrow self-interested stake in the litigation pursued by the public interest firms they funded.<sup>47</sup> Today, much of IJ's litigation agenda on property rights and economic liberties actually opposes powerful business interests. For example, developers and other politically connected

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44. See TELES, *supra* note 1, at 67–73.

45. See *id.* at 69.

46. See *id.* at 64–66.

47. See *id.* at ch. 7.

businesses benefit from the types of "economic development" and "blight" condemnations that IJ challenges.

It is somewhat surprising that it took so long for right-of-center public interest lawyers to realize that business interests were not necessarily their friends. As far back as Adam Smith, free market advocates have recognized that many business interests benefit from the expansion of government regulation and routinely lobby for special favors from the state.<sup>48</sup> Smith famously wrote that "[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the publick."<sup>49</sup> More recently, public choice economists have emphasized the role of business interests in expanding government whenever it was in their narrow self-interest to do so.<sup>50</sup> Unfortunately, public interest lawyers had to learn this lesson the hard way. "Real world" lawyers could have saved themselves much trouble by reading the academic literature on business-government relations produced by denizens of the ivory tower.

### C. *The Shortage of Follow-up Litigation*

The conservative-libertarian public interest movement still has at least one major weakness relative to its liberal rivals: the comparative paucity of lawyers available to litigate "follow-up" cases that enforce and build on major favorable precedents.

This is a significant shortcoming. One of the most powerful findings of social science research on judicial review is that even the most important precedents do not enforce themselves. Government officials and interest groups will generally do all they can to evade or ignore judicial decisions that restrict their powers.<sup>51</sup> It took some twenty years of follow-up litigation (as well as congressional intervention) to force southern public schools to obey *Brown v. Board of Education*.<sup>52</sup> In some cases,

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48. See, e.g., ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 661–62 (R.H. Campbell & A.S. Skinner eds., Liberty Classics 1981) (1776) (documenting role of business interests in promoting "mercantilist" regulations that benefited them at the expense of consumers).

49. *Id.* at 145.

50. For a survey of the relevant literature, see DENNIS C. MUELLER, PUBLIC CHOICE III 347–53 (2003). See also OLSON, *supra* note 20, at 141–48.

51. See, e.g., ROSENBERG, *supra* note 15, at 78–82, 86–93.

52. See, e.g., KLARMAN, *supra* note 15, 398–421 (discussing often effective "massive resistance" to enforcement of *Brown*); ROSENBERG, *supra* note 15, at ch. 3 (same).

necessary follow-up litigation can be conducted by business interest groups with a financial stake in the outcome. For example, abortion clinics had an interest in conducting follow-up litigation after *Roe v. Wade*.<sup>53</sup> However, this will rarely be true of cases where the most important beneficiaries of a decision are poor or politically weak. In such situations, pro bono efforts by private attorneys can play a crucial role. The poor and politically weak are the most important potential beneficiaries of libertarian public interest efforts in the fields of economic liberties and property rights (among others). For example, some three to four million mostly poor and minority Americans have been displaced through “blight” and “urban development” federal takings since World War II as a result of federal and state court decisions allowing government to condemn property for virtually any reason.<sup>54</sup> The wealthy and politically influential can usually defend their property rights and other economic interests via the political process and therefore have less need for judicial protection.

As Teles describes, liberal public interest lawyers can rely on an extensive network of attorneys in private law firms and bar associations to do follow-up work for them on a pro bono basis.<sup>55</sup> Despite some modest efforts to create a parallel network,<sup>56</sup> conservatives and libertarians lag far behind in this area. Top lawyers at both IJ and CIR have identified this as probably the most important weakness of right-of-center public interest law and its “greatest organizational failure.”<sup>57</sup> Whether this weakness will be remedied in the future is difficult to tell.

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53. See ROSENBERG, *supra* note 15, at 195–201.

54. See Somin, *supra* note 30, at 269; see also Ilya Somin, *Blight Sweet Blight*, *LEGAL TIMES*, Aug. 14, 2006, at 42. For more detailed discussion of the reasons why protection of property rights is likely to disproportionately benefit the poor, see Ilya Somin, *Taking Property Rights Seriously? The Supreme Court and the “Poor Relation” of Constitutional Law*, in *THE UNITED STATES SUPREME COURT: CONTESTED CONSTITUTIONAL DOCTRINES* (Steven Kautz et al. eds., forthcoming 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1247854](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1247854) [hereinafter Somin, *Taking Property Rights Seriously?*].

55. See TELES, *supra* note 1, at 24–33, 249–50.

56. See *id.* at 251–52, 255–56 (discussing IJ’s efforts to get more libertarian-oriented lawyers involved in pro bono litigation).

57. *Id.* at 253–54.

## CONCLUSION

As Teles shows, the libertarian and conservative legal movement has launched an important and partially successful challenge to the previously overwhelming liberal dominance of American legal institutions. At the same time, however, the movement is still far short of achieving many of its goals. At least at the federal level, judicial protection for property rights remains relatively weak,<sup>58</sup> and protection for economic liberties is weaker still.<sup>59</sup> As this Review goes to press, Barack Obama and the Democratic Party have just won a major political victory. Whether that victory will set back conservative and libertarian legal causes as much as liberal victories of the New Deal era did will become clear over the next few years. At the very least, the appointment of a new generation of Democratic judges who are relatively hostile to free markets and property rights may make libertarian courtroom victories harder to achieve.

In sum, the conservative-libertarian legal movement has achieved some important successes, but still has crucial weaknesses. Whether it can overcome the combination of its own shortcomings and a potentially adverse political environment remains to be seen. Free market advocates may once again have to spend some time in the legal wilderness before they can win further victories. But the road back from that wilderness may be easier this time because of the valuable resources provided by the legal network whose development Teles so ably describes.

