A Scholar's Journey On The Dark Side

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These past few years I have lectured for the Federalist Society. That combined with celebrating my fortieth anniversary as an academician has prompted considerable reflection. My initial inclination was to write about how free pizza has contributed to the dissemination of conservative legal education (free pizza is frequently offered at lecturing events to entice attendance), but when I learned that the American Civil Liberties Union used the same tactic, I abandoned the project. I eventually focused on my impressions of contemporary legal education.[1] But I get ahead of myself.

I. INTRODUCTION

In the twilight of my career I now realize that even in my youth my inclinations were conservative. Born in Bensonhurst, Brooklyn, I was nurtured in a close-knit Sicilian, Roman Catholic, extended family. The neighborhood I grew up in was lower-middle class, dominated by registered democrats who, much to the chagrin of local party functionaries, consistently voted republican. In 1960 I passionately supported John F. Kennedy, which disappointed my parents, aunts, and uncles. One could conclude that my views at the time were rather conventional.[2] 1964 and

[*] Professor, St. John's University, New York, Department of Government and Politics. The author gratefully acknowledges the Intercollegiate Studies Institute for permission to include materials from an essay written honoring the contributions of George W. Carey to the study of American politics and theory. William Gangi, *The Rule of Men: How Caring Too Much About Important Things is Destroying Constitutional Law*, *in* DEFENDING THE REPUBLIC: ESSAYS IN HONOR OF GEORGE WESCOTT CAREY (Bruce Frohnen & Kenneth Grasso eds., Intercollegiate Studies Institute) (forthcoming). I also want to express my appreciation to my wife, Patricia, for her keen editorial eye, and her patience with me as I immersed myself in these materials.

1 *See generally* The Federalist Society, http://www.fed-soc.org/ (last visited Sept. 3, 2007). While the Federalist Society undoubtedly has a point of view, no one there has ever offered me guidance or asked me to subscribe to any litmus test. I often am amused when liberally inclined students, drawn to my lecture by the offer of free pizza, comment afterwards that a lot of what I had to say made sense.

2 My colleague, Professor Robert Pecorella, kindly pointed out two books illustrating the trend of previously Democratic Italian-Catholic-Americans toward Republicanism in the 1960–70s, demonstrating that my views were fairly typical. RICHARD GAMBINO, BLOOD OF MY BLOOD: THE DILEMMA OF THE ITALIAN-AMERICANS (1974); KEVIN P. PHILLIPS, THE EMERGING REPUBLICAN MAJORITY (1969). Evidently, the Italian attachment to family, and resistance to government, made them suspicious of the Democratic Party's statist approach. That, plus Irish control of the New York Democratic Party left them wary. *See id.* I recall assigning EDWARD C. BANFIELD, THE UNHEAVENLY CITY REVISITED (Little, Brown and Co. 1974) (1968) to my first classes, and being struck by his analysis. When studying minorities, rather than race, one should examine future orientation. *Id.* at 52–57. He contended that children of the poor and rich shared similar orientation—a tendency to seek immediate gratification. To be sure, their reasons were different—the poor because of despair and the rich because things were too easily acquired. He also concluded privacy was primarily a matter of upper class con-

the completion of my BA found me torn between two career paths: law or political science. I decided to pursue my master's and Ph.D. in political science, reasoning that the eventual teaching life style would allow me time to obtain a law degree, while the opposite choice would not be equally true.[3]

After my MA, I enrolled at the University of Notre Dame and before long (or so it seems in hindsight) I became deeply immersed in dissertation research, spending untold hours in the scintillating company of English common law volumes. Back then (I have not seen it in forty years) the law library was quaint, with spiral staircases leading up to what at the time was called the "stacks" (the various case reports and law reviews). It was a dusty, musty place, probably unsafe by today's environmental standards, but I loved it. I not only felt a kinship with the students who had preceded me, but like many before me, fell under the spell of Holmes and Brandeis, Cardozo and Frankfurter.[4]

Eventually I encountered a brilliant article by Herbert Packer.[5] Several things about it struck me. First, the simplicity and clarity of his hypothesis that "the shape of the criminal process has an important bearing on questions about the wise substantive use of the criminal sanction."[6] I wondered why it had never been posited before. Second, he embraced the legitimacy and usefulness of "normative model" building.[7] Third, he painstakingly sifted through conflicting viewpoints and did so with relative

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cern since in such families each child typically had his own bedroom. That was not true in poor, lower or even middle class homes, particularly where several generations of family members lived together. *Id.* at 52–77. Some of Banfield's other comments still ring true: "But facts are facts, however unpleasant, and they have to be faced unblinkingly by anyone who really wants to improve matters . . . ." *Id*. at xi. With chapter titles such as "Race: Thinking May Make It So," and "Rioting Mainly for Fun and Profit," the rumor was that the book had been banned as racist in the City universities. *Id.* at xiii.

3 My calculations did not (though perhaps they should have) encompass the realities of marriage and children, and the need to earn a living. I shrugged off the fact that one of my professors drove a ten year old car, and I knew nothing about "publish or perish." Thinking back, I realize that perhaps the strongest factor in my career choice was my aversion to commuting! Although not explored here, serious introspection makes one realize how easily the intellect is commandeered by acquired attitudes—that is, attitudes frequently bend the intellect to its will rather than the other way around. *See* WILLIAM GANGI, SAVING THE CONSTITUTION FROM THE COURTS 286 (1995) [hereinafter SAVING], *available at* http://facpub.stjohns.edu/~gangiw\Saving.pdf.

4 I distinctly recall often finding Frankfurter's opinions illuminating; primarily because of his penchant for thoroughness—his footnotes would occupy me for weeks afterward. *See, e.g*., Culombe v. Connecticut, 367 U.S. 568 (1961). Years later I concluded that Frankfurter distorted the law. *See* SAVING, *supra* note 3, at 99–102. Such distortions however were quite innocent. None of us totally escape the assumptions of our era. Publius (the common pen named used by the authors of *The Federalist Papers*— Alexander Hamilton, James Madison, and John Jay) notes: "They who have turned their attention to the affairs of men must have perceived that there are tides in them; tides very irregular in their duration, strength, and direction, and seldom found to run twice exactly in the same manner or measure." THE FEDERALIST NO. 64, at 393 (John Jay) (Arlington House 1965).

5 Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964). *Compare* Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289 (proposing a third model to complement Packer's two models).

6 Packer, *supra* note 5, at 1–2.

7 *Id.* at 5 (emphasis omitted). Packer carefully comments that "[t]hese models [referring to the Crime Control and Due Process models] may not be labeled Good and Bad, and I hope they will not be taken in that sense." *Id.* On that score successors would disappoint him.

dispassion. Finally, although he forthrightly acknowledged that under the Due Process Model, legal reform became indistinguishable from the criminal process and it would inevitably result in the guilty escaping punishment, he nevertheless embraced it.[8] It is fair to say, I think, that Packer characterized those who embraced the Due Process Model (particularly students) as being on the side of the angels. He predicted it would dominate the "future" of criminal law and on that score he certainly proved prescient.[9] Today, the Due Process Model so completely dominates the perspective of most criminal law professors, that few law students are ever exposed to pre-Warren Court precedents.[10] I will return to that particular point later.[11]

Although I rejected Packer's substantive conclusions, I now realize how fortunate I was to have encountered such a superb scholar so early in my career.[12] In that regard, throughout my career I have indeed been fortunate. For years (decades when added together), I have struggled with the work of one great scholar or another, and I have never regretted doing so. They taught me important lessons about my craft: to forthrightly confront one's opponents and to be intellectually honest.[13] I likewise urge today's law students to identify excellent scholars. If they are as good as you think they are they will point you in the direction of the best with whom they disagree. Learn to master opposition arguments as well as your own. It will make you a far better lawyer.

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8 *Id.* at 18. "[T]he criminal process is viewed as the appropriate forum for correcting its own abuses." *Id.* at 17. "[W]hile it may in the first instance be addressed to the maintenance of reliable fact-finding [sic] techniques, [the Due Process Model] comes eventually to incorporate prophylactic and deterrent rules that result in the release of the factually guilty even in cases in which blotting out the illegality would still leave an adjudicative factfinder [sic] convinced of the accused's guilt." *Id.* at 18.

9 Packer's own preferences are not at issue here. With respect to his model building he observed: "When we polarize, we distort. The models are, in a sense, distortions . . . . This Article does not make value choices, but only describes what are thought to be their consequences." *Id.* at 6. *Compare* William Gangi, *The Exclusionary Rule: A Case Study in Judicial Usurpation*, 34 DRAKE L. REV. 33, 107–10 (1984–85) [hereinafter *Exclusionary*] (the exclusionary rule is not mandated by the Constitution).

10 *See* GRANT GILMORE, THE AGES OF AMERICAN LAW 47–48 (1977) (noting that for some time the ability to identify the correct precedents has played an influential role in our law). I for one, insisted that our law school retain its copy of John Henry Wigmore's 1940 Edition of EVIDENCE. JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (3d ed. 1940) (1904). Subsequent editions incorporated progressivist assumptions, and by doing so, diminished the work as a valuable resource. *See id.* at vii. As our libraries become digitized, not only will much of this information probably disappear (who will keep older editions?) but whoever decides what is available will have a controlling voice.

11 *See infra* notes 279–280 and accompanying text.

12 I would also add Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From* Powell *to* Gideon, *From* Escobedo *to* . . ., *in* CRIMINAL JUSTICE IN OUR TIME 1 (A. E. Dick Howard ed., 1965) as well as sources cited *infra* notes 14, 17, 19. *But see* William Gangi, *The Inbau-Kamisar Debate: Time for Round 2?*, 12 W. ST. U. L. REV. 117 (1984) [hereinafter *Inbau-Kamisar*] (Kamisar's analysis rests on sub-constitutional grounds). "Our society is free to select the positions of either Kamisar or Inbau, or anyone else, on police interrogation and the appropriateness of various remedies for abuse of constitutional rights on a subconstitutional [sic] basis. Such decisions represent what self-government is all about." *Id.* at 153.

13 *See supra* note 4; *infra* note 196 and accompanying text (discussing thesis books).

From what law students have told me, however, this generation may have to work harder than I did. When I began my career, reformers were in the minority and had to first demonstrate their mastery of our legal tradition before they were given much credence. For example, by probing the *footnotes* in one of Yale Kamisar's articles, one still acquired considerable insight into the very traditions he advocated abandoning in his *text*.[14] Young professors today are far more likely to be theoretically grounded than precedent grounded, and as a result (I hope to illustrate), law students find it much more difficult to escape the conventional wisdom that surrounds them.[15]

Returning to my own professional journey, my dissertation and initial publications (one and the same) chronicled the Supreme Court decisions on coerced confessions.[16] Before long however, I focused on and pursued the exclusionary rule. Drawn to that topic, I ran across yet another brilliant article.[17] The authors equated the imposition of the exclusionary rule as synonymous with the exercise of the power of judicial review.[18] They labeled their approach the judicial integrity argument[19] and it dazzled me. Although I *knew* their conclusions were wrong, I could not find fault in their approach. Now, pretty grumpy, I pushed on, and the deeper I immersed myself the more one question emerged: *What was the proper role of the Supreme Court?* Recognizing (not too graciously) that I was in over my normative head, I abandoned the exclusionary rule research and focused my attention on the issue of judicial power.

A virtuoso performance by Raoul Berger soon caught my attention. [20] As a result I collected, read, and digested hundreds of pro-and-con articles.

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14 *See* Yale Kamisar, *A Dissent from the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1967).

15 *See infra* notes 35–37 and accompanying text. When lecturing, I point out that most constitutional law textbooks are around fifteen hundred pages. Each year the Supreme Court decides approximately eighty cases. Since many of these new cases have a significant impact on the law, textbook editors are compelled to make room for them. Over the past twenty-five years, I have noticed that many textbooks have dropped quite a few traditional precedents or retained almost only the holding. As a consequence, unless one's professor points them in the right direction, many law students have become unfamiliar with older precedents.

16 *See* William Gangi, *Confessions: Historical Perspective and a Proposal*, 10 HOUS. L. REV. 1087 (1973) [hereinafter *Confessions*]; William Gangi, *The English Common Law Confession Rule and Early Cases Decided by the United States Supreme Court*, *in* AMERICAN JUDICATURE SOCIETY 1973 (INFORMATION REPORT SERIES, No. 205, Sept. 1973) [hereinafter *English*]; William Gangi, *A Critical View of the Modern Confession Rule: Some Observations on Key Confession Cases*, 28 ARK. L. REV. 1 (1974) [hereinafter *Critical*]; William Gangi, *The Supreme Court, Confessions, and the Counter-Revolution in Criminal Justice*, 58 JUDICATURE 68 (1974).

17 *See* Thomas S. Schrock & Robert C. Welsh, *Up From* Calandra*: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1975). *Compare Exclusionary*, *supra* note 9, at 86–87, 118–20 (citing Schrock & Welsh for the contention that the exclusionary rule is really judicial review and questioning the constitutional basis thereof).

18 Schrock & Welsh, supra note 17, at 324–25.

19 *Id.* (noting that the exclusionary rule provides a judicial method for refusing to validate police illegalities).

20 Raoul Berger, *The Scope of Judicial Review: An Ongoing Debate*, 6 HASTINGS CONST. L.Q. 527 (1979).

I then created about a forty square-inch chart as well as a citation system in order to efficiently identify which articles (or part of articles) discussed which topic. Related issues grew so numerous, complex, and interwoven, it took me a year to sort, organize, and label them before I could publish my findings.[21]

The remainder of this article is divided into five parts, each of which is designed to advance the article as well as provide support for succeeding parts. Part II briefly reviews the principles that separate those who support contemporary judicial power from those who oppose it. Part III asserts that by caring too much about important things, students undermine the competencies of federal and state governments, as well as diminish the people's right to self-government. Part IV describes which issues law students must confront and what tools they must acquire before, if ever, constitutional law is re-founded. Part V places the preceding parts in the context of our Madisonian schema, and finally, Part VI offers my conclusions.

II. WHAT DIVIDES US

Constitutional scholars in the United States today may be said to reside in two camps: interpretivists and non-interpretivists.[22] I contend that the vast majority (including the faculties of our most prestigious legal institutions and political science departments) champion non-interpretivism. When that view is examined *in toto* its premises are integrated, complex, and comprehensive.[23] Generally speaking, non-interpretivists view many constitutional phrases as ambiguous, abstract, open-ended, malleable, and expandable. In this regard, for example, some argue that since the Constitution's ratifiers are long dead, their understanding of the document should

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21 William Gangi, *Judicial Expansionism: An Evaluation of the Ongoing Debate*, 8 OHIO N.U. L. REV. 1 (1981), [hereinafter *Expansionism*] (arguing that Raoul Berger's position in the debate over judicial power is supportable). My admiration and respect for Berger's contribution to my growth as a scholar may be found elsewhere. *See* William Gangi, *Raoul Berger's Impact on Constitutional Law*, 3 BENCHMARK 189 (1987). Three years after publishing the *Expansionism* article I returned to the exclusionary rule. *See Exclusionary*, *supra* note 9. A simple comparison of the titles indicates Berger's impact on my research.

22 This assertion is of course an exaggeration. First, many scholars consider themselves somewhere in the middle. Whether or not that stance is viable, I'll leave to the reader to determine. Publius suggests that at times it is not possible. *See* THE FEDERALIST NO. 15 (Alexander Hamilton), *supra* note 4, at 105 (noting that there are times when the road citizens must travel is complex and full of obstacles, but a final decision must nevertheless be made). Second, I omit what I consider mostly semantic differences between the use of the terms "interpretivist," "originalist," or "intentionist." *See* William Gangi, *The Supreme Court: An Intentionist's Critique of Non-Interpretive Review*, 28 CATH. LAW. 253, 273–84 (1983) [hereinafter *Intentionist*]. Perhaps I could have categorized the two positions as "models," as did Packer on another subject (*see supra* note 5), but I chose to label each non-interpretivist argument strand as "symbols." *See Expansionism*, *supra* note 21, at 17 n.149. Finally, it would be more accurate to characterize the division between the two camps as one between those who are *aware* there is a debate, and those who think none exists. The latter either believe nothing important has changed about constitutional law, or that non-interpretivists view interpretivists as simply having different public policy preferences than they do. Law students sense something is going on, but they are not quite sure what it is. The forces of non-interpretivism have become so strong that many law school professors dismiss the interpretivist position as either literalism, attempts to read the minds of the framers, or the increasingly popular "fundamentalist" condemnation.

23 *See* SAVING, *supra* note 3, at 194–225; *Expansionism*, *supra* note 21, at 17–55.

no longer be determining. Instead, every generation should be entitled to redefine the Constitution to suit its needs. [24]

Other non-interpretivist arguments recall the *ideals* professed by the American people when they fought the Axis powers, and contrast them with the actualities persisting after World War II: racial segregation, inadequate state systems of criminal justice, and continued gender discrimination.[25] They contend that during the late 1940s and early 1950s attempts at legislative reform either failed or never materialized, and federal and state executives far too often proved unsympathetic to marginal voting blocks.[26] The legislative process (whether at the state or federal level) and the amendment process simply proved far too *cumbersome* to be of any practical use. These developments indicated that our democratic processes were seriously flawed, if not outright defective, and that something had to be done before untold damage, perhaps even civil unrest, ensued.[27]

Non-interpretivists point out that it was the judiciary—particularly the Supreme Court—that bridged the *gap* between American ideals and existing realities. Courts stepped into the *vacuum* created by the unresponsive political branches.[28] By actively pursuing much needed societal reform, the Supreme Court soon became our nation's moral conscience. Courts could act boldly, non-interpretivists claim, because, unlike elected officials, judges could do the *right thing* without fear of losing their jobs. As a consequence, for more than fifty years, the Supreme Court has changed public social policies for the better. Having done so, Americans are far more dedicated to personal liberty and equality than ever before. In fact, the Supreme Court has almost single-handedly erased our past failures, increasingly shaping the law to make us more the people we had professed to be. Now is no time to stop these advances. The justices should continue to make decisions that encourage us to become more the people we *ought* to be.[29] In short, the non-interpretivist position is a pretty impressive point of view. Law students should recognize it, even if they remain unfamiliar with its more sophisticated arguments.

In contrast, interpretivists are a small, isolated, and embattled minority who contend that constitutional interpretation should usually begin with the ratifiers' understanding of the Constitution. They also maintain that since the Supreme Court often neglected to follow that approach, many landmark decisions are illegitimate. Put another way, interpretivists assert that con-

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24 *Expansionism*, *supra* note 21, at 18. *See, e.g.*, Arthur Selwyn Miller, *An Inquiry into the Relevance of the Intentions of the Founding Fathers, With Special Emphasis Upon the Doctrine of Separation of Powers*, 27 ARK. L. REV. 583, 601 (1973) ("The Founding Fathers have been buried. They should not rule us from their graves.").

25 *Expansionism*, *supra* note 21, at 22–24.

26 *Id.* at 37–38.

27 *Id.* at 48–49.

28 *Id.* at 23.

29 *See generally* CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT (2001). "The Constitution's open texture invites judges to engage in principled argument about moral and political issues." *Id.* at 6. *But see* William Gangi, Book Review, 31 PERSP. POL. SCI. 113 (Spring 2002).

siderable doubt exists as to whether we are still a republic, or whether the Constitution has become "a dead letter."[30]

When not ignoring or belittling their opponents' views, non-interpretivists reject interpretivist arguments as much ado about nothing. They point out that over the past fifty years, greater judicial involvement has not only produced positive public policy results, but disputes over interpretation are hardly new.[31] Such disputes have long existed and have historically been even more vehement than they are today. Furthermore, they charge that interpretivists neglect to mention that constitutional adjudication has remained largely unchanged: litigants file suits, district court judges preside over trials and render opinions, and appeals proceed as they always have. Likewise, the Supreme Court remains, as the Constitution's framers intended, the Court of last resort, and it continues to exercise a power long considered legitimate—the power of judicial review.[32] Finally, they observe that astute scholars still analyze and comment upon the Court's work.[33] In sum, once differences in time, circumstances, and ideology are accounted for, despite interpretivist claims to the contrary, the Supreme Court plays its traditional role and constitutional law remains alive and well.