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58. For a survey, see Somin, *Taking Property Rights Seriously?*, *supra* note 54 (discussing recent federal court jurisprudence). Protection for property rights is much stronger in some state supreme courts. *See id.*

59. The highly deferential *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), remains the dominant federal constitutional precedent in this field.

INVENTING THE “RIGHT TO VOTE” IN  
*Crawford v. Marion County Election Board*,  
128 S. Ct. 1610 (2008)

Although it has become almost axiomatic that the franchise is a “fundamental right”<sup>1</sup> possessed by all Americans, it remains very much open to question whether the Constitution was ever intended to bestow the broad-based right envisioned by the Supreme Court. Those wary of judicial imposition of normative convictions under the guise of pronouncing the law<sup>2</sup> indeed have ample reason to question the Court’s relatively recent discovery of this right in the Equal Protection Clause of the Fourteenth Amendment. Although the Court’s latest examination of the scope of the right to vote in *Crawford v. Marion County Election Board*<sup>3</sup> represents a sensible exercise of judicial restraint in response to states’ efforts to combat and deter voter fraud, its reasoning exposes the potential for arbitrariness and activism inherent in the Court’s current voting rights jurisprudence.

The *Crawford* Court addressed a facial constitutional challenge to an Indiana statute known as “SEA 483,”<sup>4</sup> which requires individuals voting in person to present a government-issued photo identification at the polling place.<sup>5</sup> The law does not apply to absentee votes cast by mail or to voters living in

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1. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (“Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”).

2. See THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasizing that it is the duty of the judiciary to exercise “neither FORCE nor WILL but merely judgment”); see also Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) (arguing that originalism is the interpretive method most apt to ensure judges avoid the dangerous fallacy of “mistak[ing] their own predilections for the law”).

3. 128 S. Ct. 1610 (2008).

4. 2005 Ind. Legis. Serv. 1241 (West).

5. See *Crawford*, 128 S. Ct. at 1613 (plurality opinion).

state-licensed facilities, such as nursing homes.<sup>6</sup> In addition, those lacking the required identification are entitled to cast a provisional ballot, which is counted if the voter produces such identification at the circuit court clerk's office within ten days.<sup>7</sup> The statute also contains exemptions for indigent persons as well as for those who hold a religious objection to being photographed.<sup>8</sup> Voters obtaining the photo identification for the first time are responsible for any costs incurred in gathering the necessary preliminary documentation (usually a birth certificate or a U.S. passport);<sup>9</sup> the photo identification itself, however, is available free of charge at branches of the state's Bureau of Motor Vehicles.<sup>10</sup>

Two lawsuits challenging SEA 483's constitutionality were soon filed by the local Democratic Party, elected officials, and several nonprofit organizations representing various groups of voters. The plaintiffs in the consolidated case argued that the law constituted an impermissible burden on their right to vote under the Equal Protection Clause of the Fourteenth Amendment.<sup>11</sup> In response, Indiana contended that any incidental burden the statute imposed on the franchise was outweighed by the state's interests in preventing and detecting voter fraud as well as the related need to preserve public confidence in the integrity of the election system.<sup>12</sup>

The United States District Court for the Southern District of Indiana held the statute constitutional, noting that the means employed by Indiana in advancing its valid interest in eliminating voter fraud placed only a relatively mild burden on voting rights.<sup>13</sup> The Seventh Circuit affirmed the district court's

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6. *Id.*

7. *Id.* at 1614.

8. *Id.* at 1613. Voters who properly claim either of these objections are entitled to cast a provisional ballot which is counted upon their execution of a statutorily prescribed affidavit within ten days. *Id.*

9. *Id.* at 1621 n.17 (noting that the fees for obtaining a copy of one's birth certificate in Indiana range from approximately three to twelve dollars).

10. *See id.* at 1614.

11. *Id.*

12. *See id.* at 1617.

13. *See Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 825-26 (S.D. Ind. 2006) (reasoning that "[t]he incontrovertible fact that many public and private entities already require individuals to present photo identification substantially bolsters the State's contention that '[a]mong all the possible ways to identify individuals, government-issued photo identification has come to embody the best

decision in an opinion authored by Judge Posner. Although acknowledging that some voters may “disenfranchise themselves”<sup>14</sup> by declining to endure the mildly cumbersome process of acquiring a photo ID, the court concluded that the overall burden the statute imposed on the right to vote was not severe and not even significantly greater than the countless other costs intrinsic to the voting process.<sup>15</sup> The court also emphasized the crucial distinction between the incidental fees involved in obtaining a photo identification under the Indiana statutory scheme and a poll tax proscribed by the Supreme Court.<sup>16</sup> The dissenting member of the three-judge panel strongly criticized SEA 483 as “a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic”<sup>17</sup> and asserted that the court was obligated to strike down the law under a “strict scrutiny light” standard.<sup>18</sup>

The Supreme Court granted certiorari and affirmed.<sup>19</sup> Writing for the plurality, Justice Stevens undertook what was effectively a two-step analysis of SEA 483’s constitutionality. First, the plurality determined that because the burden created by the regulation was not “severe,” it would eschew strict scrutiny in favor of the balancing approach formulated in *Anderson v. Celebrezze*.<sup>20</sup> Largely agreeing with Judge Posner’s analysis, the

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balance of cost, prevalence, and integrity.” (internal citation omitted)). The district court noted that the plaintiffs had failed to identify “a single, individual Indiana resident who will be unable to vote as a result of SEA 483 or who will have his or her right to vote unduly burdened by its requirements.” *Id.* at 783. The court cited an expert witness report stating that as of 2005, approximately 43,000 Indiana residents lacked the necessary identification. *See id.* at 807.

14. *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007).

15. *See id.* at 951 (noting that “[t]he benefits of voting to the individual voter are elusive . . . and even very slight costs in time or bother or out-of-pocket expense deter many people from voting”).

16. *See id.* at 952. Specifically, the court reasoned that, in contrast to a traditional poll tax—in which the state’s interests stood in diametric opposition to the individual’s right to vote—in this case, “the right to vote is on both sides of the ledger” given the dilutive effect voter fraud has on legitimately cast ballots. *Id.* (citing *Purcell v. Gonzales*, 549 U.S. 1, 7 (2006)). Although conceding there was some uncertainty as to the severity of voter fraud in Indiana, the court noted there was at least “indirect evidence” of such activities and pointed out the chronic underenforcement of laws criminalizing voter fraud. *See id.* at 953.

17. *Id.* at 954 (Evans, J., dissenting).

18. *Id.*

19. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008).

20. 460 U.S. 780 (1983). Justice Stevens cautioned, however, that even the mildest state-imposed burdens on the right to vote “must be justified by relevant and

plurality reasoned that the "inconvenience" entailed in acquiring a photo identification—for example, gathering the necessary documentation and traveling to a local BMV branch—did not constitute "a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting."<sup>21</sup> In addition, the ability of voters lacking the needed identification to cast provisional ballots also "mitigated" the burden.<sup>22</sup> The plurality hence concluded that SEA 483 is a "reasonable, non-discriminatory restriction[]"<sup>23</sup> subject to the more lenient demands of the *Anderson* balancing test rather than the rigors of strict scrutiny.<sup>24</sup> Although expressing agreement with the petitioners' contention that the law places a particularly acute onus on certain groups (for example, the poor and elderly), the plurality reasoned "it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified."<sup>25</sup> Accordingly, the plurality refused to undertake a separate constitutional analysis focused solely on these subsets of voters. The plurality did add, however, that its examination of SEA 483's burdens centered not on the electorate as a whole but rather only on voters who lacked the identification required by the statute.<sup>26</sup>

The plurality then proceeded to evaluate the gravity of the competing interests at stake through the lens of the *Anderson* test. As interpreted by the *Crawford* plurality, *Anderson* demanded that courts considering constitutional challenges to non-invidious<sup>27</sup> regulations placing non-severe restrictions on the franchise "weigh the asserted injury to the right to vote against the 'precise interests put forward by the State as justifi-

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legitimate interests sufficiently weighty to justify the limitation." *Crawford*, 128 S. Ct. at 1616 (plurality opinion) (internal quotation marks omitted).

21. *Crawford*, 128 S. Ct. at 1621 (plurality opinion).

22. *Id.* The plurality further noted that the additional required step of making a follow-up trip to the circuit court clerk's office is not constitutionally problematic unless it is shown to be "wholly unjustified." *Id.*

23. *Id.* at 1616 (citation omitted).

24. *See id.* at 1623.

25. *Id.* at 1622.

26. *See id.* at 1620.

27. The plurality explained that a law is not invidious so long as it relates to voters' qualifications and imposes "evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Id.* at 1616. (quoting *Anderson*, 460 U.S. at 788 n.9).



cations for the burden imposed by its rule.”<sup>28</sup> Deeming Indiana’s concern with deterring and detecting voter fraud to be a valid state interest,<sup>29</sup> the plurality concluded that the state’s statutory scheme constituted a permissible means of ameliorating the problem of fraud.<sup>30</sup> While acknowledging that the record lacked any evidence of actual in-person voter fraud in Indiana, the plurality suggested that “flagrant examples” of such activity in other parts of the country as well as fraud relating to absentee voting in a recent Indiana Democratic primary provided sufficient bases for the state’s concerns.<sup>31</sup> The plurality also accepted Indiana’s argument that safeguarding voter confidence is a legitimate state interest advanced by the identification requirement.<sup>32</sup> The plurality determined that the gravity of the state’s regulatory interest outweighed the comparatively mild burden on affected individuals.<sup>33</sup> Finally, the plurality emphasized that the state provided the photo IDs free of charge; but for this feature, SEA 483 would amount to an impermissible poll tax.<sup>34</sup>

Justice Scalia concurred in the judgment, joined by Justice Thomas and Justice Alito, but expressed two points of disagreement with the plurality’s reasoning.<sup>35</sup> First, although he agreed that the burden SEA 483 imposed on voting rights was not “severe,” Justice Scalia argued that the appropriate test was supplied not by *Anderson*, but rather by the Court’s decision in *Burdick v. Takushi*.<sup>36</sup> According to Justice Scalia, *Burdick* sought to distill the “amorphous” principle articulated in *Anderson* into a concrete and workable standard, namely, that non-

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28. *Id.* (quoting *Anderson*, 460 U.S. at 789).

29. *Id.* at 1617.

30. *See id.* at 1618. The plurality pointed to the Help America Vote Act of 2002 and a Commission on Federal Election Reform report, both of which prescribe the use of photo identification as a means of combating fraud and preserving the integrity of elections. *Id.*

31. *See id.* at 1619. The plurality also noted that Indiana’s “unusually inflated” voter rolls provided an additional “neutral and nondiscriminatory reason” supporting the enactment of SEA 483. *Id.* at 1620.

32. *Id.* at 1620.

33. *See id.* at 1623.

34. *Id.* at 1620–21.

35. *Id.* at 1624 (Scalia, J., concurring in the judgment).

36. 504 U.S. 428 (1992).

severe,<sup>37</sup> nondiscriminatory restrictions on the right to vote should generally be upheld so long as the burden is outweighed by the state's "important regulatory interests."<sup>38</sup> Second, Justice Scalia criticized the plurality's focus on the burdens placed only on those voters particularly affected by the law rather than evaluating SEA 483's overall impact on "voters generally."<sup>39</sup> According to Justice Scalia, the plurality's more individualized approach marked an unmistakable divergence from precedent and portended judicial micromanagement of voting procedures, in clear contravention of the States' Article I, Section 4 prerogatives.<sup>40</sup> Under the *Burdick* framework, Justice Scalia contended, courts are obligated to defer to states' judgments on the regulation of elections unless the law at issue "imposes a severe and unjustified overall burden upon the right to vote or is intended to disadvantage a particular class."<sup>41</sup>

Justice Souter dissented, joined by Justice Ginsburg.<sup>42</sup> Although maintaining that *Burdick*'s "sliding scale balancing analysis"<sup>43</sup> provided the controlling standard, Justice Souter indicated the need for "a rigorous assessment"<sup>44</sup> of Indiana's proffered rationales in light of what he viewed to be the "seri-

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37. According to Justice Scalia, "[b]urdens are severe if they go beyond the merely inconvenient." *Crawford*, 128 S. Ct. at 1625 (Scalia, J., concurring in the judgment) (citing *Storer v. Brown*, 415 U.S. 724, 728–29 (1974)).