Interpretivists like me respond by asserting that courts have assumed a new and revolutionary role, one inconsistent with the framers' design. We insist that beneath the veneer of continued normalcy, constitutional law has been shorn of its substance and that under the guise of interpretation our tradition of self-government has been replaced by *de facto* judicial governance. While acknowledging that non-interpretivist policy preferences (e.g., race, equality, or freedom of speech) are laudable, many precedents remain suspect on two grounds. First, noble intent is an inadequate defense against the charge of illegitimacy, and second, public policy preferences are for the *people*, not courts, to decide.[34]

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30 George W. Carey, *The Philadelphia Constitution: Dead or Alive?*, *in* LIBERTY UNDER LAW 71, 75 (Kenneth L. Grasso & Cecilia Rodriguez Castillo eds., 2d ed. 1998). *See also* GEORGE W. CAREY, IN DEFENSE OF THE CONSTITUTION (Liberty Fund, Inc. 1995) (1989) [hereinafter DEFENSE]. Carey speculates that the framers' limited understanding of judicial review may well be "passé" and "[w]hat we have in its place is a theory of judicial supremacy, a theory that, remarkably enough, is supported by most of our elected leaders, who accept the notion that the Court is the final arbiter as to the meaning of the Constitution." *Id.* at 186–87. I resist Carey's conclusion, but concur in his second finding. *See infra* note 354 and accompanying text. Even more intriguing and somewhat ironic is that when the framers created the judiciary, they purposely *departed* from the republican elective principle (e.g., they granted life tenure to judges during good behavior rather than periodic election), in an effort to *reduce* the prospect of governmental tyranny (i.e., the consolidation of executive, legislative, and judicial power into a single hand). *See* DEFENSE, *supra* note 30, at 132–35; *infra* notes 240–247 and accompanying text.

31 *See* SAVING, *supra* note 3, at 221–22.

32 *Id.* at 195–205.

33 *Id.* at 220.

34 *See generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004). We can briefly mention here that laissez-faire capitalism captured the imagination of the American intelligentsia–including its judges. As a result, for fifty years (between the 1880s and 1930s), the Supreme Court struck down state and federal legislation attempting to ameliorate

In the name of frank disclosure let this interpretivist put some of his cards on the table. I do not ask readers to agree with me, only to be forthright with themselves, that is, to admit when at one point or another, even briefly, they entertained conclusions similar to those reached herein. The first reading assignment in my undergraduate courses in constitutional law is Plato's analogy of the cave.[35] I then ask students to imagine the Supreme Court justices standing at the rear of the cave, casting shadows (decisions) upon the front wall. Seated in successive rows are constitutional scholars, members of the intelligentsia (lawyers, political scientists, and educators), and behind them elected officials and media representatives. Common citizens fill the remainder of the cave. As in Plato's analogy all those seated are prisoners with chains about their necks, their heads fixed to view the shadows on the front wall.

Each October, when the Court starts a new term, I claim that yet another round of shadows is cast upon our political life. Presumed experts and media representatives soon confidently speak of *new* rights—or rights *dashed*—while in learned journals constitutional scholars eventually explain how the newly-designed shadows portend a deepening of—or a retreat from—our cave's commitment to greater personal liberty, equality, or social justice. In this manner, common citizens learn from those supposedly *more expert*, that the new shadows are full of wonders or dangerous consequences.

Law students, I suggest, are particularly vulnerable to these shadow-makers. They learn that the law craft consists of three steps. First, they must identify what desirable public policy outcomes they want. Then they must use their imagination, combined with recently minted interpretive approaches,[36] so as to bring the policy outcome they desire within the meaning of one constitutional phrase or another—that is, either linking it with an existing right (e.g., free speech) or creating a new one (e.g., privacy). Finally, law students practice honing their reductionism skills—that is, the ability to minimize or obliterate any competing value or precedent—which once again requires their imagination. Put another way, their constitutional law education often boils down to learning how to get a court to do what they believe is right.

What, I ask rhetorically, could be the motivation for pursuing constitutional law in such a manner? The motivation is—what law students should always expect it to be—virtuous, but that makes it no less dangerous. By using judicial power many non-interpretivists wish to perfect the Constitu-

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the ill effects of modern industrialization. The justices then, as now, claimed that the *Constitution* compelled their decisions. But, in fact, they simply imposed upon the American people the dominant intellectual prejudices of their era. *See Intentionist*, *supra* note 22, at 260–64; DEFENSE, *supra* note 30, at 3–17; SAVING, *supra* note 3, at 94–97; *infra* note 327 and accompanying text.

35 PLATO, *Republic*, *in* THE COLLECTED DIALOGUES OF PLATO 575, 747–51 (Edith Hamilton & Huntington Cairns, eds., Paul Shorey trans., Princeton Univ. Press 1961) (1938).

36 SAVING, *supra* note 3, at 125–67.

tion as well as our societal faults.[37] Put another way, they envision a world where the sacrifices of Martin Luther King would become unnecessary. Non-interpretivists see themselves as occupying the moral high ground.

Curmudgeon that I sometimes am, I characterize many widely-admired Supreme Court doctrines as containing little legal substance. I am referring to such doctrines as: evolving standards of decency, fundamental rights, preferred freedoms, a whole *bag full* of nexus and balancing tests, as well as intriguing phrases such as penumbras and emanations, vagueness, overbreadth, chilling effect, expectations of privacy, excessive entanglement, grossly disproportionate, and perhaps, the mother of all shadows—selective incorporation. Although some are admittedly snazzy and others possess a modicum more of traditional interpretive merit than do others, more often than not what one finds beneath their glossy surfaces are public policy arguments dressed-up as constitutional ones. As one scholar astutely observed of the Warren Court opinions: they "seem more and more devious, sloganistic and directed to the human thirst for fairytales . . . . Surely [the] purpose [being] to obscure (for lesser minds) . . . raw exercise[s] of judicial fiat."[38] Since that statement was made in 1979, nothing has materially changed.

Once law students penetrate the rhetoric (not easy to do if you share either the mindset or *cause*) they will realize that many Supreme Court opinions simply provide the rationalizations of five Justices for imposing their public policy predilections on the American people, and they do so by skillfully hiding them under the subterfuge of *interpretation*. The Justices are constantly creating new shadows and tweaking old ones, and in doing so, they also use other modern so-called interpretive devices—such as approaching constitutional phrases at higher levels of generality.[39] Or a ma-

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37 *See generally* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981). The reader may wish to keep Publius' comment in mind:

> On the other hand, it will be equally forgotten that the vigor of government is essential to the security of liberty; that, in the contemplation of a sound and well-informed judgment, their interests can never be separated; and that a dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people than under the forbidding appearance of zeal for the firmness and efficiency of government. History will teach us that the former has been found a much more certain road to the introduction of despotism than the latter, and that of those men who have overturned the liberties of republics, the greatest number have begun their career by paying an obsequious court to the people, commencing demagogues and ending tyrants.

THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 4, at 35.

38 Wallace Mendelson, *Raoul Berger's Fourteenth Amendment—Abuse by Contraction vs. Abuse by Expansion*, 6 HASTINGS CONST. L.Q. 437, 440–41 (1979).

39 *See, e.g.*, Paul Brest, *Who Decides?*, 58 S. CAL. L. REV. 661, 662 (1985) ("level of generality"); Larry A. Alexander, *Painting Without the Numbers: Noninterpretive Judicial Review*, 8 U. DAYTON L. REV. 447, 452 (1983) ("higher and higher levels of generality"); Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1035, 1045 (1981) ("different levels of generality" and "sufficiently high level of abstraction"); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 742 (1982) ("general language"); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1245 (1987) ("historical intent may be fixed at highly varied levels of abstraction."). We have moved further and further away from our legal tradition. One of my all time favorites is Professor Leif Carter's use of "intersubjective zap." Professor Les-

jority will turn to the ever-popular—though maddeningly and inconsistently applied—appropriate level of judicial scrutiny. In this context, is it any wonder why, over the past fifty years, once clearly-understood constitutional phrases have become mysteriously *ambiguous*?

I fully understand how exciting and tempting it is to be swept into these powerful shadows and into the impressive imaginations of so many first-rate scholars. But I counsel law students to recognize these doctrines and interpretive devices only for what they *functionally* accomplish: allowing judges, under the guise of interpretation, to substitute *their* judgments for those of legislators. Conversely, if some among you wish to be constitutionalists in the traditional sense, you face some tough choices. Even if you believe that the public policy preferences enunciated by Supreme Court majorities are morally superior, more ethically correct, or otherwise preferable to those presently operative in our society, you must decide whether or not they have been illegitimately imposed.[40] Other questions you must ask and answer are: Where would you locate the authorization for courts to do so? And, would such a power change our regime from a democratic republic to a judicial oligarchy?

I will briefly return to the interpretivist/non-interpretivist dispute, but before doing so, I cannot mislead you into believing that any conclusions you reach on the merits of said dispute would tip the balance one way or the other. As I mentioned earlier non-interpretivists clearly dominate in the law schools, as they do elsewhere in academia. My purpose here is simply to increase your awareness of the assumptions that very likely pervade your education. After spending more than thirty years periodically examining the legal literature, I am convinced that much of what today masquerades as profound non-interpretivist normative constitutional theory, more often than not, is utter nonsense. Far too often such literature ignores the framers' design, historical facts, contrary precedents, makes innumerable unsupported assertions, or is permeated with personal assessments about what the American people need or should desire. Furthermore, in their desire to empower the Supreme Court, non-interpretivists have redefined republicanism, and in so doing *have ignored the need to obtain the people's consent*.

One aside: When I'm out lecturing, students frequently report that their courses in constitutional law have become truncated, consisting almost exclusively of either First Amendment, privacy issues, or whatever

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lie Goldstein quoted him in a paper: "Does the Court opinion produce in its audience a felt sense of 'intersubjective zap,' as a good rock concert does? If so, it is a good opinion." Leslie F. Goldstein, *Judicial Review and Democratic Theory: Guardian Democracy vs. Representative Democracy*, 40 W. POL. Q. 391, 395 n.17 (1987).

40 It is far easier to persuade a few judges of the merits of one's public policy views than embracing the far more arduous task demanded by the Constitution: to convince your fellow citizens. Professor Eisgruber, for example, combines moral fervor, and simultaneously redefines democracy. *See* EISGRUBER, *supra* note 29. "I maintain that the Supreme Court should be understood as a kind of representative institution well-shaped to speak on behalf of the people about questions of moral and political principle." *Id.* at 3. Uh, no thank you.

topics have captured their professor's fancy. My own impression is that selective Bill of Rights provisions, or the Fourteenth Amendment, have almost completely swallowed the original Constitution. The constitutional law tradition is far richer than what many law students are experiencing today. These "Johnny-One-Note" (or Two, or Three) constitutional law courses are analogous to the sometimes female complaint that far too many men think with a single appendage.

In sum, the legitimacy of Supreme Court decisions cannot rest upon the fact that the public policies implemented are worthy ones, or the ultimately unknowable conviction that without judicial intervention, public policy reforms never would have materialized. But if the reader thinks otherwise, finds contemporary sleight of hand arguments convincing, agrees that courts ought to make public policy determinations, or holds certain policy results so dear that any other considerations—including constitutional legitimacy—pale in comparison, all I can do is ask what they will say if a Court majority emerges with a *different* personal agenda? For the imprudent or those who have a perverse desire to go against conventional wisdom, or even those who are simply unable to stifle their intellectual curiosity, read on . . . and welcome to the Dark Side.[41]

III. CARING ABOUT IMPORTANT THINGS AND ITS IMPACT ON GOVERNMENTAL COMPETENCY

To probe *any* substantive area of constitutional law leaves one embarrassed. I speak here, not about whether you agree with one Court decision or another, but about whether you find the decisions cogently (not simply logically) argued. Do precedents form a coherent body of law? There actually has been a "mess" for quite some time.[42] All this I suggest is not accidental; it was inevitable once the Supreme Court became a dominant force in public policy-making. That new role (or, perhaps, that march in a new direction) was bound to distort our history and precedents. You cannot have one without the other.[43] I put aside here legitimacy issues in deci-

41 *See supra* note 2; Gary L. McDowell, *Introduction* to JUDITH A. BAER ET AL., POLITICS AND THE CONSTITUTION: THE NATURE AND EXTENT OF INTERPRETATION, at vii, vii (1990) ("it is not too much to say that the preference for the rule of law over the rule of men depends upon the intellectual integrity of interpretation."); *Compare* J. Skelly Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971) (discussing Bickel's assertion that the Warren Court was "result-oriented," relying "on events for vindication more than on the method of reason for contemporary validation") *with* Aileen S. Kraditor, *On Curiosity: or, the Difference Between an Ideologue and a Scholar*, 15 INTERCOLLEGIATE REV. 95 (Spring 1980) (describing an ideologue as someone who ignores information contrary to his hypothesis and a scholar as someone who humbly seeks the truth).

42 *See* Gary C. Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361, 1361 (1979). *See* Robert G. Dixon, Jr., *The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 BYU L. REV. 43; SAVING, *supra* note 3, at 252–56 (tracing the roots of modern substantive due process). *See also infra* note 138.

43 When legislative thinking changes, no one expects continuity. It is a matter of counting votes. For a brilliant manual on how the Supreme Court might (and did!) change public policy direction without letting the cat out of the bag, see Jerold H. Israel, Gideon v. Wainwright*: The "Art" of Overruling*, 1963 SUP. CT. REV. 211. As one scholar observes, it should not come as a surprise if students today conclude that "the Supreme Court [is] first among the presumed equals." GEORGE W. CAREY, THE

sions, which under the rubric of interpretation, blatantly legislate,[44] and those decisions in which previously-unknown rights were created,[45] and even those decisions where the people ultimately are coerced to adhere to policy options not mandated by the Constitution.[46] I want to focus here instead on government competency—an issue of concern to democrats and republicans, liberals and conservatives. In some respects the examples that follow I have chosen arbitrarily, and students may eventually wish to apply the criteria employed to other areas of constitutional law where, for one reason or another, they suspect legislative discretion has been curtailed because legislators anticipated (or were advised) that the proposals contemplated would not be acceptable to a majority of Justices.

A. We Care About Racism and Inequality

Brown v. Board of Education[47] is perhaps the most influential case decided by the Supreme Court in the twentieth century. It stands for the principle that all races should be treated equally. The Court's immediate concern of course had been with segregated schools, but *Brown* certainly contributed, a decade later, to the passage of the Civil Rights Act of 1964.[48] Since then, Americans have become more sensitive to gender discrimination as well as other areas of contemporary concern, such as sexual harassment and discrimination based on sexual orientation. Many non-interpretivists, in fact, proudly *locate the birth of modern judicial review in Brown*, and insist that, as a result, many Americans care more deeply about

FEDERALIST: DESIGN FOR A CONSTITUTIONAL REPUBLIC 169 (1989) [hereinafter DESIGN]. There are many reasons for this observation. First, students tend to assume that scholars investigating our history apply consistent standards. Not so. *See generally* GILMORE, *supra* note 10. For a perceptive review of these issues, see Stephen B. Presser, *Confessions of a Rogue Legal Historian: Killing the Fathers and Finding the Future of the Law's Past*, 4 BENCHMARK 217 (1990). Second, insights are as often lost as found. *See* William Gangi, *The Supreme Court and Coerced Confessions:* Arizona v. Fulminante *in Perspective*, 16 HARV. J.L. & PUB. POL'Y 493, 524–26 (1993). Third, with increasing frequency the Justices cite their *own* prior opinions in a process that eventually converts initially unsupported assertions into settled case law, and which is then uncritically embraced by other scholars. *See* Klaus H. Heberle, *From* Gitlow *to Near: Judicial "Amendment" by Absent-Minded Incrementalism*, 34 J. POL. 458 (1972); *Expansionism*, *supra* note 21, at 41–43. Finally, we cannot assume that each new appointee is better than his/her predecessor, or even has a similar command of a body of case law.

44 *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Roe v. Wade, 410 U.S. 113 (1973).

45 *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

46 *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961).

47 Brown v. Bd. of Educ., 349 U.S. 294 (1955).

48 42 U.S.C. § 1971 (2000). *See Expansionism, supra* note 21, at 33–35 (to recognize that the Court is largely responsible for many social reforms does not resolve legitimacy issues). Students of constitutional law know that the Civil Rights Act of 1964 was passed under Congress' power to control *interstate commerce*—not the Fourteenth Amendment equal protection clause. The latter had been rejected as a sound basis for controlling private discrimination. *See* The Civil Rights Cases, 109 U.S. 3 (1883). *Brown* and the Civil Rights Act are related in more of a political than a constitutional sense. Implementation and enforcement of *Brown*, coupled with the Civil Rights movement, created powerful political images (black children denied entrance to school by an assembled national guard, images of dogs attacking crowds, beatings, and so on). While undoubtedly there were those committed to continuing segregation, others were equally determined to dismantle it. Media images apparently swayed a considerable mass of heretofore indifferent citizens, in favor of the Civil Rights Act. As I will suggest later in this article, American politics often places a determining voice in such hands. *See infra* text accompanying note 317.

all types of discrimination than they ever did before. They are probably right.

But things change. Once the Supreme Court turned to forced busing, the originally supportive public majority began to fall apart, both on and off the court. School desegregation cases soon metamorphosed into affirmative action, then into the far more complex issue of reverse discrimination, and more recently, centered on the constitutionality of school vouchers (which at least indirectly contains a racial component).[49] In fact, race issues persist today and plague our public schools, particularly in urban areas.[50] One specific concern is the disproportionately high drop-out rate among black male high school students, which in turn negatively impacts on the number of black males in colleges, graduate, and professional schools. That decline cascades adversely on black job opportunities, equal opportunity, and upward mobility.

Some educators argue that the high drop-out rate among black high school males is at least partially due to the lack of appropriate role models. These educators advocate that some *public* funds should be expended to create *all black* male high schools, where in a disciplined atmosphere, with a vigorous curriculum and black male teachers, the drop-out rate might be reduced. Would such an experiment work? I have not the foggiest idea. Would it be worth a try? In discussing it, interested parties might weigh evidence and alternatives, concluding that while it may not be the only proposal, or the best one, they will not know how effective it might be unless it is given a try.

But would public funding run afoul of the very principles established in *Brown*? Some scholars might argue that, no, it would not, because the Fourteenth Amendment does not prohibit *beneficent* discrimination. Other scholars would reply that such interpretive distinctions only encourage racial divisions. Still, other scholars may respond that *Brown* poses a constitutional obstacle to public funding because such funding would be unquestionably racist.[51] My point is this: public policy race discrimination issues (and for that matter gender and sexual orientation ones) are far more complex today than they were when *Brown* was decided, and public opinion is far more fragmented. Why should judicial assessments carry more weight

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49 *See* Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971) (racial desegregation); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (affirmative action); Grutter v. Bollinger, 539 U.S. 306 (2003) (reverse discrimination); Gratz v. Bollinger, 539 U.S. 244 (2003) (reverse discrimination); Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (school vouchers).

50 Talk about odd bedfellows: an atheist donated 22.5 million dollars to New York catholic schools because he thought they were doing a better job than the public schools. Erin Einhorn, *My Faith is in Cash*, N.Y. DAILY NEWS, June 3, 2007, at 13. His approach is to help those who help themselves, by subsidizing those who sacrifice to put their children through private school. In his colorful language: "And to the extent that they don't help themselves, then f--- 'em." *Id.* Public schools he described as "'a horror and an outrage[.]' . . . 'I wouldn't give a nickel to the public school system.'" *Id.*

51 Similar issues arise with respect to publicly funded educational experiments based on gender segregation, which some educators have suggested to remedy unequal performance among females in mathematics and science programs.

than, or limit, legislative options?[52] After all, those restrictions are ultimately arbitrary, meaning that upon careful examination, one finds that the so-called constitutional arguments are often indistinguishable from the sub-constitutional arguments supporting the same result.[53] Do law students imagine that such clashes of opinion and the realities they represent will be permanently resolved by judicial *fatwas*, or that there is only one way to resolve them? And in seeking a single *national* solution, are we compelled to ignore one of the most touted strengths of a federal system: state experimentation?[54] Today, *Brown* contributes to legislative incompetence because the once-named "last resort"[55] of constitutional argument (that is, equal protection) now inhibits legislative creativity.[56]

B. We Care About Procedural Rights

Procedural rights traditionally revolve around the question of *how*: how executive and judicial officials must proceed before doing something, especially with respect to how criminal defendants are treated.[57] For more than forty years, the assumption that "[t]he quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law" has dominated contemporary criminal law.[58] Non-

52 *See generally* Samuel G. Freedman, *Still Separate, Still Unequal*, N.Y. TIMES, May 16, 2004, Book Review, at 8 (demonstrating that beneficiaries of *Brown v. Board of Education* question its wisdom). Justice Clarence Thomas, for example, contends that affirmative action decisions may themselves perpetuate badges of racial inferiority. *See Grutter*, 539 U.S. at 373 (Thomas, J., concurring in part and dissenting in part). *But see* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 127 S. Ct. 2738 (2007) (recent desegregation case).

53 Law students are aware of that reality. Is it worse today than when Professor Bridwell described it nearly thirty years ago? He noted:

> Many interested readers would be offended by the realization that *only* a policy debate over results is involved in much constitutional law scholarship, and perhaps some would be too embarrassed to conclude that they had been so far outside the prevailing ideological fashion that they failed to realize that a jargonized, result-oriented dialogue had largely replaced the analytical device of separating principles from results.