38. *Id.* (internal quotation marks omitted). *Burdick* formulates the rule as follows: "[W]hen a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Burdick*, 504 U.S. at 434 (internal quotation marks omitted).

39. *Crawford*, 128 S. Ct. at 1625 (Scalia, J., concurring in the judgment).

40. *See id.* at 1626. Justice Scalia emphasized "[t]he Fourteenth Amendment does not regard neutral laws as invidious ones, even when their burdens purportedly fall disproportionately on a protected class." *Id.*

41. *Id.* at 1626–27. Some confusion persists, however, over exactly how demanding the *Burdick* test is in practice. *See* Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 330 (2007) (arguing that the Court "has not done much to resolve this ambiguity. . . . [but] suffice it to say that the Supreme Court typically applies something like rational basis review in nonsevere burden cases, but that the rationality standard may not be quite so lax as the one applied to ordinary economic and social legislation; also, to the extent that the burden is fairly characterized as 'significant,' if not quite 'severe,' some intermediate form of scrutiny may be in order").

42. *Crawford*, 128 S. Ct. at 1627 (Souter, J., dissenting).

43. *Id.* at 1628 (Souter, J., dissenting).

44. *Id.* at 1635.

ous" (albeit not "severe")<sup>45</sup> nature of the burdens imposed by SEA 483. Implicitly disagreeing with Justice Scalia's contention that *Burdick* prescribes a singular focus on the law's overall impact on all voters, Justice Souter argued that it is indeed constitutionally relevant if a statute's incidental effect is to impose particularly cumbersome burdens on certain classes of individuals even though the average voter would regard the law's requirements as mere inconveniences.<sup>46</sup> Emphasizing the costs entailed in traveling to relatively scarce BMV locations and in obtaining the necessary preliminary documentation, Justice Souter asserted that "in the *Burdick* analysis it matters that both the travel costs and the fees are disproportionately heavy for, and thus disproportionately likely to deter, the poor, the old, and the immobile."<sup>47</sup> Justice Souter concluded that the state's purported interests could not withstand the "rigorous assessment" necessary in light of SEA 483's heavy burdens.<sup>48</sup> Specifically, Justice Souter underscored the complete absence of any evidence of in-person voter fraud in Indiana,<sup>49</sup> and concluded by remarking that SEA 483 comes "uncomfortably close" to the poll tax invalidated by the Court some four decades earlier.<sup>50</sup>

Justice Breyer filed a separate dissent expressing his view that the law "imposes a disproportionate burden upon those eligible voters who lack . . . [a] statutorily valid form of photo ID."<sup>51</sup> The proper test, argued Justice Breyer, is not the *Burdick* formulation, but rather "whether the statute burdens any one such [voting related] interest in a manner out of proportion to

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45. *Id.* at 1632.

46. *See id.* at 1629 ("The need to travel to a BMV branch will affect voters according to their circumstances, with the average person probably viewing it as nothing more than an inconvenience. Poor, old, and disabled voters who do not drive a car, however, may find the trip prohibitive . . ."). Justice Souter did, however, suggest that the number of voters affected is a germane factor when administering the *Burdick* test. *See id.* at 1632–33.

47. *Id.* at 1631.

48. *Id.* at 1635.

49. *See id.* at 1637. Justice Souter also took a skeptical view of the State's rationale that voter fraud is extremely difficult to detect. *See id.* at 1638. He added that, even if Indiana had shown voter fraud to be a substantial problem, it would not necessarily justify the "particular burdens [SEA 483] imposes on poor people and religious objectors," namely, the need to travel to the county seat of government within ten days of the election every time they wish to vote. *Id.* at 1640.

50. *Id.* at 1643.

51. *Id.* (Breyer, J., dissenting).

the statute's salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative)."<sup>52</sup> Answering this question in the affirmative as to SEA 483, Justice Breyer noted that other states have implemented photo ID laws less restrictive and less burdensome than Indiana's, and that there is no apparent reason why it is necessary for Indiana to maintain more stringent requirements.<sup>53</sup>

While the *Crawford* Court's judgment upholding SEA 483 as a constitutional exercise of Indiana's regulatory powers is correct, the plurality's reasoning leaves open the potential for future improper judicial encroachments on the States' authority to devise their own election law regimes. Balancing tests such as that employed by the plurality in *Crawford* and its precursors always contain at least some element of arbitrariness caused by the subjectivity inherent in assigning respective weights to competing (and often somewhat abstract) interests. This effect, however, is exacerbated exponentially when the "right" occupying one side of ledger—here, a general "right to vote" that can be invoked even against neutral, nondiscriminatory regulations—is one entirely of the Court's invention with little grounding in the Constitution's text and original intent. In such instances, there is no independent constraint on the Court's power to define the extent and magnitude of its own creation.<sup>54</sup> Much of voting rights doctrine in general and *Crawford* in particular, exemplifies precisely this situation.

Although the exact meaning and scope of the Fourteenth Amendment is a vexing question not capable of easy resolution, it is highly doubtful that, whatever else it was meant to accomplish, the Equal Protection Clause conferred a broad-ranging fundamental "right to vote."<sup>55</sup> As an initial matter, the text of

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52. *Id.* (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring)).

53. *See id.* at 1644–45.