Randall Bridwell, *The Federal Judiciary: America's Recently Liberated Minority*, 30 S.C. L. REV. 467, 473 (1979). *See also Expansionism*, *supra* note 21, at 35–37; SAVING, *supra* note 3, at 208–09.

54 SAVING, *supra* note 3, at 97–98, 170–75. Although non-interpretivist generally applaud the benefits of federalism, for them, state experimentation is confined to the economic sphere. This double-standard was articulated by Justice Goldberg: "[E]xpansion of individuals' rights is based on the fact that under our constitutional scheme these rights do and should expand. Overruling is therefore permissible, or rather intrinsically necessary, to facilitate this beneficial expansion, which I have shown to be sanctioned by tradition and reason." ARTHUR J. GOLDBERG, EQUAL JUSTICE: THE WARREN ERA OF THE SUPREME COURT 85 (1971).

55 Buck v. Bell, 274 U.S. 200, 208 (1927).

56 Berger demonstrates to my satisfaction that the Equal Protection Clause was understood by its framers to be "wedded and confined to those enumerated rights" subsumed in the privileges and immunities clause. Raoul Berger, *The Fourteenth Amendment: Facts vs. Generalities*, 32 ARK. L. REV. 280, 286 (1978) [hereinafter *Fourteenth*]. The contention that the framers of the Fourteenth Amendment, by use of the equal protection language, intended that all people in the future could or would have to be treated equally in all things, finds little support. RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 166–69 (1977) [hereinafter GOVERNMENT]. *See infra* note 138.

57 *See infra* notes 207–219 and accompanying text.

58 Walter v. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 26 (1956). *But see Exclusionary*, *supra* note 9, at 111–13 (contending that the statement does not reflect our histo-

interpretivists preach that Americans ought to care about protecting defendants' rights, first, because in the long run they have more to fear from abusive police conduct (alluding to the Nazi or Soviet examples), than they do from any criminal activity, and second, because each one of us one day might find ourselves a criminal defendant. Wouldn't we then want such rights to be defined generously?[59] Accordingly, non-interpretivists celebrate an ever-expanding plethora of rights, emphasizing that they be equally available to disadvantaged minorities.[60]

There is no reason (*here*, at least) to quarrel with such assumptions.[61] Both justifications assume that pertinent Bill of Rights provisions were always considered superior to, synonymous with, or preceded concern for, the common good. I wouldn't bet the farm.[62] Taken individually or collec-

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ry and is dependent upon defective premises); *Critical*, *supra* note 16, at 38–44 (proffering that the Supreme Court's use of "lessons of history" does not stand up to critical analysis).

59 The intriguing question is: Is not that precisely the situation faced by the ratifiers of the Constitution and the Bill of Rights? Yet, evidence is lacking that any such intention existed. And if the second argument in the text is so telling, why do we not leave redefinition to the people? The non-interpretive response: United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (holding that courts are obliged to step in where the democratic process fails, such as with permanent minorities).

60 *See* David L. Bazelon, Comment, *Equal Treatment in the Enforcement of the Criminal Law: The Bazelon-Katzenback Letters*, 56 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 498 (1965); EDITORS, THE CRIMINAL LAW REVOLUTION AND ITS AFTERMATH 1960–1971 (1972).

61 *See generally* EUGENE W. HICKOK, JR. ET AL., THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING (Eugene W. Hickok, ed.) (1991); William Gangi, *O What a Tangled Web We Weave . . .* , THE PROSECUTOR: J. NAT'L DISTRICT ATT'YS ASS'N, Spring 1986; *Exclusionary*, *supra* note 9, at 123.

62 As late as 1940, for example, John Henry Wigmore noted that courts did not reject the admissibility of confessions simply because promises were not kept, confidences betrayed, deceptions intentionally perpetrated, or the methods used to obtain them were illegal. WIGMORE, *supra* note 10, § 823, at 249. Similarly, in 1955, Albert R. Beisel, Jr. observed that "[c]onfessions at common law are not invalidated just because compulsion was applied or inducements held out to an accused, but because compulsion or inducement render or are likely to render an accused's confession untrustworthy as criminal evidence." ALBERT R. BEISEL, JR., CONTROL OVER ILLEGAL ENFORCEMENT OF THE CRIMINAL LAW: ROLE OF THE SUPREME COURT 47 (1955). The Fifth Amendment's privilege against compulsory self-incrimination apparently developed in the context of the "moral compulsion that an oath to a revengeful God commands of a pious soul." R. Carter Pittman, *The Fifth Amendment: Yesterday, Today and Tomorrow*, 42 A.B.A. J. 509, 510 (1956). According to Wigmore, courts also did not reject confessions on the basis of violating the privilege against self-incrimination. "The sum and substance of the difference is that the confession-rule aims to exclude self-criminating statements which are *false*, while the privilege-rule gives the option of excluding those which are *true*." WIGMORE, *supra* note 10, § 823, at 250. Prior to decisions of the Warren Court the privilege against compulsory self-incrimination applied only in the courtroom, after a "criminal case" commenced, which occurred only after an indictment. U.S. CONST. amend. V. The framers of the Fifth Amendment evidently considered it inhumane to require a defendant to take an oath in such proceedings. It created a dilemma—if, on the one hand, the defendant told the truth, revealing his guilt, he could lose his life; on the other hand, if he lied after having taken an oath to tell the truth, he could suffer eternal damnation. WIGMORE, *supra* note 10, § 2263. *See also* JOHN MACARTHUR MAGUIRE, EVIDENCE OF GUILT: RESTRICTIONS UPON ITS DISCOVERY OR COMPULSORY DISCLOSURE 120–21 (1959); EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 146 (4th ed. 1963); CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 155 (1954); LEWIS MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 10 (1959); BEISEL, *supra*, at 86–87; Kamisar, *supra* note 14, at 68–69; Charles T. McCormick, *The Scope of the Privilege in the Law of Evidence*, 16 TEX. L. REV. 447 (1938); William T. Plumb, Jr., *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 382 n.226 (1939), *English*, *supra* note 16; and LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT (Ivan R. Dee 1999) (1968). Pittman describes the privilege as a defensive device against laws that did not enjoy the sanction of public opinion. Its growth paralleled the development of a jury trial. He observes:

tively, these assumptions contribute to legislative incompetence. Take the issue, for example, of profiling. Courts frequently condemn profiling; they claim that under strict scrutiny (one of those new interpretive devices I spoke of earlier) profiling of one sort or another constitutes an unreasonable search and seizure. At best—with a maddening array of ifs, whens, and buts—courts have reluctantly approved police profiling techniques designed to identify, for example, "drug courier profiles," that is, behavior patterns of potential drug smugglers (flying repeatedly to particular locations, paying cash for the tickets, and seldom checking luggage).[63] Should considerations of race or ethnicity *automatically* result in a determination of unreasonableness?[64]

While the Bill of Rights certainly placed restrictions on federal governmental conduct, *never* was it understood to require the suspension of common sense.[65] You know where I am going with this. Under what circumstances *could* the government utilize terrorist profiling that has a race or ethnicity component? More important still, who should make that determination: the President and Congress—both of whom are accountable at the polls; or life-tenured judges? The framers certainly were aware of the possibility of a government abusing its power. What did they advise? Be cautious. Do you doubt, even for a moment, that if a majority (or even a substantial minority) of citizens considered airport security measures unreasonable today, they could long endure? What if a court strikes down a security measure as unreasonable, and then, after some incident similar to

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> [A]ll that the accused asked for was a fair trial before a fair and impartial jury of his peers, to whom he should not be forced by the state or sovereignty to confess his guilt of the fact charged. Once before a jury, the person accused needed not to concern himself with the inferences that the jury might draw from his silence, as the jurors themselves were only too eager to render verdicts of not guilty . . . .

Pittman, *supra*, at 510. For an analogous discussion regarding the original meaning of the Sixth Amendment right to counsel and due process, *see* William Gangi, *The Sixth Amendment, Judicial Power, and the People's Right to Govern Themselves, in* HICKOK ET AL., *supra* note 61, at 367–68. The lynchpin of judicial imposition of these substantive changes to criminal constitutional law has been the Supreme Court's doctrine of selective incorporation and the exclusionary rule, which, as I have noted, some scholars defend on the basis of judicial integrity or as an equivalent of judicial review. *See* sources cited *supra* notes 5–10, 19, and accompanying text. These issues cannot be rehashed here. For further discussion regarding selective incorporation, see Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435 (1981) which notes that various doctrines of incorporation are without historical foundation. *See also* Charles Rice, *The Bill of Rights and the Doctrine of Incorporation*, *in* HICKOK ET AL., *supra* note 61, at 11–16. For more on the exclusionary rule's lack of a constitutional basis, see *Exclusionary*, *supra* note 9.

63 United States v. Mendenhall, 446 U.S. 544, 561 (1980) (Powell, J., concurring) (recounting that by using such profiles, drug enforcement authorities found drugs in 77 out of 96 searches). Would you consider an investment or any other thing with that degree of certainty, unreasonable? *But see also* City of Indianapolis v. Edmond, 531 U.S. 32 (2000) (holding that a checkpoint program under which police, without individualized suspicion, stopped vehicles for the primary purpose of discovering and interdicting illegal narcotics constitutes an unreasonable search).

64 *See* Oliver v. United States, 466 U.S. 170 (1984) (upholding a warrantless search of an open field for marijuana, on the grounds that the common law understanding of "effects" does not encompass an open field, or create an expectation of privacy). *See Exclusionary*, *supra* note 9, at 39–46.

65 *See infra* note 257 (regarding Justice Jackson's admonition). The framers understood the need to provide sufficient power, and that any potential for abuse was considered a secondary matter. *See* SAVING, *supra* note 3, at 27–29; *infra* note 274.

September 11, 2001, a subsequent investigation reveals that had the offensive security measure been in place, the incident could have been prevented? Unfortunately, lack of common sense, political insensitivity, and an overzealous commitment to individual rights, are not impeachable offenses.[66] Nor should they be. But at least in such instances we can choose not to return *electable* officials to office!

C. We Care About Substantive Rights

Substantive rights issues revolve around *what* legislators must *never* do.[67] Take the death penalty, for example. After having failed to abolish it, the Supreme Court for decades now, has persisted in narrowing its application.[68] Nevertheless, some death penalty critics are dissatisfied. They insist that the death penalty is inconsistent with contemporary moral standards and should be declared unconstitutional, not simply when it is practiced arbitrarily, and not because an innocent person may be mistakenly executed, or because most other Judaic-Christian countries have abolished it, but *because* it is *morally wrong*.[69]

Of course, opinions on whether or not the death penalty should be imposed and under what circumstances, had presumably been discussed in state legislatures when those statutes were reenacted after the *Furman* decision.[70] To be frank, in most states opponents simply failed to convince legislative majorities of their position. Instead of graciously accepting political defeat, or perhaps doubling their efforts to persuade their fellow citizens of the merits of their position, they ran to courts where their non-interpretivist allies transformed a judicial responsibility to *interpret* the law into the *power* to make laws contrary to the legislative will.[71] In fact, that

66 *See, e.g.*, Kyllo v. United States, 533 U.S. 27 (2001) (warrantless use of thermal-imaging device aimed at private home from public street to detect relative amounts of heat within home, held to constitute unlawful search within meaning of the Fourth Amendment). *Compare* Chandler v. Florida, 449 U.S. 560 (1981) (holding that prior cases do not stand as an absolute ban on state experimentation with an evolving technology).

67 SAVING, *supra* note 3, at 94–97 (informing that substantive rights are a relatively recent invention created during the laissez-faire period).

68 *See, e.g.*, Furman v. Georgia, 408 U.S. 238 (1972) (plurality opinion) (declaring existing state death penalty statutes unconstitutional because they were applied arbitrarily and/or unequally). In the years following the decision, thirty-eight states (a very significant number as this is sufficient to amend the Constitution) *voted to reenact death penalty statutes* in one form or another. Details do not here concern me. Yet, as we shall see, non-interpretivists frequently identify constitutional commands with moral correctness. *See infra* notes 81 and accompanying text. Today, interpretive disputes over the constitutional definition of "cruel and unusual punishment" are less about what the ratifiers of the Constitution meant by that phrase than they are about what the Justices believe should be acceptable conduct. *See generally* RAOUL BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE (1982).

69 *Compare* Penry v. Lynaugh, 492 U.S. 302 (1989) (holding that the Eighth Amendment permits execution of a mentally retarded person) *with* Atkins v. Virginia, 536 U.S. 304 (2002) (holding that Eighth Amendment does not permit execution of the mentally retarded).

70 *See Furman*, 408 U.S 238 (plurality opinion) (sanctioning several possible approaches to death penalty statutes). One of those approaches—mandatory death sentences—however, was subsequently struck down. *See* Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

71 Where have judges either been authorized to *veto* legislation without locating their basis in the

sums up the history of substantive rights in the United States: waves of judicial impositions.[72]

Take a look at *Coker v. Georgia*.[73] Prior to 1972 Coker had been tried and convicted of rape and murder and sentenced to death.[74] His sentence had been commuted to life imprisonment when (as mentioned earlier) *Furman* temporarily overturned all state capital punishment statutes. Subsequently, while Georgia was one of many states that reenacted death penalty statutes, it was one of only two states that included the crime of rape as a capital offense.[75] Coker subsequently escaped from prison, but before being apprehended, raped a 16-year-old girl (an adult under Georgia law). For *this* rape Coker again was convicted and sentenced to death under the now constitutionally mandated requirement for a bifurcated trial.[76] The Supreme Court reversed his conviction, deciding that because the adult victim did not *die*, Georgia's penalty for rape was "excessive"[77] and "disproportionate."[78]

I put aside here a conclusion that under the guise of interpretation, the Supreme Court acted as a super-legislature, substituting *its* assessment of competing ethical and public policy considerations for those of elected state officials.[79] That, of course, is illegitimate. My emphasis here is on growing government incompetence. The grossly disproportionate *constitutional* standard invented by the Court leaves unresolved issues such as whether or not the death penalty may be imposed for the rape of a child or

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ratifiers' understanding, or where have they been granted the power to adapt the document to changing circumstances? Either power, I contend, is inconsistent with our republican form of government as understood by the framers. The responsibility to veto *constitutional* but *unwise* legislation is the President's—not the Supreme Court's—and I concur with those who contend that any lack of clarity of the framers' intentions *diminishes* the judicial power, not increases it. If the framers' intent is unclear, legislators—not courts—gain discretion. *See infra* note 275.

72 *See generally* Dixon, *supra* note 42. *See also supra* note 34; *infra* notes 85, 124, 138, 141, 220–221, 223, 228, 284, 304, 344 and accompanying text.

73 Coker v. Georgia, 433 U.S. 584 (1977).

74 *Id.* at 586.

75 *Id.* at 598. Under the federal nature of our union, states remain sovereign within their area of competency, serving as the locus of social experimentation. This fact was once considered a unique and beneficial attribute of our system of government. *See supra* note 54 and accompanying text. Today, however, the Court increasingly surveys state policies, sometimes prohibiting states from exercising their right when a majority of Justices decides that those states are out of synch with the actions of other states, or more precisely, out of synch with the views of a majority of Justices. *Coker* is but one example.

76 Any such rules created by the Court are not legitimate exercises of its authority. *See* BERGER, *supra* note 68, at 142–52.

77 *Coker*, 433 U.S. at 598.

78 *Id.* at 599. We do not know whether that standard would apply to the rape of a child. Nor do I take a position on making rape a capital offense, but I cannot detect any constitutional principle to explain why a state could not do so.

79 The history of death penalty imposition in the United States is equally unsupportive of the Court's decision on so-called grounds of being cruel and unusual. For example, some states had punished horse stealing and cattle rustling with death, and no one ever raised a constitutional objection. *See* BERGER, *supra* note 68, at 148. And, by the way, there were no females on the court when *Coker* was decided! Many women oppose the death penalty for rape because they believe it encourages rapists to kill their victims. Legislators, not judges, weigh such considerations.

an *attempted* presidential assassination. What about in treason cases where someone does *not* die? Or may we impose the death penalty for terrorist acts that, by chance, do *not* result in death? Can it be imposed on those who finance, plan, abet or otherwise assist but do not actually *conduct* the terrorist act? Would the imposition of the death penalty in any or all of these situations also be considered grossly disproportionate? After all, here we are not talking about mere BMWs.[80]

What, I have to ask, makes judges more qualified than elected officials to determine the justness of criminal penalties?[81] Non-interpretivists usually respond that since federal judges enjoy life tenure, they are freer to do the *right* thing. Do *you* find such reasoning convincing? When considering such issues, do you believe mastery of the interpretive craft should be determining? Why? Would you similarly accept the determination that the withdrawal of troops in Iraq is a credible tactic because of the expertise possessed by a heart surgeon? Once categorized as having constitutional stature, such judicially created doctrines may not be reversed by state or federal legislatures. The only way these doctrines can be reversed is if one or more Justices in the current majority change their mind, resign, or die (and then are replaced with judges who think differently). Even *then* the people must wait for a similar case to weave its way through the appellate process.[82] Is *this* what you learned about republicanism? Decisions such as *Coker* render state and federal legislators, and thus the people, less competent to deal with perpetual change.[83]

D. We Care About the First Amendment

Of all Bill of Rights provisions non-interpretivists hold none in higher esteem than the First Amendment right of free speech.[84] These rights, we are told, are *preferred* ones—rights that apparently enjoy both procedural

80 BMW v. Gore, 517 U.S. 559 (1996) (jury's award of punitive damages for undisclosed repairs to a new vehicle held to be excessive).

81 I put aside here whether or not penalties must be just to be constitutional, but I side with Berger that nothing but confusion ensues once one no longer distinguishes law from morality. *See Expansionism*, *supra* note 21, at 24; SAVING, *supra* note 3, at 268–69.

82 *Compare* Booth v. Maryland, 482 U.S. 496 (1987) (victim impact statements violate the Eighth Amendment) *with* Payne v. Tennessee, 501 U.S. 808 (1991) (Eight Amendment *does not* bar victim impact statements).

83 I will not here belabor the fact that substantive rights established by the Supreme Court have a checkered history, first appearing in its decisions on economic rights, and more recently over application of Bill of Rights provisions (traditional or recently invented). *See Expansionism*, *supra* note 21, at 41–43*;* sources cited *supra* note 72.

84 I put aside here other First Amendment areas, such as freedom of the press, or the establishment and free exercise of religion clauses, where the principles in the text and accompanying notes equally apply. *See generally* ROBERT L. CORD, SEPARATION OF CHURCH AND STATE (1982). *But see* William Gangi, Book Review, 7 HARV. J.L. & PUB. POL'Y 581 (1984); RELIGION AND POLITICS IN THE EARLY REPUBLIC (Daniel L. Dreisbach ed., 1996); Daniel L. Dreisbach, "*Sowing Useful Truths and Principles": The Danbury Baptists, Thomas Jefferson, and the "Wall of Separation*", 39 J. CHURCH & ST. 455 (1997); Michael W. McConnell, *Free Exercise as the Framers Understood It*, *in* HICKOK ET AL., *supra* note 61, at 54; Stanley C. Brubaker, *Original Intent and Freedom of Speech and Press*, *in* HICKOK ET AL., *supra* note 61, at 82.

and substantive characteristics.[85] Were you not taught that the First Amendment is at the very heart of American freedom, that you should take inordinate pride in possessing such rights (not only in the substantive sense, that is, the ability to say or print almost anything, but also because these rights form the foundation of the American tradition)?[86] If one envisions *Brown* as one leg of a three-legged stool supporting and justifying modern judicial power, surely the First Amendment is another leg.[87] Does the preceding assessment portray what you are being taught in law school? Students, I suspect, are often browbeaten to acknowledge that they care deeply

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85 DAVID B. MAGLEBY ET AL., GOVERNMENT BY THE PEOPLE, 397 (21st ed. 2006) (1952). The preferred freedoms doctrine was

> advanced in the 1940s when the Court applied all of the guarantees of the First Amendment to the states. . . . Judges have a special duty to protect . . . [First Amendment] freedoms and should be most skeptical about laws trespassing on them. Once that judicial responsibility was established, judges had to draw lines between nonprotected and protected speech, as well as between speech and nonspeech.

Id. The doctrine usually refers to "freedom of expression and association, rights of political participation, rights of religious autonomy, and rights of privacy and personhood . . . ." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 770 (2d ed. 1988) (1978). Origin of the doctrine is usually attributed to Justice Stone's opinion in United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). *See* LOUIS LUSKY, BY WHAT RIGHT?: A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION 112 (1975). A classic statement can be found in ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES (Harvard University Press 1954) (1941). More absolutist approaches can be found in Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961); Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549 (1962); GEORGE ANASTAPLO, THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT (1971); NAT HENTOFF, THE FIRST FREEDOM: THE TUMULTUOUS HISTORY OF FREE SPEECH IN AMERICA (1980). In 1963 Charles S. Hyneman concluded that after 1937, the Supreme Court substituted preferred First Amendment freedoms for the property rights favored by their laissez-faire predecessors. Both preferences erode the presumed constitutional protections that legislative acts enjoyed; instead, statutes affecting preferred rights began to be treated with suspicion, if not presumed unconstitutional. CHARLES S. HYNEMAN, THE SUPREME COURT ON TRIAL 226 (1963). One sample of what he found will suffice (he is quoting John Frank):

> I suggest that the following proposals would bring us a little closer to the plan of the fathers. . . . [T]he doctrine of presumption should be completely eradicated in cases involving basic liberties. In that area, a presumption of unconstitutionality should prevail. In free speech cases, in particular, the Supreme Court has no business paying 'great deference,' or indeed any deference to the judgment of the legislature. It should do the exact opposite.

JOHN P. FRANK, SUPREME COURT AND SUPREME LAW (Edmond Cahn, ed., Indiana University Press 1954) *quoted in* HYNEMAN, *supra*, at 227 (alterations and omissions in original). When it comes down to submitting convincing proof that the framers shared such beliefs, non-interpretivists come up short. So-called preferred freedoms were nonexistent to the framers. For example, not only was application of the Bill of Rights to the states explicitly "voted down" by the First Congress, Berger, *supra* note 20, at 567, but even "Jefferson, that apostle of free speech, insisted that states have 'the exclusive right' to control freedom of the press." *Id.* As noted above, not until the late 1930s did the Supreme Court accord the First Amendment preferred status. And that had been demanded by the intellectual fashion of the day—as were the economic rights before it. Justice Stone warned that "the constitutional device for the protection of minorities from oppressive majority action, may be made the means by which the majority is subjected to the tyranny of minority." ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 331 (The Viking Press 1956) (1953). Professor Bridwell observed: "[O]ne might ask what makes the tyranny of the minority—the judiciary or those they favor—better than the tyranny of the majority? We get no answers." Randell Bridwell, *The Scope of Judicial Review: A Dirge for the Theorists of Majority Rule?*, 31 S.C. L. REV. 617, 654 (1980).

86 MAGLEBY ET AL., *supra* note 85, at 387.

87 I realize I am one leg short of a good analogy, but surely it is sufficient to say that the third leg is the right of privacy.

about the First Amendment.

But if law students perform even a rudimentary review of the pertinent literature, they will become suspicious of such claims. The framers certainly had a far narrower view of free speech than do the justices today.[88] Yet perhaps in no other area have legislative hands been so frequently tied.[89] In *Texas v. Johnson*,[90] for example, the Supreme Court declared unconstitutional state statutes that prohibited the burning (desecration) of the American flag. That case provides law students with as good an illustration of modern interpretive razzle-dazzle as any other. In a nutshell, the *Johnson* Court concluded that in this instance the First Amendment protected expressive conduct as well as ordinary *speech*.[91]

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88 *See* Lawrence J. Adams III, The Reality of Seditious Libel in America: Zenger to the 1798 Sedition Act (June 17, 1998) (unpublished M.A. thesis, St. John's University) (on file with St. John's University). The liberty of the press

> consists in permission to publish, without previous restraint upon the press, but subject to punishment afterwards for improper publications. A law, therefore, to impose previous restraint upon the press, and not one to inflict punishment on wicked and malicious publications, would be a law to abridge the liberty of the press, and as such, unconstitutional.

Id. at 101 (quoting 9 ANNALS OF CONG. 2990 (Joseph Gales & W. Seaton eds., 1820) (1789)) (emphasis omitted). With respect to the free speech clause, Adams observes: "It certainly permitted prosecutions for seditious libel (not to mention such items as obscenity and blasphemy—that is, things the people considered licentious and not liberty.) [sic]" *Id.* at 80. I also put aside here the fact that, whatever protections were afforded by the First Amendment, they did *not* apply to the states. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833). When the First Amendment proposals were first drafted in the House they "were designed to apply to state governments as well as the national government." FORREST MCDONALD, E PLURIBUS UNUM 369 (Houghton Mifflin Co. 1965). The Senate, however, "removed the applicability of the bill of rights to the states . . . ." *Id.* Kendall suggests that Madison knew that the Senate would not approve of applying the Bill of Rights against the states. "Of course that provision was, as Madison must have known it would be, duly struck out in the Senate; on Madison's own showing, the idea of a bill was to please the objecting minority, who were above all anti-consolidators, anti-centralizers, States' righters." WILLMOORE KENDALL, CONTRA MUNDUM 320 (Nellie D. Kendall ed., 1971) [hereinafter CONTRA]. *See also* SAVING, *supra* note 3, at 190–93. *See generally* ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION (1997). *But see* William Gangi, Book Review, 27 PERSP. POL. SCI. 104 (Spring 1998).

89 I was tempted to discuss the right of a free press. You know—what the media calls the people's "right to know"—although if you know anything about judicial decisions in this area, the people have precious little to say about it. Maybe just a few words on the media . . . When I first drafted this article several years ago, not a day passed in which the media did not divulge some information affecting our security. For instance, to the best of my recollection, the media published a diagram of New York City's water system, mentioning there was little or no security. Or, to take another example from television, there was a report that an Oregon town stores our biological and chemical weaponry (yes, they provided a map and a picture of the building!), and as if oblivious to recent events, noted that if a fully fueled plane crashed into that building, it would release enough biological and chemical weapons to kill some 10,000 nearby residents. Private libel, obscenity, and perhaps seditious libel (hard to tell) still lie outside the technical protection of the First Amendment, although applicable decisions have sharply and illegitimately contracted legislative discretion. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Roth v. United States, 354 U.S 476 (1957). Given the fact that these matters were originally outside such protection, upon what authority do the Justices impose their own preferences? I reject the proposition that all they are doing is traditional interpretation. Publius long ago rejected the position that the judiciary was entitled to interpret the Constitution according to what it believed was its *spirit*. *See* THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 4, at 482. He was hardly unacquainted with the difficulties surrounding interpretations. *See infra* note 265.

90 Texas v. Johnson, 491 U.S. 397 (1989). *See also* United States v. Eichman, 496 U.S. 310 (1990).

91 *Johnson*, 491 U.S. 397 *passim*. For an articulate and (at times) convincing *sub-constitutional*

En route to that conclusion the majority acknowledged that the flag had symbolic importance. However, differences of opinion existed over *what* protection the flag should be afforded.[92] Some Americans, they recounted, viewed the flag as symbolic of national unity and believed it should not be desecrated, while others viewed the very act of burning the flag a part of the free speech right.[93] At this point the Court reminds us that free speech is a "fixed star," implying that the Court had *always* defined it broadly, and so the majority felt compelled to accept the second point of view.[94] They recognized that among American citizens the second view might be a minority one, but that must be irrelevant to the majority's final determination.[95] Simply put, the Court declared that First Amendment constitutional protections (as now defined by the justices, not by the ratifiers) are not subject to legislative interference. The Court insisted that by its decision "the flag's deservedly cherished place in our community will be strengthened, not weakened . . . ."[96]

Johnson provides a representative example of how non-interpretivist methodology inevitably leads to the Justices substituting their predilections for both those of the ratifiers, and currently elected representatives.[97] By enacting the flag-burning statute, legislators presumably thought that *speaking freely* (subject to applicable legal consequences, such as those applying to libel and incitement) is one thing, and *doing* something is a different kettle of fish.[98] Nothing in the Constitution, I suggest, prohibits citizens from punishing crimes they consider grievous, whether it be flag burning, other *acts* of racial and religious desecration, or other hate

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critique of state flag desecration statutes, see ROBERT JUSTIN GOLDSTEIN, BURNING THE FLAG: THE GREAT 1989–1990 AMERICAN FLAG DESECRATION CONTROVERSY (1996) (arguing that the Supreme Court rejection of federal and state flag desecration laws is consistent with the commands of the First Amendment). *But see* William Gangi, Book Review, 26 PERSP. POL. SCI. 168 (Summer 1997) [hereinafter Goldstein Review].

92 *Johnson*, 491 U.S. at 407–10. *See infra* notes 294–297 and accompanying text (noting that scholars have the obligation to determine the relative strengths of existing opinion). The approach used by the Court is faulty and self-serving. Guess who is the final arbiter regarding which voices shall be determinative? It is indeed a different thing than an election.

93 *Johnson*, 491 U.S. at 413–16. "[T]he government may not prohibit expression simply because it disagrees with its message . . . ." *Id.* at 416.

94 *Id.* at 415 (quoting W. Va. Board of Education v. Barnette, 319 U.S. 624, 642 (1943)). "[T]he flag protects those who hold it in contempt." *Johnson*, 491 U.S. at 421 (Kennedy, J., concurring).

95 *Johnson*, 491 U.S. at 416–17. Presumably that conclusion is necessary because the right is preferred. For an analogous situation, see *infra* notes 106–114 and accompanying text.

96 *Johnson*, 491 U.S. at 419. "The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong." *Id.* Is that not a statement of First Amendment faith? But, if the assumption for that act of faith is no where to be found among those who ratified the Constitution and Bill of Rights, upon what authority is it imposed upon the people?

97 Of course at this juncture non-interpretivists wax eloquent about the defects of our political system. As I noted earlier, their arguments are complex and interrelated. I urge students to examine their complexity in *Expansionism*, *supra* note 21, at 17–55 or in SAVING, *supra* note 3, at 194–225.

98 The Court's recitation of precedent in such cases, as well as its reasoning, more often than not, amounts to casting shadows on the wall of American politics. For more on the framers' understanding of speech and press, see *supra* note 88. With respect to the relationship between precedents and progressivist assumptions, see *infra* notes 249–282 and accompanying text.

crimes.[99] But rather than defend that assertion, I have bigger fish to fry. In every First Amendment case I have examined, not one Justice ever demonstrated more than an elementary appreciation of symbol utilization.[100] All have ignored an entire body of scholarship which contends that to fully understand what a people hold dear, it is important to establish correlations between their symbolic expressions and their perceived embodied truths, as well as between those symbols and the actions of the people.[101] Instead, the Justices persist in viewing symbols solely as potential tools of manipulating the masses.[102] This much seems self evident: w*hoever defines our symbols, defines us as a nation*. So again I raise the issue: in whose hands would the framers have placed that responsibility? The only answer compatible with their design and with our history, is in the hands of elected *officials accountable to the people*—the same hands authorized to declare war and to send American sons and daughters, husbands and wives, broth-

99 I make the distinction here between the legislature being *authorized* to pass the law and the wisdom of the legislation. Any consensus reached in the legislature does not necessarily mean the legislation is intelligent or moral. Marshall declared: "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824). *See* KRAMER, *supra* note 34, at 76–78. With respect to federal and state flag desecration statutes *compare* GOLDSTEIN, *supra* note 91 (arguing that the Court was justified in invalidating flag burning statutes due to the abridgement of free speech, and further noting that public outcry alone does not justify prosecution), *with* Goldstein Review, *supra* note 88, at 168 (disagreeing with Court's conversion of conduct into expression).

100 *See infra* notes 283–300 and accompanying text.

101 *See infra* notes 196–198 and accompanying text. My goodness, it sounds like a possible nexus test! Mom would have been proud! My point, however, is not that the majority should embrace yet another non-constitutional theoretical standard; rather that their unawareness of another viewpoint undercuts their authority. Elsewhere I have commented:

> When symbol creators ignore the historical record or distort precedents in order to redefine the meaning of rights, or assert that their ideas of fairness are superior to those constitutionalized by the ratifiers, three consequences ensue. They have admitted that the authority for their views does not rest on choices made by the ratifiers; hence, they are obliged to respond to charges of illegitimacy and usurpation; and they acknowledge that they are no longer engaging in interpretation in any traditional meaning of that term. Instead, they are changing, or abusing, the meaning the rights in question originally had—without authorization to do so. They are in fact creating new symbols and interpreting the Constitution according to what they allege is its spirit—a position explicitly rejected by Publius.

SAVING, *supra* note 3, at 186. In the past, canons of construction offered a valuable check against such theorizing. Justice Story commented:

> [W]here its words are plain, clear, and determinate, they require no interpretation . . . . Where the words admit of two senses, each of which is conformable to general usage, that sense is to be adopted, which without departing from the literal import of the words, best harmonizes with the nature and objects, the scope and design of the instrument.

GARY L. MCDOWELL, THE CONSTITUTION AND CONTEMPORARY CONSTITUTIONAL THEORY 12 (1985) (quoting J. Story, 1 Commentaries on the Constitution of the United States § 405, at 387–88 (1833)) (omission in original). Professor Allen adds: "For Publius, the meaning of written law is plain, but only when texts are well-drafted in modes of discourse open to discernment, reason and common sense, and when those who purport to apply the texts rely on true and proper maxims of construction." Anita L. Allen, *The Federalist's Plain Meaning: Reply to Tushnet*, 61 S. CAL. L. REV. 1701, 1715 (1988).

102 These issues go to criteria of relevance. For a discussion and sources associated with this topic see *Exclusionary*, *supra* note 9, at 106 & n.407; *Inbau-Kamisar*, *supra* note 12, at 146–49; SAVING, *supra* note 3, at 179–90.

ers and sisters, fathers and mothers into battle—perhaps to lose their lives.

Let's take a look at the same issue in a more recent case. The *oral arguments* in *Virginia v. Black* initially showed promise of a substantial discussion of symbol utilization because Justice Clarence Thomas observed that cross-burnings are "intended to cause fear and to terrorize a population."[103] His observation was rooted in an experiential *fact*, one of concern to all governments—not some unauthorized First Amendment *theory*. What could the citizens of Virginia do about symbol usage that created a concrete concern for some of its citizens?[104]

Virginia v. Black[105] demonstrates how deeply entangled the Court has become with the shadows (principles, corollaries, and doctrines) of its own creation.[106] Justice O'Connor's plurality opinion was predictable because it rests on modern First Amendment theory rather than an objective examination of our history.[107] Briefly put, paralleling the arguments made in *Johnson*,[108] Justice O'Connor concluded that while the First Amendment does not entirely proscribe states from banning cross-burning with intent to intimidate, Virginia's *prima facie* instruction "renders the statute unconstitutional" in its current form.[109]

Let me provide a few additional details. First, as anticipated, Justice O'Connor cited the usual litany of First Amendment cases, including the stirring words of eminent jurists, which I am sure made the hearts of modern First Amendment advocates go pitter-pat. But, even if one puts aside the issue of the legitimacy of these cases, in at least two of them the inspiring words were articulated in *dissent* and/or the defendants were in fact convicted.[110] The opinion also is replete with citations to seminal cases de-

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103 Linda Greenhouse, *An Intense Attack by Justice Thomas on Cross-Burning*, N.Y. TIMES, Dec. 12, 2002, at A1.

104 The statute in the Virginia case dated from 1952 in then-segregated Virginia, before *Brown v. Board of Education*. *Compare* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (upholding a law restricting "fighting words") *with* Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978) (overturning a law banning "hate speech"), *cert. denied*, 439 U.S. 916 (1978).

105 Virginia v. Black, 538 U.S. 343 (2003) (holding a statute that criminally punished any person who, intending to intimidate another person or group by burning a cross on another person's property, highway, or public place, unconstitutional since the statute may have required that any such cross-burning is *prima facie* evidence of an intent to intimidate). For an unusual perspective see Willmoore Kendall, *The People Versus Socrates Revisited*, 3 MODERN AGE 98 (1959) (discussing that under the circumstances, the Athenian assembly had a reasonable basis for condemning Socrates).

106 The field is so dominated by First Amendment ideology that students tend not to examine its soundness. After all, there must be some truth under the barrage of literature, and of course, there is—but one has to dig for it. Talented students often expend a tremendous amount of energy skimming the surface of selected topics. I advise them that they would learn a great deal more about the topic and the scholarly craft if they narrowed the topic. Students must sift through a body of literature until there is repetition and one distinguishes degrees of proficiency among sources. To do that, the topic must be narrow. *See Exclusionary, supra* note 9, at 117–18. I can say this much with confidence: there is no necessary correlation between intensity and correctness—for them, their laissez-faire predecessors, *or* for me! *See infra* notes 317–341 and accompanying text.

107 *Black*, 538 U.S. at 358–60.

108 *See supra* notes 90–96 and accompanying text.

109 *Black*, 538 U.S. at 364.

110 *See, e.g.*, *infra* note 280; Heberle, *supra* note 43. The litany of such cases are intended to

cided during the Warren era[111] when our history often was ignored and our precedents rewritten.[112] Even the Court's quotation of the First Amendment[113] is misleading because it implies that the provision's emphasis is on the "no law" language, whereas our history clearly demonstrates that it was the "abridging" language that was determining.[114]

As I have previously noted for some time now, the Supreme Court has cast more and more shadows on public policy choices touching upon free speech. They determine what is to be protected or unprotected speech and create alleged constitutional doctrines to manage, distinguish, and ultimately hide the fact that they have rewritten the framers' understanding. Prior to the current infections, state and federal governments *did* legislate in areas not specifically understood as being protected by those who ratified the First Amendment.[115] Today, judges redefine constitutional phrases (in this instance speech); employ doubtful interpretive devices (such as approaching provisions at a higher level of generality so that speech becomes expression, which then morphs into symbolic speech); vary the level of judicial scrutiny (one suspects on the basis of what interests them or what

warm up the crowd and make sure citizens understand what is at stake, particularly if for one reason or another, citizens might fail to recognize those stakes. *See Exclusionary, supra* note 9, at 113–17.

111 *See, e.g.*, *Black*, 538 U.S. at 358. *See also infra* note 280.

112 *See* SAVING, *supra* note 3, at 102–06. I have concluded elsewhere that when precedents are cited that do not *themselves* rely on the Constitution, both the authority of the case as well as the precedents remain suspect. *See Inbau-Kamisar, supra* note 12, at 122–123 and *supra* note 101.

113 *E.g.*, *Black*, 538 U.S. at 358.

114 *See supra* note 88. The "no law" emphasis is associated with Justice Black. Adams notes: "The absolutist position taken by Justice Black . . . ignores the legal history of criminal libel law from [the 1730s] to the 1798 Sedition Act . . . [and] conflicts with the actions of elective assemblies in the post-Zenger era, the protections afforded by freedom of the press stipulations in the state constitutions, the context of press freedom in the ratification debate, and the passage and enforcement of the 1798 Sedition Act." Adams, *supra* note 88, at 109 (emphasis omitted). Adams further asserts that Justice Hugo Black "ignored the founding era's absolute prohibition against the printing of blasphemy and obscenity. . . . [Furthermore,] Justice Joseph Story rejected absolutist theory as 'a supposition to [sic] wild to be indulged by any rational man.'" *Id.* at 109–10 (emphasis omitted). In brief, "Black's position on the intent of the First Amendment's speech and press clause is simply wrong." *Id.* at 110. For the framers, areas such as libel, seditious libel, obscenity, and blasphemy were *never* thought to abridge the rights to free speech or press. Those subjects were *outside* First Amendment protection. *See id.* at 109. No other conclusion is possible, and technically speaking, it *still* remains true. The difference is today the judiciary is the sole arbitrator of defining the terms. James Wilson explained: "What is meant by the liberty of the press is, that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government, or the safety, character, and property of the individual." *Id.* at 57–58 (quoting 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 449 (1888)).

115 *See supra* note 111. I refer of course to the subjects mentioned in the prior note as well as to the fact that they were defined under the common law bad tendency test—a far more restrictive test than the clear and present danger or the preferred freedoms tests. The bad tendency test left a great deal of discretion in the hands of legislatures. And, much to the regret of some scholars, evidence does not support the claim that the First Amendment was intended to supersede the laws of seditious libel. *See* LEONARD LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION xii, 10–15, 182–85 (Harper & Row 1963) (1960). In fact, the 1798 Alien and Sedition Acts *liberalized* protections afforded by the First Amendment because, by statute, it established that truth would be, as a matter of fact and law, an acceptable defense. Alien and Sedition Acts, ch. LXXIV, § 3, 1 Stat. 596, 597 (1798) (expired Mar. 3, 1801). The fact that President Jefferson extended amnesty does not repudiate my position. JAMES MAGEE, FREEDOM OF EXPRESSION 22 (Randall M. Miller, ed., 2002). It simply adds weight to my position that the legislature had considerable discretion.

they think they can get away with); apply equally suspect corollaries (such as overbreadth and chilling effect); create one nexus test or another; or discover successive overarching First Amendment principles (such as clear and present danger, and the more recently preferred freedoms test). As a consequence, unless they really need it, the Court more or less has abandoned the common law bad tendency test that the framers *did* understand, and in its stead, they have created various *balancing tests*, which of course ultimately leave in its own hands the resolution of such issues. Such flimflam may be near and dear to First Amendment advocates' hearts, and law students may be compelled to spend innumerable hours mastering these materials (no doubt learning something in the process), but none of these doctrines or tests are necessitated by our history, precedents, or the Constitution.