54. It is worth noting that even the current Court's most prominent originalists, Justice Scalia and Justice Thomas, have seemingly accepted the authority of the *Burdick* framework, which by its terms contemplates a general "right to vote" that can conceivably nullify even generally applicable, nondiscriminatory regulations. *See id.* at 1626–27 (Scalia, J., concurring in the judgment) (arguing that courts should generally uphold such a neutral law "unless it imposes a severe and unjustified overall burden upon the right to vote" (emphasis added)).

55. Importantly, the Court never has held that the Fourteenth Amendment endows American citizens with an independent and freestanding right to vote that can be invoked, for example, to compel the government to render unelected pub-

Section 2 of the Fourteenth Amendment, which expressly contemplates reducing the representation in Congress of states that deny adult males the franchise, seems to foreclose the possibility that a general right to vote is embedded in Section 1's Equal Protection Clause.<sup>56</sup> Representative James Bingham, a principal author of the amendment, himself declared that, as Section 2 attests, "[t]he amendment does not give . . . the power to Congress of regulating suffrage in the several States."<sup>57</sup> Bingham implied that, to the extent Section 2 is an enforcement mechanism for remedying wrongful deprivations of the franchise, it was directed to the relatively narrow objective of protecting the rights of black Americans.<sup>58</sup> Many historians have concurred in this view. After conducting an exhaustive examination of the Fourteenth Amendment's adoption, Professor Raoul Berger concluded that "the framers' incontrovertible exclusion of suffrage

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lic positions subject to direct election by voters. Rather, as a product of the Equal Protection Clause strand of the Court's "fundamental rights" jurisprudence, the essence of the right to vote is that, once the government chooses to extend the franchise to citizens, it must do so on an equal basis. *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973). In that case, the Court indicated that "the right to vote, *per se*, is not a constitutionally protected right." Instead, "the protected right . . . [is one] to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State's population." *Id.*

56. *See* U.S. CONST. amend. XIV, § 2. ("[W]hen the right to vote . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.").

57. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866). Clearly implicit in Bingham's argument is that Section 1 does not create any rights with respect to suffrage because if it did, these rights would be subject to congressional regulation under Section 5, which vests in Congress the power to enforce the Amendment's requirements.

58. *See id.* at 2543 ("By [Section 2], if . . . [any] State discriminates against her colored population as to the elective franchise (except in cases of crime,) she loses to that extent her representative power in Congress."). Indeed, it seems that most of the debate concerning the interplay between the Fourteenth Amendment and voting rights centered on the enfranchisement of black Americans; the notion that the amendment would reach all forms of state regulation of voting (including those with no discriminatory intent) appears not to have been considered. *See* CHESTER JAMES ANTIEAU, *THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT* 28-30 (1997) (noting that the Arkansas ratifiers were apparently aware that the Fourteenth Amendment could be construed to mandate black suffrage but that many Michiganders and West Virginians did not take such an expansive view of the amendment).

from the Fourteenth Amendment . . . leaves no room for judicial 'flexibility.'"<sup>59</sup> Other scholars chronicling the circumstances of the Fourteenth Amendment's adoption have similarly noted flatly that "[t]he statement most frequently made in debates on the Fourteenth Amendment is that it did not, in and of itself, confer upon blacks or anyone else the right to vote."<sup>60</sup>

Despite the *Anderson* Court's effort to construe the Equal Protection Clause otherwise, even those framers who maintained that the Fourteenth Amendment's demand for equality extends to suffrage do not appear to have contemplated that it would embrace even neutral and nondiscriminatory regulations.<sup>61</sup> For example, the prominent abolitionist and Fourteenth Amendment proponent Senator Thaddeus Stevens indicated that the amendment would not bar states' property qualifications on the franchise so long as such laws were applied to all citizens.<sup>62</sup>

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59. RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 154 (2d ed. 1997). Professor Berger argued that "[a]part from a few radical dissentients, there was a wide consensus that control over suffrage had from the beginning been left with the States, as was categorically stated by [framers Thaddeus] Stevens, [William] Fessenden, [Roscoe] Conkling, [John] Bingham, and many others." *Id.* at 472 (footnotes omitted).

60. WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 125 (1988). Nelson noted that, although some proponents of the amendment argued that it did compel the equal administration of those voting rights which a state chose to extend, others espoused the view that "the amendment concerned only civil rights and not political rights and hence had nothing at all to do with voting." *Id.* at 132. Even such a strong proponent of the amendment as Michigan Senator Jacob Howard asserted that "the theory of this whole amendment is, to leave the power of regulating the suffrage with . . . the States, and not to assume to regulate it by any clause of the Constitution." BERGER, *supra* note 59, at 85 (alteration in original) (internal quotation marks omitted). Howard also argued on the Senate floor that the notion that the Fourteenth Amendment grants a right to vote is "a construction [that] cannot be maintained. No such thing was contemplated on the part of the committee which reported the amendment; and if I recollect rightly, nothing to that effect was said in debate in the Senate when it was on its passage." CONG. GLOBE 40th Cong., 3d Sess. 1003 (1869). Furthermore, Section 2 is a "plain, indubitable recognition and admission . . . of the right and power of each State to regulate the qualifications of voters." *Id.*

61. See *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (asserting that even when the law at issue is generally applicable and not motivated by an intent to discriminate, the Court will "not only determine the legitimacy and strength of each of [the state's] interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights").

62. See NELSON, *supra* note 60, at 142 (noting that Stevens believed that "if the property qualification applie[d] impartially to all," its incidental effects were irrelevant from the standpoint of the Fourteenth Amendment (alteration in original) (internal quotation marks omitted)).