For students who resist the above analysis in *Black*— examine Justice Scalia's concurring and dissenting opinion, where he observes that even if one *accepts* the authority of modern First Amendment precedents, the Court still prematurely decided the possible impact of the Virginia statute's prima facie provision.[116] He describes the majority's approach to the "overbreadth analysis [as] unprecedented"[117] because it struck down the statute on "the *possibility* of such convictions"[118] without first determining whether "the enactment reache[d] a substantial amount of constitutionally protected conduct."[119] Indeed, Scalia claims he is "aware of no case—and the plurality cites none—in which we have facially invalidated an *ambiguous* statute on the basis of a constitutionally troubling jury instruction."[120] So, as if there were not enough shells (i.e., doctrines) already under which the pea may be hidden, others are added in *Black*.

Although, regretfully, he does not challenge the body of First Amendment case law or doctrines, Justice Thomas' dissent comes closest to my assessment: "In light of my conclusion that the statute . . . addresses only conduct, there is no need to analyze it under any of our First Amendment tests."[121] He concluded that the Virginia Legislature (especially given the State's segregationist history and the intimidating nature of cross-burning) had the right to pass such a law, and the prima facie "inference" contained in the statute was not fatal since it remained rebuttable.[122] He points to other areas in the law where even *irrebuttable* presumptions exist and were *never* considered fatal to criminal statutes (such as in statutory rape cases where an underage victim forecloses a consent defense, or when

116 *Black*, 538 U.S. at 368–69 (Scalia, J., concurring in part and dissenting in part).

117 *Id.* at 371.

118 *Id.* at 373.

119 *Id.* (quoting Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494 (1982)).

120 *Id.* at 376.

121 *Id.* at 394–95 (Thomas, J., dissenting). Justice Thomas was the only Justice to even mention Barron v. Mayor of Baltimore, 32 U.S. 243 (1833) in Kelo v. City of New London, 125 S. Ct. 2655, 2681 (2005) (Thomas, J., dissenting).

122 *Black*, 538 U.S. at 394–96 (Thomas, J., dissenting) (emphasis omitted).

an intent to sell narcotics is presumed by the quantity of drugs seized).[123] He acknowledges and accepts that *Black* involves the First Amendment, and so under applicable guidelines the burden of proof is on the state to prove that its interest in the statute is compelling.[124] But even accepting those criteria Thomas finds the Court inconsistent. He points out that in another case the Court had upheld "a restriction on protests near abortion clinics, explaining that the State had a legitimate interest . . . plac[ing] heavy reliance on the 'vulnerable physical and emotional conditions' of patients."[125] In *Black*, however, "the plurality strikes down the statute because one day an individual might wish to burn a cross, but might do so

123 *Id.* at 397–98.

124 *Id.* at 398. This compelling state interest requirement is part of the preferred status designation the First Amendment now enjoys, that is, unlike traditionally, when a law was presumed constitutional and the burden of proof fell on the plaintiff, under the preferred status requirement, laws touching upon the First Amendment are presumed unconstitutional and the burden of proof rests on the government to convince the judiciary that they have compelling reasons for doing what they voted to do. Elizabeth J. Wallmeyer, *Filled Milk, Footnote Four & the First Amendment: Analysis of the Preferred Position of Speech After the* Carolene Products *Decision*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1019, 1020 (2003). I find no support whatsoever for such a doctrine. The modern First Amendment faith has its theoretical roots in the "open society" symbol. *See generally* 1 KARL R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES (5th ed. 1966). *See also* CHARLES FRANKEL, THE CASE FOR MODERN MAN (Beacon Press 1959) (1955); J. SALWYN SCHAPIRO, LIBERALISM: ITS MEANING AND HISTORY (Louis L. Snyder ed., 1958); *infra* note 132. Charles Wilson, Chairman of General Motors, once revealed that "[f]or years [he] thought what was good for our country was good for General Motors and vice-versa." GEORGE STALK ET AL., HARDBALL: ARE YOU PLAYING TO PLAY OR PLAYING TO WIN? 22 (2004). Such thinking was typical of the laissez-faire period when many Justices assumed that an Invisible Hand somehow guided even the basest individual motives (e.g., greed) to the benefit of the public good. At the time, laissez-fairest judges struck down legislation prohibiting, for example, federal or state legislators from addressing issues such as economic dislocation. Presumably, these judges believed that such circumstances called for even greater faith in the Invisible Hand. Put another way, judges illegitimately substituted their economic preferences for those of federal and state legislators and created a sophisticated body of reasoning to do so. We have no reason to believe that they were motivated by any other motive than their idea of the common good. Ultimately, such reasoning was recognized as a charade. *See infra* note 222. These judges never convincingly grounded their preferences in the ratifiers' intent, or established that determining national economic policy was within their competency. One also may point to two contemporary examples of the same approach. First, coupled with the usual religious fervor, First Amendment Invisible Hand advocates assume that the widest possible definition of free speech will not adversely affect the common good, while they also simultaneously prohibit legislators (more often than not and more frequently than before) from addressing its perceived shortcomings. These contemporary First Amendment Invisible Hand supporters cannot convincingly demonstrate that the framers rated First Amendment freedoms above all others, or, that they did not anticipate legislative balancing. In fact, the evidence is clearly to the contrary. Today's First Amendment Invisible Hand stands on no higher ground than that of the laissez-fairest. I suggest that such a position is also not supported by the ratifiers' intentions, and lies outside judicial competency. Second, there is the judicial imposition of the exclusionary rule, not only within federal courts but also on the states—the latter even harder to justify since by the Court's own admission, exclusion is not a personal constitutional right. Instead, it is a judicially created remedy for which I find no constitutional authority. Put another way, the Justices have imposed their beliefs upon the American people. *See Exclusionary*, *supra* note 9, at 54, 105, 117–18. Naturally, of course there is a degree of truth in all such impositions. SAVING, *supra* note 3, at 90–94. But the issue is this: Under the constitution of the United States do the people have the right to place limits on economic competition or freedom of speech, or to determine rules of evidence admissibility not specifically constitutionalized? The answer is clearly, yes. To make such a determination however, does not answer the issue of whether the limits imposed by the people's representatives are wise or ethically correct.

125 *Black*, 538 U.S. at 399 (Thomas, J., dissenting) (citations omitted).

without an intent to intimidate anyone."[126] In Thomas' words, "the connection between cross burning and violence is well ingrained,"[127] and in a state such as segregationist Virginia (when the original statute was enacted)[128] even its citizens "sought to criminalize [such] terrorizing *conduct*" because they believed no person should have to live under such fear or intimidation.[129] "The ban on cross burning with intent to intimidate demonstrates that even segregationists understood the difference between intimidating and terroristic conduct and racist expression."[130]

When students probe the First Amendment faith they will find that it rests on little more than the logic of John Stuart Mill and his creative successors.[131] These free speech theorists (or worshipers) usurp federal and state legislative power, and ultimately rest on unconvincing scholarship.[132] Let me go further. *Even if* one embraces all their doctrines and assumptions as perfectly true, they would still *not* provide a constitutional standard. All they amount to are sub-constitutional arguments. They may be brilliant, they may be reasonable, they may be logical, and they may even be convincing, but they still are not compelled by the Constitution. Congress and state legislatures can reject their dictates or reasoning. They also, of course, can embrace them, and by statute or amendment, direct courts to apply them.[133] But I deny that *courts* have ever been authorized to impose them. So, I agree with Justice Thomas that cross-burning is conduct—not speech—and no amount of sophisticated reasoning can make it anything else. In contrast, in *Black*, a majority of Justices immersed themselves in the ungrounded imagination of theorists instead of the realities confronted by elected officials.[134] To impose an expanded definition of speech on

126 *Id.* at 399–400.

127 *Id.* at 390.

128 The statute was enacted in 1952 following several cross-burning and other intimidations of blacks. *Id.* at 393. "It strains credulity to suggest that a state legislature that adopted a litany of segregationist laws self-contradictorily intended to squelch the segregationist message." *Id.* at 394.

129 *Id.* at 393.

130 *Id.* at 394. "The legislature [found] the behavior so reprehensible that the intent is satisfied by the mere act committed by a perpetrator." *Id.* at 397.

131 *Exclusionary*, *supra* note 9, at 105. *See also* JOSEPH HAMBURGER, JOHN STUART MILL ON LIBERTY AND CONTROL (1999); LINDA C. RAEDER, JOHN STUART MILL AND THE RELIGION OF HUMANITY (2002); George W. Carey, *The Authoritarian Secularism of John Stuart Mill*, 15 HUMANITAS 107, 107–19 (2002) (reviewing LINDA C. RAEDER, JOHN STUART MILL AND THE RELIGION OF HUMANITY (2002)) (predicting intense intellectual warfare between those who stubbornly cling to the idea that Mill was a champion of individual liberty, and revisionists who are not so sure when Mill's public works are contrasted with his private correspondence). *See infra* notes 288–356 and accompanying text.

132 *See* sources cited *supra* notes 43, 88, 101, 114, 124. There is a direct relationship between progressivist assertions of the open society symbol (the forerunner of the contemporary intoxication with the First Amendment) and the growth of judicial power.

133 *See* William Gangi, *The Sixth Amendment: Judicial Power and the People's Right to Govern Themselves*, 66 WASH. U. L.Q. 71(1988) [hereinafter *Sixth*] (Congress agreed to pay for counsel in capital cases—a more extensive provision than existed in England which was limited to treason cases—after having approved the Sixth Amendment right to counsel, but before it was ratified). That right, which had a long colonial history, had been understood to assure only the right to retain counsel if one could afford it. *Id.* at 76.

134 *See Black*, 538 U.S. 343; *Exclusionary*, *supra* note 9, at 107–110. This model-building is an

Congress or state legislators—as the Supreme Court has done for over sixty years—is not interpretation, it is *judicial over-reaching*. If an act is within legislative competency, it is not the function of the judiciary to decide its wisdom, and if under one guise or another it does so, the Court acts illegitimately.[135] In sum, O'Connor's plurality opinion merely continues to promulgate unsupported modern First Amendment wishful thinking by selectively choosing precedents that define words, while ignoring what the people did, as well as contrary precedents.[136] The fact that some scholars have expended considerable effort in explicating First Amendment assumptions, or have probed, poked, or analyzed ad nauseum case law shadows, is neither here nor there. Two generations of laissez-faire scholars did the same thing.[137]

Decisions such as *Johnson* and *Black* also intrude on states rights. I remind students (who often appear quite surprised) that when the Bill of Rights was adopted, it did *not* apply to the states; equally revelatory, apparently, is the fact that states' bill of rights provisions *preceded* the federal

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intoxicating brew, as are the persuasive skills that sustain it. In Plato's words, speech is "a great and powerful master" that operates on man "with magic force." Eric Voegelin, *Wisdom and the Magic of the Extreme: A Mediation*, 17 S. REV. 235, 249 (1981). The spell of language "can swerve the soul when it is weakened, by passion or lack of knowledge, toward opinion . . . in conflict with truth." *Id.* Plato compared the power that language has over the soul to that of a drug over the body. "[A]s the drug can heal or kill, harmful persuasion can drug and bewitch the soul." *Id.* Even when the consequences of abusive persuasion are recognized as evil the situation may "resemble a sick man who wants the physician to cure him by treating the effects of dissipation . . . without giving up his way of life." *Id.* at 252. In short, the "desire for drugs is now related to the core of existential disorder, to the hatred of the truth that would interfere," *id.* that is, recognition of the truth that would force the dreamer to give up his dream, his perception of reality, his system. "In the clash between system and reality, reality must give way." ERIC VOEGELIN, *Science. Politics and Gnosticism*, *in* SCIENCE, POLITICS AND GNOSTICISM 1, 45 (William J. Fitzpatrick trans., Henry Regnery Co. 1968) (1959) [hereinafter VOEGELIN, *Science*]. *See infra* note 301 and accompanying text.

135 "Laws may be unjust, may be unwise, may be dangerous, be destructive, and yet not be so unconstitutional as to justify the Judge in refusing to give them effect." Berger, *supra* note 20, at 628 (quoting James Wilson). *But see* KRAMER, *supra* note 34, at 76–77 (providing context to Wilson's remarks).

136 *See supra* notes 110, 118; *infra* note 223.

137 *See* GILMORE, *supra* note 10, at 62–64, 75–77, 101–05. I am not going to get involved in the results-oriented reasoning in cases such *Bolling v. Sharpe*, 347 U.S. 497 (1954). It is part of the body of modern case law I find embarrassing. One could also refute Justice Sutherland's parallel reasoning in *Powell v. Alabama*, 287 U.S. 45 (1932). *See Sixth*, *supra* note 133, at 77–81. In 1897, the Supreme Court held that the Fifth Amendment's condemnation of compulsory self-incrimination and the common law confession rule had common histories. *See* Bram v. United States, 168 U.S. 532 (1897). For an analysis of *Bram*, see *Critical*, *supra* note 16, at 4–14. By 1940 scholars, notably Wigmore, strongly criticized the *Bram* decision, claiming "[t]hat the two roles should be supposed to have something of a common principle or spirit is a not [sic] unnatural error. But that history should be rationally tampered with by asserting any common origin is inexcusable." 3 WIGMORE, *supra* note 10, at 250 n.5. He did not pull any punches: *Bram* "reached the height of absurdity in misapplication of the law[.]" *Id.* at 241 n.2. And again: "[H]ow much longer will that misguided and unrepudiated opinion continue to cloud the reputation of the Federal Supreme Court?" *Id.* at 264 n.1. Perhaps in response to this withering criticism, the Supreme Court abandoned the privilege-confession identity in *Brown v. Mississippi*, 297 U.S. 278 (1936). "[T]he privilege against self-incrimination is not here involved." *Id.* at 285. However, in *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court resurrected *Bram*, substituting story-telling for scholarship. *See* WIGMORE, *supra* note 10, at 250 n.5. *But see* Dickerson v. United States, 530 U.S. 428 (2000) (upholding *Miranda v. Arizona* against congressional challenge, on the basis that warnings to criminal defendants have become embedded in our culture).

one.[138] Accordingly, some states had established religions until their citizens decided to abandon them.[139] Subsequent interpretations of the Fourteenth Amendment, including the creation of the selective incorporation doctrine (used to impose already defective federal Bill of Rights interpretations on the states), rests on a foundation of sand.[140] Selective incorporation lacks credible historical support, is logically absurd, and for two generations now, has masked judicial usurpations.[141]

Many precedents cited in related cases go so far beyond the well-understood and limited common law rights envisioned by the framers, that they amount to constitutional amendments. But the Constitution's Fifth Article requires *the people's consent* to make such changes, and it omits any judicial involvement.[142] In contrast, some non-interpretivist scholars

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138 After ratification, the Bill of Rights did not apply to the states, and even if it had applied, the Fifth Amendment's due process clause guaranteed only long-accustomed *procedures*. *See* BERGER, *supra* note 56, at 193–200; HERMINE HERTA MEYER, THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT 126–27 (1977) (pointing out that relevant due process procedures are specified in the Fifth and Fourteenth amendments). With respect to the oft-cited alleged generalities associated with due process, Berger questioned whether "due process of law" was loose language. Yet, Charles Curtis, an admirer of the Court's innovations, wrote that the meaning of due process of law in the Fifth Amendment "was as fixed and definite as the common law could make a phrase. . . . It meant a procedural process." BERGER, *supra* note 56, at 200. The Court stated that the phrase in the Fourteenth Amendment was used "in the same sense and with no greater extent[.]" Hurtado v. Cal., 110 U.S. 516, 534 (1884). John Bingham, the Amendment's draftsman, said that its meaning had been settled "long ago," BERGER, *supra* note 56, at 203, by the courts and, but for a couple of cases which John Hart Ely justly labels as "aberrations," John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 417 (1978), "that meaning was all but universally procedural." BERGER, *supra* note 56, at 204. So far as the framers were concerned, "due process" was not a "loose" term, but one of fixed and narrow meaning. *Id.* at 200. Professor Meyer concurs:

> No one could dream that one day the United States Supreme Court would take a constitutional term, turn it into a nonsensical phrase—substantive due process—and misuse it as a cover-up for the absence of constitutional authority to interfere with the constitutional functions of the legislatures of the states, and even with those of Congress.

MEYER, *supra*, at 127. As I will soon make clear, I suggest students return to documents such as the Massachusetts Body of Liberties. *See infra* notes 177–195 and accompanying text.

139 *See* sources cited *supra* note 85.

140 Is it sad, though not surprising, that so many law students are frequently unfamiliar with *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). But *Barron* is only one among many. *See infra* note 202.

141 *See supra* note 137; *infra* note 205. As noted earlier the arrogance and self-serving justifications of the media's Invisible Hand, rival those of their laissez-fairest predecessors. *See supra* note 124. *See also, e.g.*, Eason Jordan, *The Awful News CNN had to Keep to Itself*, INT'L HERALD TRIB. (Paris), Apr. 12–13, 2003, at 6 (describing how CNN management chose to ignore the torture of its own personnel and Iraqi citizens, as well as the fact that the Iraqi government—under Hussein—severely circumscribed their movements and ability to report—all so they could report from Baghdad). Here is a respected journalist unable to see just how self-serving such arguments are, and how powerful are the assumptions that guide him.

142 U.S. CONST., art. V. There are two methods of amending the constitution, although throughout our history we have only used one. A suggested Council of Revision, giving the Justices a role in judging the wisdom of legislation before it was implemented, was rejected at the Convention. *See* SAVING, *supra* note 3, at 128–29. *But see* KRAMER, *supra* note 34, at 280 n.1. Take this question: Can the Supreme Court declare a federal constitutional amendment, unconstitutional? I recall, but cannot locate, one scholar's judgment that the Bill of Rights could not be repealed by amendment because it would violate the *spirit* of the document. I disagree. The Supreme Court has declared an amendment to a state constitution, unconstitutional. *See* Reitman v. Mulkey, 387 U.S. 369 (1967).

argue that the people's consent may be assumed to have been tacitly granted since the people have not objected to the judiciary's expanded role or because elected representatives have failed to chastise the Court and refused to employ the counter-measures at their disposal.[143] I disagree. First, the Justices have never collectively informed the people that they believe they are more capable than legislators or the people themselves to make wise public policy. Instead, behind the smoke and mirrors of their own creation they inform the people, as did their laissez-faire predecessors, that the decisions they make are based on the *Constitution*. And then they coerce obedience by reminding the people of their solemn promise to obey the document their forefathers shed blood to secure. Second, the Justices forego the people's allegiance when, violating their oath on the level of practice if not principle, they abandon the *only* authority they ever possessed: the ratifiers' understanding of the Constitution.[144] In light of such deception and ordinary canons of construction, consent of the people to a greater judicial role than was understood by the ratifiers *should be explicit*.[145] The Court today acts not only as if it was authorized to sit as the second Philadelphia Convention, but after it finishes its work, the Justices ratify their own proposals. The people's *present* representatives, for whatever reason (ideological, political, practical, or theoretical), may accept this new judicial role, but unless the Constitution is formally modified, at any subsequent time that role may be unceremoniously repudiated by the representatives who succeed them.[146]

No word, phrase, or portion of the Constitution—be it "liberty," "equal protection," "due process," "free speech," or the Bill of Rights *in toto*—can swallow up and render ineffective or superfluous the people's charter of self-government—the Constitution.[147] Unless proscribed by the

143 SAVING, *supra* note 3, at 218–23.

144 To avoid being misinterpreted, I want to remind the reader that the issue is not the *power* of judicial review, but its *scope*. *See* Berger, *supra* note 20.

145 *See infra* note 205.

146 "Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act." THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 4, at 470. Publius is being perfectly consistent. If a limited constitution is to endure, it must be respected by all, including those who would be entrusted with the task of changing it. The capacity of the present generation to amend the Constitution by the procedures provided does not permit them to abandon those ratified limitations until the change is procedurally enacted. *Id.*

147 Twenty-five years ago I speculated that the scholarship of Raoul Berger would necessitate that teachers lie about what was known or unknown about the intent of those who framed the Fourteenth Amendment. Law students are in a far better position than I to judge whether there has been any change in how professors confront the following questions:

> What then will the Justices and we scholars do about fourteenth amendment [sic] cases in the context of Berger's findings? There are, of course, several options.
>
> . . . Ignore Berger's conclusion; they will go away; nobody really cares—it's results that count . . . .
>
> . . . The Justices and we scholars could claim that the history is not relevent [sic]. . . .
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> . . . The history is ambiguous. Thus far, this certainly has been the most prominent theme. This approach holds a lot of promise, if as scholars and/or justices, we don't mind

text or rooted in the ratifiers' understanding or historical practice, the people are entitled to govern themselves as they see fit. After all, as Publius reminds us, the cure for an ill-administration most often is a change in elected representatives.[148] As for the American people, and for law students, I have nothing but the highest expectations. I have never regretted placing my faith in either (well, okay, most of the time). The American people cannot be faulted for accepting the Court's (or its supporter's) word on what is constitutional or not, any more than a car owner should be faulted for accepting a trusted mechanic's word that a repair is needed. Despite frequent and grave misgivings about the wisdom of what the judges have decided, the people have remained extraordinarily faithful to our Constitution,[149] and constitutional scholars should expend every effort to distinguish what is, and what is not, constitutionally binding. Judges must embrace self-government in its *full* measure, and not limit the people's options to what they believe is wise public policy.

Am I (under the guise of expressing concern for interpretive rules, government competency, or self-government) merely substituting my own public policy preferences for those championed by my non-interpretivist brethren? The reader must ultimately decide. But I suggest that issue misses the point. Do *law students* believe the framers authorized *judges* to impose *their* will on the American people? And if the framers did not, who did? Finally, public policy resolutions requiring the balancing of competing constitutional claims, or necessitating moral judgments, are at the very heart of politics. Isn't that precisely what *making law* is all about? Can law students separate what they hold most dear, from what the Constitution may or may not require?

IV. TASKS AND TOOLS: THE INTERPRETIVIST CHALLENGE

This article maintains that constitutional law has been seriously damaged, and if it is ever to be repaired, law students must address several questions: What and from whom did they learn about A) the limits of judicial power, B) the American political tradition, C) the authority of precedents, and D) contemporary standards of scholarship? I begin by discussing the limits of judicial power, since today I better appreciate that the non-interpretivist approach is only a symptom, rather than the disease itself.

> participating in a lie. All we have to do, once we examine the evidence is, forget it, distort it, ignore it. . . .
>
> There is the related problem of what to do with our students? Do we tell them a straight-out, bald face lie—for their own good, naturally. 'Despite the alleged findings of Berger *et al*, the evidence is ambiguous.' Or kind of slip it by—more an admission than a confession: 'The evidence *seems to be inconclusive*, but naturally you will have to make your own judgment.' Or 'Whatever the Berger *et al* findings, the question is, what do we want the Constitution to mean today? How can we make it work for us? It is more important to focus on the results obtained.'

Expansionism, *supra* note 21, at 62 n.472 (citations omitted).

148 THE FEDERALIST NO. 21 (Alexander Hamilton) *supra* note 4, at 140.

149 As evidenced by the fact that our Constitution has remained in place for over two centuries.

A. Approaching the Limits of Judicial Power

Despite earlier characterizations, law students will find the non-interpretivist position far from monolithic. Some non-interpretivists contend the Supreme Court should use its power *only* to defend the structures created by the framers;[150] others contend that judicial power should only be confined to assuring fair access to the democratic process;[151] still others turn to the courts only to expand traditional rights, to create new substantive rights, or both.[152] Most discerning non-interpretivists, however, admit that the power wielded by the Supreme Court today certainly was not the power sanctioned by the framers.[153]

Law students will further find that interpretivists and non-interpretivists are actually in agreement about certain things. For example, both camps acknowledge that those who proposed and ratified the constitution understood it to have created a limited government—one "contain[ing] certain specified exceptions to the legislative authority . . . ." [154] They also agree that a life-tenured judiciary and judicial review are essential to preserve those aforementioned limitations, and both acknowledge that the constitution placed limits on Congress because otherwise, as Publius noted, "the servant [would be] above his master . . . [and] the representatives of the people [would be] superior to the people themselves . . . ."[155] Interpretivists firmly maintain, however, that in accepting judicial review, the framers never authorized judges to impose *their* sense of wisdom or morals on the people, expand the constitutional restrictions on Congress or the President, or to create new rights. The points need not be belabored. George W. Carey succinctly sums them up:

> We submit, then, that Federalist 78, when read in its entirety . . . amounts to a perfectly sensible statement with which few, if any, would seriously disagree, given the fact that we have a written charter of government. To note, as Hamilton does, the feebleness and weakness of the judiciary, the fact that it cannot take any "active resolution whatever," that it is to be a passive institution exercising only JUDGMENT, that its powers extend to declaring acts of the legislature unconstitutional only when contrary to the "manifest tenor" of the Constitution . . . that it can only use this power when there is an "irreconcilable variance"

150 *See, e.g.*, MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE (1995) (disagreeing with one set of interpretive rules being applied to political structures while another is used in personal rights cases). See also William Gangi, Book Review, 90 AM. POL. SCI. REV. 200 (1996) (reviewing MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE (1995)).

151 *See, e.g.*, JOHN HART ELY, ON CONSTITUTIONAL GROUND (1996). *But see* William Gangi, Book Review, 27 PERSP. POL. SCI. 52 (Winter 1998) [hereinafter Ely Review].

152 Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

153 *See, e.g.*, William Ray Forrester, *Are We Ready for Truth in Judging?*, 63 A.B.A. J. 1212 (1977); Louis Lusky, "*Government by Judiciary": What Price Legitimacy*, 6 HASTINGS CONST. L.Q. 403, (1979). The Supreme Court has a "new and grander conception of its own place in the governmental scheme." *Id.* at 408.

154 THE FEDERALIST NO. 78 (Alexander Hamilton) *supra* note 4, at 466.

155 *Id.* at 467. In the text I refer only to Congress, because ultimately they can pass laws with or without the President's consent.

> between the statute and the Constitution, and, finally, that it is "indispensable" that it be "bound down by strict rules and precedents," hardly lends support to the thesis that he sought to vest the judiciary with the kind and degree of powers that modern-day "judicial activists," among others, impute to it. Put otherwise, we have noted that, if judicial review is indeed a part of the contract to which we have given our tacit consent, we must, perforce . . . go to Federalist 78 to see the justification for it and to understand its scope as well as the obligations of the Court in exercising this power. When the terms of the contact are broken by the Court, our obligation to respect or obey its power of judicial review is severed, and the other branches of government, principally the Congress, are entitled, nay *obliged*, to use the constitutional means at their disposal to curb, regulate, and control the Court in such a manner as to compel conformance with the terms of the contract. This line of reasoning is but a corollary of the line of reasoning by which the courts lay claim to the power of judicial review. The Court is equally obliged as a creature of the Constitution not to overstep its bounds or exceed its constitutional authority. To argue otherwise would be to say that the Court endorses judicial supremacy.[156]

As we have detailed earlier, however, many non-interpretivists reject being bound to the *framers'* understanding of judicial review or to the limited scope of its appropriate application. They hop-skip-and-jump from the legitimacy of judicial review to the unsupported conclusion that the role played today by the Supreme Court is *consistent* with the ratifiers' understanding.[157] But assuming for the moment that the interpretivist position summarized by Professor Carey is correct, how did an independent federal judiciary fit into the framers' design?[158] I reject non-interpretivist assertions that the contemporary role of the Supreme Court is indistinguishable from the role sanctioned by the framers. The preponderance of the evidence is to the contrary, and in fact, there is little difficulty in meeting the more demanding burden of beyond a reasonable doubt.[159]

Publius of course had explicitly characterized the judiciary as "the

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156 EFENSEDEFENSE, *supra* note 30, at 135. A tribute to Carey's scholarship is the fact that these words were penned prior to 1977 when Raoul Berger's GOVERNMENT BY JUDICIARY (a seminal work upon which much of the modern critique of the Supreme Court rests) was published. *See* GOVERNMENT, *supra* note 56; *supra* note 21. Carey had articulated components of these conclusions earlier. *See* Willmoore Kendall & George W. Carey, *Introduction* to *What to do About the Court?*, *in* LIBERALISM VERSUS CONSERVATISM: THE CONTINUING DEBATE IN AMERICAN GOVERNMENT 277, 277–84 (1966) [hereinafter CONTINUING]. For an illustration of the varying viewpoints on the role of the Court, compare Eugene V. Rostow, *The Supreme Court in the American Constitutional System*, *in* CONTINUING, *supra*, at 285, 285–300; Charles S. Hyneman, *Frontiers of Judicial Power*, *in* CONTINUING, *supra*, at 301, 301–10; Robert A. Dahl, *Decision Making in a Democracy: The Supreme Court as a National Policy-Maker*, *in* CONTINUING, *supra*, at 310, 310–22. *See also* WILLMOORE KENDALL & GEORGE W. CAREY, THE BASIC SYMBOLS OF THE AMERICAN POLITICAL TRADITION 139–42 (1970) [hereinafter BASIC]. "Judges did not typically intervene unless the unconstitutionality of a law was clear beyond doubt, which as a practical matter left questions of policy and expediency to politics." KRAMER, *supra* note 33, at 150.

157 SAVING, *supra* note 3, at 194–225.

158 George W. Carey, *The Supreme Court, Judicial Review, and Federalist Seventy-Eight*, 18 MODERN AGE 356 (1974), *reprinted in* DEFENSE, *supra* note 30, at 122, 122–38.

159 Of course my assumption in the text is dependent upon an agreement that our history—not speculation—should be the governing criterion.

weakest of the three departments of power . . . ."[160] He assumed judges would use traditional canons of statutory construction, and if they strayed too far from their interpretive responsibilities, Congress could limit its appellate jurisdiction, reduce the budget of the judicial branch (but not the salary of judges), regulate how courts conducted their business, or, ultimately, impeach judges.[161] To deduce, as many non-interpretivists must, that by authorizing judicial review Publius or the ratifiers somehow signaled a repudiation of the republican character of the government, is patently absurd.[162]

Although Publius staunchly defends an adequately empowered independent judiciary, as we all should, his remarks cannot fairly be construed as sanctioning the exercise by the judiciary of either legislative or executive powers—powers that have a different nature. He carefully rejected the Anti-Federalist charge that by citing the "*spirit* of the constitution" the federal judiciary could by manipulative reasoning impose their beliefs on the people.[163] More or less the same contention was resurrected a century later by the Revisionists[164] who contended that the framers' entire constitutional design was intended to thwart popular majorities and charged that judicial review was the "final bastion against majorities intent upon regulating property rights."[165] The legacy of scholarship that supported Revisionist reasoning is, I suspect, what continues to provide justification for many contemporary non-interpretivist assumptions.[166] I will return to this point.

If law students examine Publius' defense of an independent judi-

160 THE FEDERALIST NO. 78 (Alexander Hamilton) *supra* note 4, at 465–66 (citing Montesquieu: "Of the three powers above mentioned, the JUDICARY is next to nothing.").

161 THE FEDERALIST NOS. 78–83 (Alexander Hamilton). *See also* SAVING, *supra* note 3, at 40–51.

162 DEFENSE, *supra* note 30, at 133–35. "[T]he Court has itself violated the manifest tenor of the Constitution and it has done so in these and like cases by failing to observe the injunctions that Hamilton set forth." *Id.* at 138. *See also* KRAMER, *supra* note 33, at 102–03; *Id.* at 108 (quoting Thomas Jefferson). Kramer quotes John Tyler: "[T]he violation must be plain and clear, or there might be danger of the judiciary preventing the operation of laws which might be productive of much public good." *Id.* at 102 (alteration in original). *See also supra* note 30.

163 THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 4, at 482. Publius dismisses Anti-Federalist objections on the grounds that "there is not a syllable in the plan under consideration which *directly* empowers the national courts to construe the laws according to the spirit of the Constitution . . . ." *Id.* He says that his proposition about the power to declare acts void, however, was perfectly consistent with "the general theory of a limited Constitution . . . ." *Id.* Publius contends that the proposed solution, a completely independent judiciary, is preferable to the British model. In fact, since more of the American states use a model similar to the one proposed at Philadelphia, the proposed constitution is in this respect not "as novel and unprecedented" as its critics suggest. *Id.* at 483–84. Publius goes on to give his reasons for reaching these conclusions. *See id.* It should be kept in mind that Publius' analysis in all the papers is made in the absence of a Bill of Rights, a situation which would have added to the number of prohibitions to be monitored by the judiciary.

164 *See infra* text accompanying notes 220–230.

165 DEFENSE, *supra* note 30, at 122–23.

166 There are some differences between the laissez-fairest and the contemporary non-interpretivists. Today, non-interpretivists *support* increased judicial power (at least in the personal rights area), while the original Revisionist critics *chastised* the Court for using judicial power to limit legislative power (at least in the property rights area). At one lecture of mine, I suggested that both Courts were equally guilty of imposing their will, to which a law professor (about my age as well as extraordinarily articulate and civil), frankly commented that, "the laissez-fairest were simply wrong!"

ciary,[167] they will reach two conclusions. First, "there is no denying that Federalist 78 clearly constitutes the most authoritative evidence we possess that the Framers intended judicial review."[168] And second, the power of judicial review championed by Publius is *not* equivalent to the claim of "judicial *supremacy*" put forth by modern judicial power proponents.[169] While the non-interpretivist defense of modern judicial power is certainly sophisticated, if students investigate it, they ultimately will find it unconvincing.[170] In the end the non-interpretivist position provides students with a short-term fix—they get to dress up the results they prefer in constitutional garb. Students who aspire to walk in the shoes of the framers, however, must oppose court decisions that usurp the legislative role. At times this may be difficult because some students care so much about a particular issue, but they must oppose illegitimate decisions even when they agree with the wisdom of the public policies said decisions promote.

Let us assume for the moment that the forgoing brief presentation has convinced you that there is some merit in the interpretivist position that the framers' understanding of judicial review is incompatible with the modern non-interpretivist model. Would that determination have any bearing on how you view the authority of the Supreme Court? Non-interpretivists contend that any discrepancy with what the framers understood as the judicial power, is simply no longer important. Why, they ask, should Americans today still be bound by the views of those long dead? I call this the "so what" argument, and as you might suspect (and I will demonstrate), it has many applications. It amounts to this: "I do not care what the framers believed about judicial power, or what our history demonstrates, or what precedents held, because I support the Supreme Court's decisions, even if they *are* illegitimate." If such is the case, there is little need to read on. Such students have foregone reason and embraced will. I wish them productive careers.

B. Approaching the American Political Tradition

Assuming that at least some students have survived this assault on everything they hold dear, and remain intrigued, or they agree that the "so what" line of argument evinces will rather than judgment, they might next consider probing our history. But where should they begin?[171] Over the

167 DEFENSE, *supra* note 30, at 125–29.

168 *Id.* at 129.

169 *Id.* (emphasis added). Carey also notes the parallel reasoning between Federalist Paper 78 and Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). *Id*. In many respects Carey's analysis preceded and parallels my own. *See* SAVING, *supra* note 3, at 40–51. Many non-interpretivists in fact concede that the modern idea of judicial power is something new. They just don't think that fact is particularly relevant. *See Expansionism*, *supra* note 21, at 20–22; sources cited *supra* note 153.

170 I assume, of course, they will evaluate the conflict impartially, without focusing on how it may impact the results they favor.

171 Let me make a few suggestions for curious souls looking for something to research. You could compare the contemporary definition of free speech in England and the United States. If you look back, I suspect you will find a great deal of similarity up until the decisions of the Warren Court. I might suggest also that if students examine contemporary English law on the subject they may get a better

past years, having been asked that very question on several occasions, I acknowledge that rediscovering what has been lost is not as easy as it once was.[172] I suggest pursuing this objective on three levels: select original sources, be careful about secondary sources describing the American founding, and remain historically grounded.

1. Selecting Original Sources: The Enduring Contribution of the Federalist Papers

Students should get in the habit of examining original sources. The Mayflower Compact (1620) and the Massachusetts Body of Liberties (1641) would certainly be a good start, but when it comes to appreciating the framers' design, there is no better place to begin than *The Federalist Papers*.[173] The *Papers* of course stand on their own merits and this article cannot possibly review particulars. My focus here, instead, is to increase your awareness of the negative sentiment that exists among non-interpretivists regarding the importance of the *Federalist Papers*. To do so, I suggest one essay that might be helpful in weighing the various charges.[174]

Students are usually familiar with *Paper Nos. 10*, *51*, and, maybe, *78*, which are often conveniently included in college text book appendices. College text book authors sometimes also cite these papers to buttress two assumptions. First, the core characteristic of American politics is competing interest groups (you know—"The 'Mischiefs of Faction'").[175] Second, the Supreme Court (having been granted the power of judicial review), is therefore charged with resolving public policy disputes.[176] Kendall and Carey advise that to put *Papers Nos. 10*, *51*, and *78* in context students should read *all* of the *Papers*.[177] Unlike what students are most likely taught from non-interpretivist sources, these authors advise that the *Papers* are neither "'mere' journalism" nor "propaganda."[178] And they are any-

grasp about how far we have deviated from our common law history. Hurry up though—there is some speculation that before long the English Bill of Rights may be replaced by decisions of the European Court of Justice. *See* MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL 277–78 (1982).

172 *See supra* note 12–16 and accompanying text.

173 See THE FEDERALIST PAPERS, *supra* note 4.

174 Willmoore Kendall & George W. Carey, *How to Read "The Federalist"*, *Introduction* to THE FEDERALIST PAPERS, *supra* note 4, at v [hereinafter *How to Read*], *reprinted in* CONTRA, *supra* note 88, at 403.

175 MAGLEBY ET AL., *supra* note 85, at 132.

176 *See, e.g.*, *How to Read*, *supra* note 174. Later on I will have more to say about modern democratic theory. Textbooks frequently articulate two other unsupported assumptions about American Government: the framers founded three equal and coordinate branches (*poppycock*), and the purpose of separation of powers was to protect minority rights. With respect to the first, the fact that Congress can impeach the President and Justices, yet, remain the sole judge of its own members, should be sufficient alone to ignore that contention. *See* William Gangi, Professor, St. John's University, New York, Department of Government and Politics, Lecture No. 8 on Chapter Twelve: The Presidency, MAGLEBY ET AL., *supra* note 82, (2006) *available at* http://members.aol.com/gangibill/lecture8.htm. With respect to the second contention see *infra* notes 240–246 and accompanying text.

177 *How to Read*, *supra* note 174, at v.

178 *Id.* at vi–ix, xiii–xv (emphasis omitted).

thing but simplistic. On the contrary, the *Papers* are "a 'basic document' of the American political tradition"[179] that constitutes "a re-enactment, in miniature, of the *miracle* of the Philadelphia convention . . . ."[180]

But, wait—did not Hamilton and Madison subsequently express divergent views, and is not that sufficient reason to reject the contributions of both?[181] The authors respond, yes and no. Yes, because the two authors subsequently expressed different views. No, because that is insufficient reason to reject their common understanding at the time of ratification. "[T]he holistic perspective of *The Federalist* . . . holds out the best prospect for identifying, illuminating, and comprehending these and like concerns surrounding the foundations of our system."[182] The fact that three writers contributed to the product, or that subsequently two of these authors had divergent views, is not only largely irrelevant, it misses the point. They add:

> The Constitution became possible because, increasingly, the delegates were willing to ask themselves not "What do *I*, personally, think the Constitution ought to be?" but rather "How *much* of what I think can I insist on with any hope of getting others to go along with me?" and "How *much* of what we can all get together on is there any hope of getting accepted by the American people?". (Not, as that famous book puts it, "What do I will?", but "What is the general will?".) *The Federalist*, we are saying, re-enacts that political miracle—as, we would add, with the exception of the tragic years that produced the Civil War, American political life has re-enacted it over and over again ever since—and eventuates in a public act that became possible only because the authors were prepared to submerge their individual personalities, their individual political philosophies, in the common enterprise.[183]

Early in my career I was thus inoculated against the then-current, and still-prevalent, attitude that the *Papers* contain "mutually inconsistent positions and values" that mask the framers' undemocratic motives.[184] That perception has led far too many political scientists to ignore or dismiss the *Papers* (with the notable exception of *Paper No. 10*).[185] Are law students

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179 *Id.* at xv (emphasis omitted).

180 *Id.* at xii.

181 *See* George W. Carey, *Publius—A Split Personality?*, 46 REV. POL. 5 (1984) *reprinted in* DEFENSE, *supra* note 30, at 18.

182 DEFENSE, *supra* note 29, at 33.

183 *How to Read*, *supra* note 174, at xii. Intriguing of course, is the fact that neither Alexander Hamilton nor James Madison were satisfied with the final product. *See* Charles F. Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government*, 36 WM. & MARY Q. 215 (1979).

184 DESIGN, *supra* note 43, at xiii. Carey points out that "authors who focus on the political-economic dimensions . . . are prone to read Publius as saying that the 'first object of government' is the protection of property per se, rather than, as he states it, the protection of 'the diversity in the faculties of men, from which the rights of property originate.'" *Id.* at 27.