In addition, while legal scholar William van Alstyne has challenged the *Reynolds* dissenters' argument that the legislative history of the Fourteenth Amendment foreclosed the majority's reliance on the "one person, one vote" principle,<sup>63</sup> even he acknowledged that "the case can safely be made that there was an original understanding that [Section] 1 of the proposed Fourteenth Amendment would not itself immediately invalidate state suffrage laws severely restricting the right to vote."<sup>64</sup>

Indeed, the Supreme Court itself adhered to precisely this understanding of the Fourteenth Amendment for nearly a century before abruptly reversing course during the Warren Court era. In one of the first cases concerning the subject, the Court refused the plaintiff's urging to formulate a general right to vote out of the newly ratified Fourteenth Amendment.<sup>65</sup> Although the *Minor v. Happersett* plaintiff's argument that the Fourteenth Amendment prohibited restrictions on the franchise based upon sex was rooted in the Privileges or Immunities Clause<sup>66</sup> (thereby rendering some of the Court's reasoning inapposite to the Equal Protection Clause issue), much of the Court's logic is generally applicable to any Fourteenth Amendment argument concerning the right to vote. Specifically, the Court examined the circumstances of the amendment's adop-

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63. See William W. van Alstyne, *The Fourteenth Amendment. The 'Right' to Vote and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 85 (arguing that "there was no express understanding one way or the other, respecting the prospective relevance of the Equal Protection Clause to instances of state legislative malapportionment").

64. *Id.* at 72. Professor van Alstyne reasoned tenuously that, because Congress "did not adopt . . . [a] specific and narrowly defined amendment that, by its clear language, could never be applied to suffrage," *id.* at 73, the Court's fashioning of expansive voting rights is justified. While the amendment's broad wording is certainly relevant, it makes more sense to view it not as a license to engage in judicial policymaking but rather as a starting point to discern more precisely what was intended by the open-ended language, by examining exactly what the amendment's framers and ratifiers believed it did and did not do. Indeed, to the extent ambiguities surrounding its adoption and differences of opinion among its ratifiers preclude a comprehensive and definitive understanding of the amendment's precise intent, it would surely be a dubious principle of constitutional construction to require that the framers explicitly enumerate everything an amendment is *not* meant to accomplish lest the Court claim the power to declare heretofore unknown rights. This is especially true when there is a noticeable paucity of evidence that the framers or ratifiers intended to confer a general right to vote, despite being conscious of the possibility of doing so.

65. See *Minor v. Happersett*, 88 U.S. 162 (1874).

66. See *id.* at 165.

tion, noting that not only had states enacted various restrictions (relating to, for example, property ownership) since the time of the Founding,<sup>67</sup> but that virtually no one regarded the Fourteenth Amendment as securing a broad right to the franchise, as evidenced by the numerous limitations on suffrage remaining after its ratification and the perceived need to enact the Fifteenth Amendment.<sup>68</sup> The Court also explained that the wording of Section 2 of the Fourteenth Amendment rendered highly dubious the notion that the broad language of Section 1 secured a general right to vote.<sup>69</sup> The penalty Section 2 exacts for depriving adult male citizens of the franchise<sup>70</sup> seems by its terms to contemplate that the States can in fact impose such restrictions so long as they are willing to accept the penalty. Indeed, as recently as the 1970s, the Court relied on the explicit language of Section 2 in upholding the constitutionality of states' revocation of felons' voting rights.<sup>71</sup>

Similarly, the Court in *Colegrove v. Green*<sup>72</sup> rejected the plaintiffs' claims that Illinois's congressional apportionment scheme amounted to a constitutional injury to the "right to vote." Relying on the plain text of Article I, Section 4, Justice Frankfurter

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67. See *id.* at 172–73.

68. See *id.* at 175 (arguing that if the Fourteenth Amendment really had been intended to extend to the right to vote, there would have been no need to adopt the Fifteenth Amendment); see also *United States v. Reese*, 92 U.S. 214, 217–18 (1875) (explaining that before the Fifteenth Amendment was ratified, "[i]t was as much within the power of a state to exclude citizens of the United States from voting on account of race &c., as it was on account of age, property or education").

69. See *Minor*, 88 U.S. at 174.

70. See U.S. CONST. amend. XIV, § 2.

71. See *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974). But see Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 289 (2004) (arguing that the Court has generally viewed Section 2 as having "no independent effect" in light of the more broadly worded Fifteenth Amendment). Regardless, *Ramirez* seems to represent an anomaly in the Court's current voting rights jurisprudence and to some extent stands in deep tension with other decisions. If Section 2 is still a viable provision (as *Ramirez* indicates it is), all restrictions on the franchise except those explicitly forbidden by other provisions of the Constitution are presumably permissible (although potentially subject to penalty). If Section 2 is nugatory, however, then it appears likely that laws prohibiting felon voting must withstand strict scrutiny to remain constitutionally valid.

72. 328 U.S. 549 (1946); see also *Oregon v. Mitchell*, 400 U.S. 112, 126 (1970) (Black, J.) ("The Equal Protection Clause of the Fourteenth Amendment was never intended to destroy the States' power to govern themselves, making the Nineteenth and Twenty-fourth Amendments superfluous.").



opined that ensuring fair representation is "[a]n aspect of government from which the judiciary, in view of what is involved, has been excluded by the clear intention of the Constitution."<sup>73</sup> The Court likewise adhered to the original understanding in unanimously upholding Georgia's generally applicable poll tax against an Equal Protection Clause challenge.<sup>74</sup>

In 1966, however, the Court abruptly changed course and declared in *Harper v. Virginia Board of Elections* that voting is a "fundamental political right" protected by the Equal Protection Clause.<sup>75</sup> While beginning its opinion with an attempt to clothe its sweeping assertion with the respectability of *stare decisis* by citing the nineteenth-century case *Yick Wo v. Hopkins*,<sup>76</sup> the

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73. *Colegrove*, 328 U.S. at 554 (opinion of Frankfurter, J.). Although *Colegrove* was a case involving vote dilution rather than vote deprivation, the Court's later apportionment doctrine was itself grounded in the Equal Protection Clause and bears many conceptual parallels to the Court's general 'right to vote' jurisprudence. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 566 (1964) ("Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations . . ."); *Baker v. Carr*, 369 U.S. 186, 237 (1962) (holding that malapportionment claims are justiciable under the Equal Protection Clause).