185 *Id.* at xiii–xiv. *See also* Douglass Adair, *The Tenth Federalist Revisited*, 8 WM. & MARY Q. 48 (1951). One other point: the participants at the Philadelphia Convention were *practicing* politicians. They understood only too well, as the quoted portion (*supra* text accompanying note 183) makes clear, that if they had failed to obtain a consensus acceptable to the people, any schema they produced would, like so many others before it, be heaped on the junk pile of history. Years earlier Carey had introduced me to John Roche's seminal piece, John P. Roche, *The Founding Fathers: A Reform Caucus in Action*,

aware—in the words of John Jay previously quoted[186]—that "tides" surround them, and if so, how can they escape (or even minimize) the dominant opinions of their era? You realize, of course, that years of intense toil and reflection are ahead of you, and you will be compelled, to one degree or another, to rely on the scholarship of those who preceded you.[187] The former builds expertise and a sense of continuity, while the latter encourages you not to confuse ego with professional obligations. Examine the work of any great scholar, and you will find curiosity and meticulousness, as well as a sense of fairness.[188] True scholars treat their opponents with respect and civility, although they do not run from a fight.[189] If scholarship is about anything, it is about being honest with ones' self and those with whom one disagrees. It entails sifting through and evaluating evidence to reach conclusions, while simultaneously—and as much as humanly possible—acknowledging and putting aside one's personal preferences and biases.[190] *The Federalist Papers* preserve a legacy of knowledge about human nature, politics, power, freedom, honor, and faith, as well as wariness and respect for one's fellow citizens. They are about "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."[191] *The Federalist Papers* are certainly *not* about judicial oligarchy or intellectual elitism.

2. Approaching Secondary Sources: Beware of Unstated Assumptions

Throughout your secondary school education (perhaps even in college and law school), did your professors often cite the Declaration of Indepen-

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55 AM. POL. SCI. REV. 799 (1961) *reprinted in* CONTINUING, *supra* note 156, at 33.

186 *See supra* note 4.

187 As, for example, George W. Carey has done throughout his career. In one work the dedication is to his friend and colleague, Willmoore Kendall, BASIC, *supra* note 156, and in another work the dedication is to Charles S. Hyneman, DESIGN, *supra* note 43. He had acknowledged the latter's influence on his earlier work, in Willmoore Kendall & George W. Carey, *The "Intensity" Problem and Democratic Theory*, 62 AM. POL. SCI. REV. 5, 6 n.1 (1968) [hereinafter *Intensity*] *reprinted in* CONTRA, *supra* note 88 (subsequent citations will be to this book). Elsewhere, Carey credits Hyneman for his early perception of the possible consequences of the Supreme Court's desegregation decisions, namely, "whether the Court would be so bold as to take upon itself the task of correcting the presumed 'political failures' of the elective branches." DEFENSE, *supra* note 30, at 4–5.

188 Kraditor, *supra* note 41. That is not to say that their conclusions are always right, or that, like all human beings they do not have their failings, personal or professional, or that they are exempt from the normal scholarly perils. *See infra* notes 286–303 and accompanying text.

189 Despite his tendency toward being overly polemic, I recommend Raoul Berger as a model.

190 The ability to be more objective comes in a variety of guises. Take Warren Buffet's recent acknowledgement after his wife died, that he better appreciated his talent to make money, and that he would not be as good as Bill and Melinda Gates at expending it for noble causes. Carol J. Loomis, *Warren Buffett Gives it Away*, FORTUNE, July 10, 2006, at 56. Buffet decided to give the Bill & Melinda Gates Foundation 10 million shares of Berkshire Hathway stock, to be gifted at a rate of 5% of the designated shares each year. *Id.* at 62. The value of this stock today is over $30 billion. *See id.* While we are on the topic of separating judgment from ego, one might also cite John Travolta's character in *Saturday Night Fever* when, despite winning the support from his friends, he recognized his opponent was the better dancer. SATURDAY NIGHT FEVER (Paramount Pictures 1978). *See also supra* note 50 (regarding the blunt assessment of a New York City atheist).

191 THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 4, at 33.

dence as marking the beginning of our political tradition? Was emphasis placed on individual rights and equality above all other values, closely followed by professors waxing eloquent about the Bill of Rights? I am willing to wager that, for most of you, more time and energy was spent on the Bill of Rights (especially the First Amendment) and how the Supreme Court has adapted society to changing circumstances (of course citing *Brown v. Board of Education*)[192] than on the framers' understanding of republican government, judicial power, or even the powers of Congress.[193]

During my Ph.D. candidacy years I obtained an underground copy of two of Willmoore Kendall's five Vanderbilt Lectures. While I found them interesting, I had a dissertation to complete and put them aside. Several years later those lectures, as well as four by George W. Carey, were published in book form.[194] Close inspection of the materials initially left me troubled. My personal copy of the Mayflower Compact (1620) (contained in a volume of important American documents) omitted some of the language that the *Basic* authors quoted as being in the Compact. Eventually, however, I noticed that my copy of the Compact was an *edited* one, that is, one in which the editor obviously had deleted various words and phrases because he had thought them extraneous.[195]

That was an important lesson for me to learn about scholarship: look for unstated assumptions. The difficulty of that task is compounded if you share an author's assumptions. *Basic* sensitized me to two things. First, to "thesis books," that is, books wherein the authors pretty much know their conclusions before they begin.[196] As a result, scholars often unintentionally distort our history, and because they do so, subsequent scholars rely on skewed research. For considerable periods of time original sources may remain unexamined.[197] The second is what Kendall and Carey labeled as

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192 347 U.S. 483 (1954).

193 *See infra* notes 197–223 and accompanying text.

194 BASIC, *supra* note 187. After Willmoore Kendall's untimely death his widow asked George W. Carey to edit and expand the original Vanderbilt Lectures. *Id.* at vii.

195 *Compare* The Mayflower Compact (Nov. 21, 1620), *in* RICHARD B. MORRIS, BASIC DOCUMENTS IN AMERICAN HISTORY 7, 7–8 (Louis L. Snyder ed., D. Van Nostrand Co. 1956) *with* BASIC, *supra* note 151, at 157–58. Once I obtained a full version of the Compact, Carey's scholarship proved impeccable. The problem I encountered however, has tainted two generations of research materials, particularly with respect to the injection of progressivist assumptions. Later in this article I put forth several rules for scholars dependent upon historical works. *See infra* notes 293–297 and accompanying text; SAVING, *supra* note 3, at 252. *See also* ERIC VOEGELIN, THE NEW SCIENCE OF POLITICS 4–6 (1952). Voegelin notes that "[t]he damage is . . . done through interpretation. The content of a source may be reported correctly as far as it goes, and nevertheless the report may create an entirely false picture because essential parts are omitted. And they are omitted because the uncritical principles of interpretation do not permit recognizing them as essential." *Id.* at 10.

196 BASIC, *supra* note 187, at 9. This occurrence is perhaps more widespread than we care to admit. The far greater danger however, is that focused on one's thesis, contrary evidence goes unrecognized.

197 *See infra* notes 287–292 and accompanying text. This is why earlier in this section I urged students to consult original sources. For some time now, Supreme Court decisions have been replete with assumptions of progress, including such phrases as "evolving standards of decency." Trop v. Dulles, 356 U.S. 86, 101 (1958). By the Warren Court years, that assumption had become so embedded in adjudication, Earl Warren could use it without feeling the need to quote its originator. *See* SAVING,

the "official literature," that is, secondary literature which contends that our entire tradition has been one of liberty and equality.[198] *Basic* provides a potent vaccination against the pernicious ramblings of college textbooks that often ignore or distort our history. Admittedly, students bitch and moan because *Basic* requires so much more thinking than the standardized American government college textbook—those that all-too-frequently highlight important information in contrasting black or purple. But after some initial struggle, more perceptive undergraduates become resentful, and law students become down right livid![199] They demand to know: "Why didn't our college or law professors raise these issues before?" I reply: "Surely your teachers had good intentions. They probably didn't want to confuse you, believing it was best to teach you the ideal, rather than unpleasant realities." Perhaps they believed these were noble lies.[200]

As adults, law students are entitled to frankness and convincing evidence. My experience as a lecturer thus far is that students are receiving neither. Not unexpectedly, students learn their contemporary catechism, that is, at least some professors regularly make them aware of our nation's failures (against blacks, Indians, women and, now, illegal immigrants), while our prior generations are collectively labeled racists or misanthropes. To this Brooklyn boy, such accusations are akin to hitting an opponent when they are down. Maybe the rules have changed, but in my youth, such conduct was considered unsportsmanlike. It also seems intellectually dishonest. After all, one's opponents are dead. They cannot explain why they believed or acted as they did, although one of course expects that they believed they were doing the *right* thing.[201] The primary assumption today

supra note 3, at 102–03; Nat'l Mut. Ins. v. Tidewater Transfer Co., 337 U.S. 582, 646–47 (1949) (Frankfurter, J., dissenting) (noting that the founders intended for certain concepts in the Constitution to evolve with society). As I mentioned in SAVING, there is no need to accuse Warren of plagiarism, only to appreciate the nature of unstated assumptions. SAVING, *supra* note 3, at 103 n.77. *See also id.* at 183 n.59, 254 n.114. For examples see the statements of Justice O'Connor, *infra*, notes 244 (noting the importance of legal education given that a large percentage of senators and judges are products of elite law schools), 340 (commenting on societal changes with regard to race-conscious admissions policies).

198 BASIC, *supra* note 156, at 9–10. *See, e.g.*, MAGLEBY ET AL., *supra* note 85, at 430 ("The Declaration of Independence proclaims the precious rights of *equality* and *liberty* . . . . [I]t took almost 200 years for that definition to be expanded to include all races, all religions, and all women as well as men."). *Compare* William Gangi, Professor, St. John's University, New York, Department of Government and Politics, Lecture No. 12 on Chapter Seventeen: Equal Rights Under Law, *with* MAGLEBY ET AL., *supra* note 82, (2006) *available at* http://members.aol.com/gangibill/lectur12.htm. *See also* William Gangi, Professor, St. John's University, New York, Department of Government and Politics, Caring Too Much About Very Important Things: The Decline of American Constitutional Law, Address at Southwest Texas State University (Nov. 15, 2001) *available at* http://members.aol.com/gangibill/texas50.htm.

199 The Department of Government & Politics at St. John's University has a joint degree program with the School of Law—an M.A./J.D. program. St. John's University School of Law, Academics and Programs, http://www.stjohns.edu/academics/graduate/law/academics/jd.sju (last visited July 28, 2007).

200 For a discussion of "noble lies" see 3 ERIC VOEGELIN, ORDER AND HISTORY: PLATO AND ARISTOTLE, 105–07 (1957). "[W]hat is that "Big Lie"? It is the simple truth that all men are brothers." *Id.* at 105. *See supra* note 147 (asserting that scholars must find a way to handle Fourteenth Amendment *facts*).

201 One wonders if succeeding generations will find contemporary abortion justifications as convincing as we do today.

appears simplistic: this generation is smarter and morally superior to any that preceded it. While such lack of humility is bound to reap its comeuppance, it helps explain why precedents are no longer considered a repository of legal wisdom (or folly, and I wonder if the two are not intimately related) and thus discarded as no longer instructive.[202]

But *Basic* does more than undermine the official literature. It contends that above all, our tradition is about *self-government*. If that realization is placed center-stage, the continuity of the American political tradition, from the pre-revolutionary period to the present, almost magically emerges. Some distasteful facts certainly still must be acknowledged. But in doing so, students should minimize judgments of hypocrisy or stupidity, and be dissuaded from applying twentieth century moral sensibilities retroactively to eighteenth century citizens. In that historical context students no longer perceive citizenship solely in terms of *rights* enjoyed. Rather, they come to understand the awesome responsibility they have to define who we are as a nation, defend that meaning, and pass the legacy of self-government onto their children.[203] *Basic* also offers this important guideline: "Unless we can see a *correspondence* between the symbols we have in hand and the people's action in history, the symbols we have in hand do not in fact represent that people, and we must look a second time for the symbols that do in fact represent them."[204] As discussed later in greater detail, if a scholar speculates that particular words in the Constitution were understood by the people to mean one thing, but the people's actions are inconsistent with that meaning, it is far more likely that the *scholar* misconstrued what the people meant, than to assume the people did not comprehend the consequences when they selected the words they did. To charge the people with being either stupid or hypocritical (because their words did not allegedly match their actions) is at best premature.[205]

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202 Law students are seldom assigned seminal articles or even complete classic cases, and my impression is that competing views and precedents are often ignored. When lecturing, I ask law students if they have ever read the *full* versions of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833); Luther v. Borden, 48 U.S. (7 How.) 1 (1849); Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). Rarely do students acknowledge reading even *two* from the above list (and even then, may have done so only as undergraduates). Of course, many have read truncated textbook versions of these cases. I understand that students are pressed for time, so their energy is spent mastering shadows. While I cannot really fault them, the loss of intimate knowledge of such cases is impacting negatively on our legal tradition, or more precisely, it is substituting a manufactured tradition for the actual one. How can students tell the difference?

203 *See generally* BASIC, *supra* note 156. *Basic* also introduces students to an entirely new set of theoretical tools crafted by Eric Voegelin. *Id.* at 22–23. He put forth the proposition that once a people perceive themselves distinct from other peoples, they engage in "self-interpretation," that is, through myths and symbols they express what they believe. *Id.* at 21–23. Contrary to modern usage, myths and symbols are not means of manipulation—an assumption that remains at the heart of many Supreme Court decisions, including Texas v. Johnson, 491 U.S. 397 (1989), *see supra* notes 88–102 and accompanying text, and R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). Instead, symbols are a means by which a society represents its "truth" as a society. BASIC, *supra* note 156, at 17–29.

204 BASIC, *supra* note 156, at 26.

205 The applicable canon might be that, once a word's meaning has been established, departures ought to be explicit. For example, in response to his non-interpretivist opponents, Berger had replied

Before drawing this section to a close, examine a copy of the Massachusetts Body of Liberties (1641).[206] A discerning analysis will reveal, first, phrases that eventually became part of our Constitution and Bill of Rights. Second, while the liberties identified there address abuses common in preceding English history, the precautions taken are applied only against judicial and executive officials. Third, in areas which all of us recognize as particularly sensitive, the legislature (that is, the Massachusetts General Court) is authorized to make exceptions to cautions detailed.[207] Note, however, that "there is no hint of any right that *limits* the power of the legislature[,]"[208] because "escape clauses" lodged significant discretionary power in their hands.[209] In class discussions I am fond of quoting the following passage:

> No man shall be forced by Torture to confesse any Crime against himselfe nor any other unlesse it be in some Capitall case, where he is first fullie convicted by cleare and suffitient evidence to be guilty, After which if the cause be of that nature, That it is very apparent there be other conspiratours, or confederates with him, Then he may be tortured, yet not with such Tortures as be Barbarous and inhumane.[210]

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that his Fourteenth Amendment conclusions, as those of other Fourteenth Amendment historians, were based on the unequivocal statements of the Amendment's framers. GOVERNMENT, *supra* note 55, at 6. But even if this was not the case, the burden of proof (the obligation to present concrete evidence of intended change) falls squarely on those suggesting a radical departure from the announced objectives of the Amendment, because the Constitution granted only limited powers to the federal government—a principal reaffirmed by the addition of the Tenth Amendment. *Id.* at 16–17. That burden of proof is particularly high because its framers *clearly* expressed the desire to constitutionalize only the Civil Rights Act of 1866, ch. 31, 14 Stat, 27 (1866) (codified as amended at 42 U.S.C. §§ 1981, 1981a, 1983, 1988 (2000)), *rejecting* earlier drafts of the Amendment that had been broader in scope. *Id.* at 6–10. In such instances, sound interpretive principles require that any conclusion regarding their intentions "should be expressed in plain and explicit terms." United States v. Burr, 25 F. Cas. 55, 165 (C.C.D. Va. 1807) (No. 14,693). Professor Monaghan concluded:

> I find too little in the relevant source material, including the constitutional text, to think it more probable than not that any such sweeping change in the governmental structure was intended. Moreover, and more importantly, I am unable to believe that in light of the then prevailing concepts of representative democracy, the framers or ratifiers of [sec.] 1 intended the *courts* (rather than the national legislature pursuant to [sec.] 5) to weave the tapestry of federally protected rights against state government.

Henry Paul Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117, 127–28. I suggest that self-government is more about the power possessed by the people, than it is about (as the official literature would have us believe) individual rights and the role of the Supreme Court to create or enforce them.

206 The Massachusetts Body of Liberties (Dec. 1641), *in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY, at 70 (Donald S. Lutz ed., 1998).

207 BASIC, *supra* note 156, at 52–53.

208 *Id.* at 53.

209 *Id.* at 52.

210 MORRIS, *supra* note 195, at 13–14., *quoted partially in* BASIC, *supra* note 156, at 52 (errors in original). As Carey observes "the Massachusetts Constitution is generally conceded to be the most 'advanced' or sophisticated of the early State constitutions", George W. Carey, *Liberty and the Fifth Amendment: Original Intent*, 4 BENCHMARK 301, 301 (1990), which to me means we ought to study it more closely in order to better understand our tradition of liberties. I cannot here emphasize how much the competing values were weighed in the provision quoted in the text. But such weighing was common. For example, with respect to early coerced confession history, see *English*, *supra* note 16; *Critical*, *supra* note 16.

Of course most non-interpretivists today would be apoplectic at the suggestion that the quoted provision guaranteed *any* right. Where, they would ask, is the *unchanging* protection from possible *legislative* interference? But—and I cannot overemphasize the point—the good citizens of Massachusetts *demanded* that provision; and they believed that writing it down offered a better means to secure and preserve their liberties.[211] They did *not* find the escape clause language troubling or *inconsistent* with the liberty secured.[212] Why? Because they understood that at the next election they could remove any legislator who did not warrant the discretion entrusted.[213] The Body of Liberties recognizes what students today often instinctively sense (once inoculated against rights rhetoric): that few, if any, rights can exist in all times and circumstances.[214] Liberties always require a balancing of competing concerns.[215] Once again I ask students: who does the Constitution authorize to perform that *balancing* function?[216]

True, the approach exemplified by the Massachusetts Body of Liberties changed once equivalent "liberties" became constitutionalized rights, that is, once the Bill of Rights was added to the federal Constitution. But in what manner and to what degree did that occur? It is precisely here that in-

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211 Professor Gary McDowell states:

> To the Founders the Constitution's principles, though fixed, were of a nature sufficient to allow for *political* change under them. What the ideology of a 'living' Constitution argues is not that the Constitution—by its own terms and language—allows political solutions to the exigencies time inevitably will bring, but that the terms and the language of the Constitution itself must be understood as changing.

MCDOWELL, *supra* note 101, at 28. The issue then is not whether the Constitution should remain adaptable—of course it should—but rather which institution was charged with that responsibility.

212 BASIC, *supra* note 156, at 52–53. "[T]here is no hint of any right that *limits* the power of the legislature." *Id.* at 53.

213 The authors put the matter in a larger context.

> And the breath-taking powers attributed to the General Court must be understood in that context: The General Court that is to pass laws on the delicate topics touched upon, to pass laws in the sensitive areas from the standpoint of freedom, is to be made up of servants of humanity, civility and Christianity, sitting as a deliberative body, and subordinate to the 'call' of humanity, civility, and Christianity.

Id. at 55. I have not investigated whether or not at that time, recall also was available. *See also* KRAMER, *supra* note 34, at 83–84.

214 They probably would understand such instincts more thoroughly after reading all *The Federalist Papers*. Publius, for example, frankly asserts that powers of national defense cannot be safely limited "*because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.*" THE FEDERALIST NO. 23 (Alexander Hamilton), *supra* note 4, at 153. Does that position increase the prospect of abuse? Publius replies, perhaps, but nevertheless that possibility must be a *secondary* consideration. Why? Because, if you try to hedge your bets, either the government eventually will fail for want of the very power withheld, or, should the power be eventually required, it will be exercised despite its unconstitutionality—which then means the framers of that constitution built into it the seeds of its own destruction. *See generally* SAVING, *supra* note 3, at 27–29.

215 *See* SAVING, *supra* note 4, at 8–9. Two months after September 11, 2001, I raised the question of the impact of terrorism on constitutional law. William Gangi, Professor, St. John's University, New York, Department of Government and Politics, The Impact of Terror: Rethinking Civil Liberties?, Address to Faculty at Southwest Texas State University (Nov. 15, 2001) *available at* http://members.aol.com/gangibill/texas20.htm [hereinafter Terror].