74. See *Breedlove v. Suttles*, 302 U.S. 277, 281 (1937). The basis of the plaintiff's challenge was not even that the poll tax wrongfully encumbered any fundamental "right to vote" but rather that the statute's exemptions (namely, for the blind, those over the age of 60, and women not registering to vote) violated the Equal Protection Clause. The Court rejected this argument, reasoning that the clause "does not require absolute equality" and that the exceptions were reasonable. See *id.* at 281-82.

75. 383 U.S. 663, 667 (1966) (internal quotation marks omitted) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). The Court had implicitly hinted at the existence of such a "right to vote" in the years immediately preceding *Harper*. See *Carlington v. Rash*, 380 U.S. 89, 96-97 (1965) (striking down provision of state constitution which permitted member of armed forces to vote only in the county where he resided at the time he entered the service). *Harper*, however, marked the first time the Court elaborated on the new "right to vote" with any specificity. Indeed, as recently as 1959, the Court declined to embrace the notion of a "fundamental right" to vote embedded in the Fourteenth Amendment. See *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51 (1959) (upholding generally applicable literacy test and noting that the "right to vote" referred to in *Yick Wo* and Section 2 of the Fourteenth Amendment "refers to the right to vote as established by the laws and constitution of the State" (internal quotation marks omitted) (quoting *McPherson v. Blacker*, 146 U.S. 1, 39 (1892))).

76. The Court in *Yick Wo* invalidated a facially neutral ordinance regulating laundry businesses on the ground that it was being applied in a discriminatory manner. 118 U.S. 356. Despite the sweeping language of the phrase cited in *Harper*, the *Yick Wo* Court did not suggest that the Equal Protection Clause contains a multifaceted and wide ranging right to vote encompassing neutrally applied laws. Indeed, the arguably more sensible interpretation of *Yick Wo* is that the Court was merely enforcing the obvious original intent of the Fourteenth Amendment, to wit, precluding

Court soon abandoned this pretense and all but acknowledged that its newly devised right lacked any significant basis in original intent. In response to decades' worth of case law directly undermining its decision, the Court remarked simply that

the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.<sup>77</sup>

The unstated implication, of course, is that the new "notions" dictating the substance of the Equal Protection Clause will be chosen by the Court and animated by whatever normative theory of the elusive concept of "equality" that any given majority of Justices happens to espouse and wishes to superimpose onto the Constitution as purportedly reflecting what the national consensus is (or ought to be).<sup>78</sup>

While *Crawford* and similar decisions<sup>79</sup> do indicate an effort to contain *Harper's* expansive holding through restrained applications of the more deferential *Anderson-Burdick* test, other cases aptly illustrate *Harper's* promise that the Court's newly devised right and corresponding balancing tests can be manipulated to supplant states' duly enacted voting regulations with the Court's favored notions of "fairness" and "equality." In particular, many courts have used the subjectivity inherent in resolving the threshold question of whether a burden is "severe" to analyze (and usually invalidate)

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states from engaging in deliberate racial discrimination through selective enforcement of the law. See *Harper*, 383 U.S. at 682 n.3 (Harlan, J., dissenting) (arguing that *Yick Wo* "finds justification in the fact that, insofar as that clause may embody a particular value in addition to rationality, the historical origins of the Civil War Amendments might attribute to racial equality this special status").

77. *Harper*, 383 U.S. at 669 (citation omitted).

78. As Judge Bork noted, the *Harper* majority's formulation of equal protection clearly "means that the content of the equal protection clause changes with the notions of five or more Justices." ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 91 (1990).

79. See, e.g., *Citizens for Legislative Choice v. Miller*, 144 F.3d 916 (6th Cir. 1998) (upholding under *Anderson-Burdick* lifetime term limits on state legislators); *Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1340 (S.D. Fla. 2008) (holding that a Florida law requiring new voters to register at least 29 days before an election did not impose a severe burden and was supported by the state's interest in "honest, fair and orderly election[s]").

neutral, generally applicable laws under a strict scrutiny standard.<sup>80</sup> Even *Crawford*, while signaling at least a partial return to judicial modesty, appeared to leave open the possibility that similar cases may be decided differently if certain details of the statute and its effects differ.<sup>81</sup>

The malleability of these tests, however, is directly attributable to the nature of the right to vote itself. As *Harper* itself essentially acknowledged, the contours of the right are defined by the philosophical proclivities of those applying it. The right to vote is a judicial creation possessing as much force as the Court chooses to accord it in any given case.

Some have argued that even if the Court has engaged in an aggrandizement of its powers unauthorized by the text or original intent, the subject matter of these decisions render them fundamentally different from other instances of judicial activism. In the voting rights sphere, so the argument goes, the Court's decisions have operated to facilitate rather than ob-

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80. See, e.g., *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986) (applying strict scrutiny to invalidate a statute requiring voters in a party's primary to be registered members of that party); *Ayers-Shaffner v. DiStefano*, 37 F.3d 726, 729–30 (1st Cir. 1994) (holding that an election board ruling limiting participation in a re-vote to those voters who had cast ballots in the original election placed an impermissibly "severe" burden on the right to vote); *Common Cause of Ga. v. Billups*, 439 F. Supp. 2d 1294 (N.D. Ga. 2006) (invalidating under *Burdick* a law that required in-person voters and some absentee voters to present photo identification); *Partnoy v. Shelley*, 277 F. Supp. 2d 1064, 1075 (S.D. Cal. 2003) (nullifying under strict scrutiny a law providing that votes cast for a candidate in a recall election will be counted only if the voter also voted on the recall question itself). Although decided before *Burdick*, other cases have also asserted the prerogative of effectively micromanaging the appropriate length of residency requirements. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 360 (1972) (striking down a Tennessee law requiring that voters must reside in the state for one year and in the county for three months before registering to vote there); see also *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969) (declaring unconstitutional a law which limited participation in local school board elections to those who either owned or leased property in the district or who had children enrolled in the district's schools).

81. For example, Justice Stevens noted that absentee voting (which did not require presenting a photo ID) was a possibility for elderly voters who had difficulty obtaining a birth certificate, but left unclear how important the absentee exemption was to ensuring SEA 483's constitutionality. See *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1622 (2008) (plurality opinion). In addition, Justice Stevens also relied on the lack of record evidence of hardship encountered by particular voters. See *id.* The necessary implication is that SEA 483 could have been placed in constitutional jeopardy had the petitioners been able to garner more testimonials by voters who allegedly were "severely" burdened by the financial or logistical hurdles to obtaining a birth certificate, traveling to the BMV, and so on.

struct the democratic process by ensuring an equalization of opportunities to participate across various strata of society.<sup>82</sup> This argument is persuasive to a degree, but it nevertheless marks a troubling and potentially dangerous concession to the notion that the Court's duty is not to "say what the law is,"<sup>83</sup> but rather to protect the integrity of American democracy in accordance with fluid constitutional boundaries crafted almost entirely according to the Justices' personal conceptions of "fairness."<sup>84</sup> In addition, to the extent that "democracy" is a constitutionally protected value, there lingers the critical question of what exactly "democracy" even means. While the egalitarianism embraced by the Court is certainly one model of democracy, it is far from the only one and indeed was a paradigm manifestly disfavored by many of the Constitution's Framers.<sup>85</sup> As Justice Harlan noted in his *Harper* dissent, various states had long espoused alternative conceptions of democracy that incorporated such considerations as interest in the outcome of the elections (as gauged by property qualifications) and ability to participate meaningfully in the democratic process (as illus-

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82. See Jane S. Schacter, *Unenumerated Democracy: Lessons from the Right to Vote*, 9 U. PA. J. CONST. L. 457, 471-72 (2007) (rhetorically asking "[h]ow . . . can democracy be the grounds to deny the equal-voting right said to be vital to supporting democracy itself?"). One might note, however, that Americans' voluntary enactment of numerous constitutional and statutory provisions augmenting the franchise (including the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, and the Voting Rights Act of 1965) undermines not only the argument that the Fourteenth Amendment was intended to encompass a broad right to vote, but also the contention that expansion of voting rights requires the judiciary to act as the self-appointed arbiter of how best to realize democratic ideals.

83. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

84. The Court has made a similar argument in other contexts to support its assertion that it could invalidate laws which in its view were the product of a deficient democratic process. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (claiming for itself the power to conduct a "more searching judicial inquiry" when "prejudice against discrete and insular minorities . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities").

85. James Madison and Gouverneur Morris, for instance, were deeply suspicious of mass democracy and maintained that suffrage should be limited to independent landowners. See JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 225 (1996). Numerous states did precisely that even in the years leading up to the ratification of the Constitution. See *THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES* (Patrick T. Conley & John P. Kaminski eds., 1992). Under this view, laws that impose barriers to the ballot actually serve to *strengthen* the vitality of the democratic process by limiting participation to those especially invested in its outcomes.

trated by proficient literacy). Indeed "it is only by fiat that it can be said, especially in the context of American history, that there can be no rational debate as to their advisability."<sup>86</sup>

In sum, *Crawford* is in some respects a shift toward renewed deference by the judiciary to the States' constitutional prerogative of regulating voter qualifications and elections, as evidenced by the plurality's explicit recognition of the latitude enjoyed by states in crafting measures to combat voter fraud and ensure the integrity of the electoral system. Nevertheless, *Crawford* also embodies more troubling potentialities. Six of the nine Justices appeared to endorse the idea that the Court may weigh the onuses imposed on particular subsets of the voting population when conducting its benefit-burden calculus. More fundamentally, the Justices unanimously accepted the core post-1960s voting rights notion that the Equal Protection Clause encompasses a general right to vote, although the Justices disagree considerably as to the magnitude of the right relative to state interests. They do agree, however, that this "right to vote" can be invoked even against neutral, generally applicable laws that do not deny the franchise on any basis proscribed by the Constitution, such as race or gender. Such an approach not only subjects duly enacted laws to the vagaries of judicial caprice but also vests in the Court the expansive authority to police the political process in accordance with its own understanding of such fundamental concepts as the nature of constitutional democracy itself.

Thomas Basile

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86. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 684 (1966) (Harlan, J., dissenting). Justice Harlan further admonished the Court for injecting its preferred theory of political representation into the Fourteenth Amendment. *See id.* at 686 ("It was not too long ago that Mr. Justice Holmes felt impelled to remind the Court that the Due Process Clause of the Fourteenth Amendment does not enact the *laissez-faire* theory of society. The times have changed, and perhaps it is appropriate to observe that neither does the Equal Protection Clause of that Amendment rigidly impose upon America an ideology of unrestrained egalitarianism." (citation omitted)). Even Professor Schacter acknowledged that "[t]he Constitution does not clearly specify what democracy means, nor does it clearly establish which clauses or amendments should be seen as required by the democracy that the Constitution helps to constitute." Schacter, *supra* note 82, at 474. The subjectivity and uncertainty inherent in elucidating terms like "democracy" and "republicanism" similarly call into question Judge Bork's argument that at least some of the Court's voting rights doctrine can be reconceptualized under the Guarantee Clause of Article IV. *See BORK, supra* note 74, at 85–86. Judge Bork's proposal, however, is beyond the scope of this Comment.



*The Federalist Society National  
Lawyers Convention — 2007:  
American Exceptionalism*

**I.**

**IS AMERICA DIFFERENT FROM OTHER  
MAJOR DEMOCRACIES?**

*ESSAYISTS*

RANDY E. BARNETT  
GRAHAM WILSON