216 "In republican government, the legislative authority necessarily predominates." THE FEDERALIST NO. 51 (James Madison), *supra* note 4, at 322.

terpretivists and non-interpretivists part company.[217] *Basic* suggests that up until the Virginia Declaration of Rights the change in the words (from liberties to rights) did *not* portend a change in approach: as important as individual rights were to our predecessors, they did not singularly or collectively substitute for the right of self-government. The common good preceded individual benefit. Self-government, after all, was the right to create and define individual rights.[218] Once students grasp the framers' limited view of judicial power and the central role the legislature plays in a republican form of government, they may well evaluate the authority of contemporary precedents quite differently than they did before.[219]

3. Are You Historically Grounded?

It is hardly surprising that law students often lack historical grounding. They are young, their backgrounds vary, and there is the pervasiveness of the "so-what" attitude. They already know more than did any Renaissance man. But even if our intellectual climate was more hospitable, a solid historical grounding still would be difficult to acquire. Nevertheless, insufficient grounding of our nation's founding period, its Civil War, the rise of laissez-faire, and the boom-and-bust years of recession and depression from the 1870s to the 1930s, is not without consequences. Students are left overly dependent on theoretical speculations, post-World War II adjudication, and, perhaps most telling, on precedents *since* the Warren Court. I already suggested students familiarize themselves with the founding period, but if they cannot *start* there (it is a lifetime task), I suggest they better acquaint themselves with the rise and fall of the laissez-faire period.[220]

Among others, in the late nineteenth and early twentieth centuries, James Allen Smith, Charles Beard, and Herbert Croly, made up the Revisionist school. They accused the founders of blatant self-interest and undemocratic motives, and renounced Darwinian-derived theories about social evolution and natural selection. The Supreme Court had implicitly used these theories to strike down reform legislation.[221] The Revisionists

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217 Two issues are not explored here. First, whether using "rights" versus the more traditional "liberties" constituted a substantive change in how such matters were viewed—I do not think so. *See* BASIC, *supra* note 156, at 62–67. Second, Congress certainly was restrained by the ratifiers' understanding of those rights, but, as noted elsewhere, free speech did not encompass blasphemy, libel, seditious libel, or obscenity. *See supra* notes 88, 110, 114 and accompanying text. *See also* SAVING, *supra* note 3, at 236–49 (discussing Fourth and Fifth Amendment examples).

218 BASIC, *supra* note 156, at 63–67. The text accepts the fact that Bill of Rights provisions stand on higher ground than statutory or common law rights. The specific understanding of what protection was afforded by such rights should be respected by the legislature and defended by the courts. *See Sixth*, *supra* note 133, at 71–73, 86; SAVING, *supra* note 3, at 236–48. I also put aside the issue of the application of the Bill of Rights to the states through such doctrines as selective incorporation. *See supra* note 62 and accompanying text.

219 *See supra* Part IV.A.

220 DEFENSE, *supra* note 30, at 3–17. Kendall and Carey had raised the issue earlier. *See* BASIC, *supra* note 156. I often use the term progressivists, instead of Revisionists, when their critique of laissez-faire moved from academic criticism to political action.

221 After all, it was the application of Darwinian biology that formed a cornerstone of laissez-faire economics. *See* RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT (George Brazil-

claimed laissez-faire economic principles were incompatible with the American people's sense of fairness—including the teachings of Christianity. Responding to the judicial vetoes of federal and state legislative proposals designed to address economic dislocation and depression, the Revisionists intensified their attack, wishing to undermine the authority upon which the laissez-faire Supreme Court decisions purportedly had rested—the intentions of the founding fathers. Revisionists reasoned that if both the founders *and* Supreme Court decisions were discredited, the American people would elect candidates who in turn would support reform legislation. By the mid-1930s, under considerable political pressure and the country in the midst of severe depression, the Supreme Court cautiously reevaluated the connection between what was demanded by the Constitution and laissez-faire economic theory.[222] Thirty years would pass before the Justices formally acknowledged the inappropriateness of judges attempting to oversee national economic policy.[223]

Not only were portions of the original Revisionist critique subsequently embedded in the scholarship of Vernon Parrington, Douglas Adair, Alpheus T. Mason, and Gordon Wood,[224] but within a generation Revisionist

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ler, Inc. 1959) (1944). *See also* SAVING, *supra* note 3, at 94–97. "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

222 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

> When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?

Id. at 41. This change in the majority's perspective took place *without* any change in court personnel. WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW 127 (5th ed. 1980). Given the political climate and F.D. Roosevelt's court reorganization plan, Schwartz refers to the change in the Court's perspective as "'a switch in time [that] saved Nine.'" BERNARD SCHWARTZ, THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT 16 (1957).

223 The Court explicitly rejected any economic role for itself in Ferguson v. Skrupa, 372 U.S. 726, 729 (1963) ("Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation."). The Court went on to say, "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Id.* at 730. For a description of the political climate in which the Court reversed its due process approach, see LOCKHART ET AL., *supra* note 222, at 127–28. Professor Gilmore observes that the change from laissez-faire thinking to a New Deal philosophy was "not much more than a changing of the guard[,]" GILMORE, *supra* note 10, at 87, or "a change of course, not a change of goal." *Id.* at 100. This much is clear: "[T]he slogan 'law is a science' became 'law is a social science.' Where Langdell had talked of chemistry, physics, zoology, and botany as disciplines allied to the law, the Realists talked of economics and sociology not merely as allied disciplines but as disciplines which were in some sense part and parcel of the law." *Id.* at 87. During this period, it was fashionable for liberals and progressivists to view the states as social laboratories. *Id.* at 91. *See also* Maurice Holland, *American Liberals and Judicial Activism: Alexander Bickel's Appeal from the New to the Old*, 51 IND. L.J. 1025, 1036 n.23 (1976). While the Realist-Progressivist movement rejected the substitution of judicial preferences for those of the legislature with respect to national economic policy, within several years (late 1930s, early 1940s), they began to use judicial power to set national policy goals in three other areas: the rights of criminal defendants, race relations, and voting rights. *Id.* at 1043–45.

224 DEFENSE, *supra* note 30, at 9–33. Many of these charges were, of course, initially made by the Anti-Federalists. *See generally* THE ANTI-FEDERALIST (Herbert J. Storing ed., 1985) (1981). As early

scholarship (depicting the American founders as motivated by economic self-interest and possessing an anti-democratic bias) was seriously undermined by scholars such as Forrest McDonald and Robert E. Brown.[225] Students ought to become aware that this is business as usual.[226] Insights in one field are often eagerly applied to a second allied field, and before long, to a third unrelated field (more about this later).[227] While scholarly cross-pollenization for a time is invigorating, once it occurs, it may take a generation or more before a succeeding scholar (with the same curiosity and set of competencies) points out that the insights (which still dominate the thinking in the second or third fields) have been found wanting, or totally discarded in the field where they originated.[228]

The initial charges made by Revisionist scholars nevertheless continue to cast a long shadow over an accurate understanding of the framers' design, despite the fact that within their fields of origin their conclusions have been discredited. Exposure continues through the back door, that is, the Revisionist findings still appear in college textbooks (and other scholarship) in which the authors seldom explicitly reveal the authorities upon which they rely. Students sense that something is going on. I for one have experienced it. Some professors *believe* the original Revisionist conclusions are *true* (ignoring the counter evidence) because ultimately, those findings better square with their own prejudices. Somewhat like Sally,[229]

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as 1966 Kendall and Carey collected a number of essays intended to help students understand the changing perspectives on democratic theory and the role of political parties. If one examines the first chapter in CONTINUING, *supra* note 156, one finds essays by James Allen Smith, Martin Diamond, Richard Hofstadter, John P. Roche, Charles Beard, and Robert E. Brown. The date is significant, since it fell during the heyday of the Warren Court, which is to say, during the period when the Supreme Court redefined republicanism and nationalized an expanded Bill of Rights. *See* CHRISTINE L. COMPSTON, EARL WARREN: JUSTICE FOR ALL (2001). During this period leading American democratic theorists also were advocating that American political parties should move closer to the European parliamentary model, by offering clear programmatic differences. *See* CONTINUING, *supra* note 156, at 389–446. I am unaware of another volume that contains such rich resources and such even-handed treatment! *See also, e.g*., HOWARD BALL, THE WARREN COURT'S CONCEPTION OF DEMOCRACY (1971). *But see* William Gangi, Book Review, 122 U. PA. L. REV. 505 (1973) [hereinafter BALL Review]. There is another issue that intrigues me: the assumption that the quality of scholarship perpetually improves—which again raises the matter of progressivist assumptions. I have my reservations. *See Exclusionary*, *supra* note 9, at 40 n.10; SAVING, *supra* note 3, at xix, n.14; 245 n.73. Put another way, the Court frequently forgets its own precedents and insights. For example, I have insisted that our law school retain its copy of John Henry Wigmore's 1940 Edition of EVIDENCE. WIGMORE, *supra* note 10. *See also supra* note 10.

225 *Compare* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913), *with* ROBERT E. BROWN, CHARLES BEARD AND THE CONSTITUTION: A CRITICAL ANALYSIS OF "AN ECONOMIC INTERPRETATION OF THE CONSTITUTION" (1956) (arguing that Beard's thesis lacks support) *and* McDonald, *supra* note 88, at 19–20.

226 *See infra* notes 286–303 and accompanying text.

227 *See infra* text accompanying notes 269–272. Contributions to the legal literature by non-lawyers certainly seem to be on the increase.

228 *See* SAVING, *supra* note 3, at 249–250; for example, *supra* note 4. Is it not time for the founding period to be re-reexamined without the veneers of *either* the laissez-fairest or their Revisionist critics? I have not investigated the matter, but my impression is that the Revisionist position still dominates in academia. I further believe that specific courses on *The Federalist Papers* are rare in American universities. And, of those offered, I don't know whether students are encouraged to read *all* the *Papers*, or if instructors uncritically bring the Revisionist critique to bear.

229 WHEN HARRY MET SALLY (Castle Rock Entertainment 1989).

they "fake it,"[230] that is, they give students the impression that such matters are well settled and only an idiot (and a naive one at that) would dare question relevant conclusions. So when your professors make some sweeping generalizations about the framers' distrust of the people, or that they lined their own pockets, ask them to cite their sources. Surely such assertions should be supported by evidence.

Let me explain how all of this might impact what you learn and how you learn it. Have your professors mentioned that not all colonialists were comfortable with the idea of republican government? Many colonialists, in fact, believed that monarchies and aristocracies offered far better long-term prospects for securing peace and prosperity than did democracies or republics.[231] Hence, for *good* (meaning intelligent and politically astute) reasons, the Philadelphia Convention delegates cautiously placed governmental power in the hands of the people. Past "pure democracies" and some republics had checkered histories.[232] But the beliefs held by these delegates were far more complex than a simple choice between, on the one hand, democracies or republics, and, on the other hand monarchies and aristocracies. One concern, particularly for Anti-Federalists, was that states be the proper size. Small republics or pure democracies (where all citizens participated directly in decision making) were preferred because it was believed that citizen liberty could best flourish there. But many understood that those governmental forms had poor track records for providing efficient, stable governments that were capable of preserving themselves and citizen liberty.[233] They not only were frequently in a "state of perpetual vibration between the extremes of tyranny and anarchy," but they were regularly conquered by larger, stronger states.[234] Besides, only so many people could meet in one place at one time, and so such democracies had to be "confined to a small spot."[235]

While republics could be extended over a larger territory than could pure democracies (since elected representatives would make public policy decisions instead of all the people), many colonialists (particularly among the Anti-Federalists) maintained that by their nature, republics ought to remain relatively small.[236] Increased geographic size however, would inevit-

230 *See, e.g.*, CONTRA, *supra* note 88, at 479; *infra* notes 308–310 and accompanying text.

231 *See generally* THE FEDERALIST NOS. 14, 37, 39, 49, 51 (James Madison) (demonstrating that the republican form of government was debated by colonialists).

232 *See generally* THE FEDERALIST NO. 4 (John Jay), *supra* note 4, at 49; THE FEDERALIST NOS. 6, 9 (Alexander Hamilton), *supra* note 4, at 54–59, 71–76; THE FEDERALIST NO. 10 (James Madison), *supra* note 4, at 81 (explaining "pure democracy").

233 THE FEDERALIST NOS. 10, 63 (James Madison), *supra* note 4, at 81–82, 387–88.

234 THE FEDERALIST NO. 9 (Alexander Hamilton), *supra* note 4, at 71. *Compare* KRAMER, *supra* note , at 165, 196.

235 THE FEDERALIST NO. 14 (James Madison), *supra* note 4, at 101.

236 Allen and Lloyd comment that the Anti-Federalists "believed that republican liberty was best preserved in small units where the people had an active and continuous part to play in government." THE ESSENTIAL ANTIFEDERALIST, at xiii (W. B. Allen & Gordon Lloyd et al. eds., 1985). By co-opting the term *Federalists*, opponents of the proposed constitution were forced to take on the name *Anti-Federalists*, which they insisted was a misnomer, contending that what the so-called Federalists really

ably lead to the concentration of power necessary to govern the outer reaches of a more expansive territory. That in turn, would lead to adoption of monarchical or aristocratic forms of government which could act more vigorously since decision-making power was lodged in a few, or even a single hand.[237] In sum, colonialists were between a rock and a hard place. On the one hand, small republics were preferable, however they were inevitably defeated in war by larger enemies, most frequently governed by a monarchy or aristocracy. On the other hand, if they adopted a government more suitable to governing large land masses, power would soon become concentrated and before long tyranny and the suppression of individual liberties would ensue.

Putting Republican theory aside,[238] how does the above discussion illuminate the issues before us? First, many Anti-Federalists opposed the Constitution because they believed strong governments were naturally more tyrannical than weak governments, and that the extended territory encompassed by the proposed union eventually would require a monarchical or aristocratic form of government. The Anti-Federalists argued that the so-called Federalists were delusional—or worse, had nefarious intentions—ignoring traditional political wisdom. As we know, however, Publius rejected their assumptions as well as their insistence that representatives be elected from distinct classes and interests. Instead, Publius contended that an extensive territory, coupled with fewer representatives and other features, would have a moderating impact on legislative decision-making.[239] Students ought to bring that context to an understanding of the Constitution's design.

Second, students should reassess the common non-interpretivist assumption that the separation of powers "was intentionally fused into our system to thwart *majority rule* in one way or another."[240] On the contrary, the separation of powers instead was designed to prevent *governmental tyranny*, which the framers and Anti-Federalists understood as the consolidation of legislative, executive, and judicial power into a single hand.[241] That

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wanted (but were afraid to admit), was a *national* government. The so-called Anti-Federalists were, they argued, the true Federalists because it was they who fought for preserving the state sovereignty they had possessed under the Articles of Confederation. Some Anti-Federalists had been prepared to grant the national legislature more powers than had existed under the Articles, but not as much as were Federalists. These different perspectives toward the proposed constitution are of course at the core of the arguments in *The Federalist Papers*. *See id.* at viii–x; Maryland Farmer, *Essay III, Part I*, *in* THE ESSENTIAL ANTIFEDERALIST, *supra*, at 117–18; THE FEDERALIST NO. 14 (James Madison), *supra* note 4, at 100.

237 Tyranny was not just about the concentration of legislative, executive, and judicial power, it was also about that power being employed, not for the common good, but for the benefit of those who wielded it. *See supra* note 30; *infra* note 241 and accompanying text.

238 *See infra* Part V.

239 DEFENSE, *supra* note 30, at 34–52, 77–121.

240 *Id*. at 56 (emphasis added). *See also id.* at 53–76 (discussing the Madisonian Model).

241 "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47 (James Madison), *supra* note 4, at 301.

tendency was the most serious threat confronting *all* governmental forms (monarchical, aristocratic, or popular). In response, they divided governmental power between the federal government and the states, separated the powers granted to the federal government among the three departments, and took the further cautionary step with the most likely culprit, by dividing the legislative power between two houses. These were the principal means by which the liberties of *all* citizens (whether a majority or a minority) were to be secured from the ability of the federal government to oppress the people, while at the same time, creating a stable and competent government. The Anti-Federalists rejected these devices as inadequate, but that was settled in the ratification debate.

Non-interpretivists rarely acknowledge the above purpose of the separation of powers, or they interpret it while ignoring the framers' insistence on having a competent government capable of addressing any set of circumstances. Finally, they fail to understand that the framers understood *majority* tyranny (the use of governmental power against a *minority* of citizens) to be a very different problem than that of *governmental tyranny*.[242] The problem of majority tyranny required a distinctly republican solution—namely a dependency on the moderating effect of a multiplicity of interests and an extensive territory. It was not simply that the framers believed the cure would be efficacious, but frankly put, they understood that Americans would not accept a governmental form other than a republican one.[243] The framers envisioned that the judiciary would determine whether the authority exercised, by either the President or Congress, was granted in the Constitution. But by doing so, judges were never understood as having the authority to pass judgment on the wisdom of those decisions made under the power granted.[244] The framers rejected even a modified judicial veto (granted instead only to the executive) when the powers exercised by Congress *did not exceed the powers granted*.[245] Any other role for the judiciary, the framers contend, would be more appropriate in a hereditary form of government.[246]

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242 DEFENSE, *supra* note 30, at 61–62.

243 *Id.* at 62–64.

244 *See supra* notes 99, 223. The Convention had rejected a Council of Revision as inconsistent with the republican schema (separation of powers) as well as on the grounds that judges did not possess any particular insight on public policy decisions. *See* SAVING, *supra* note 3, at 61 n.145, 128 n.15. *See also* KRAMER, *supra* note 34, at 80, 98. Kramer makes clear that the framers understood the power of judicial review would be exercised only in a clear case, *id.* at 102–03, as did Publius who said, "Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void." THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 4, at 466.

245 EDWARD KEYNES & RANDALL K. MILLER, THE COURT VS. CONGRESS 44–49 (1989).

246 *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (discussing the framers' view of a veto power as virtually monarchical). Of course there is no explicit provision in the Constitution that guarantees the separation of powers. We deduce it from the structure of the Constitution, colonial history and comments of the participants. In that context, as well as with respect to the powers granted, Congress was to play the pivotal role. It had the responsibility to adapt the society to changing circumstances. *See* SAVING, *supra* note 3, at 231–36. I ignore in the text other precautions the framers took to minimize prospects of government tyranny, including, but not limited to, delegating only *enumerated*

For these reasons, those who understood that monarchical or aristocratic forms of government were inconsistent with the spirit of the Revolution and would never gain the approval of the American people were pessimistic about the country's future. I suggest that when students examine some of the negative comments made by the framers about democracy or the people (oft quoted by non-interpretivists), they will conclude that the framers were not so much anti-democratic as they were *wise* democrats. Rather than closing their eyes to weaknesses inherent in popular governments, the framers unflinchingly addressed the weaknesses and provided a republican cure. The intricate inter-and-branch power-sharing and power-checking was *intentionally* designed to foster deliberation and encourage consensual politics, and in doing so, address the problem of intensity, a subject temporarily postponed.[247]

C. The Problem of Precedents

Having come this far, perhaps readers better appreciate the skepticism I bring to contemporary Supreme Court decisions. But my concern goes deeper than that. Law students are taught that the interpretative skills they acquire are unique to their profession—and they are. But have your professors acknowledged and schooled you in the long tradition of acquiring those skills?[248] Interpretive difficulties are hardly a modern phenome-

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powers to the federal government, and an independent judiciary capable of striking down legislation or actions inconsistent with the Constitution (i.e., judicial review). With respect to the last, however, the power was confined to legislation or actions that exceeded the powers granted, *as understood by those who ratified the document*.

247 *See infra* notes 304–352. Professor Kramer states the various devices "complicated and slowed politics long enough for reason to prevail." KRAMER, *supra* note 34, at 114.

248 SAVING, *supra* note 3, at 139–44. "Canons [of construction] are to judges what hand tools are to carpenters: both simultaneously enable the task to be performed while limiting the performance of the task. The better and more specialized the tools, the easier the task and the more craftsmanlike the product." *Id.* at 140–41. I only wish non-interpretivist intellectual energy was applied to, among other things, principled canon application, rather than being permeated by a great deal of results orientation and moral arrogance.

> Justice Story . . . listed nineteen rules that today continue to provide an excellent jumping-off point for contemporary scholarship. From that list, Christopher Wolfe has distilled four basic tenets:
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> > First, the interpreter should start with the plain and common meaning of words, which are the best expression of the lawgiver's intention, in this case, the intention of the people, who adopted the Constitution on a "just survey" of its text. Yet words may be ambiguous, or of doubtful meaning and so recourse must be had to other rules. Thus, the second rule is that doubtful words may be clarified best by looking to the nature and design, the scope and objects of the instrument. . . . The third rule . . . is that the nature of the Constitution is a frame or fundamental law of government, which requires a reasonable interpretation giving to the government efficacy and force, with respect to its apparent objects. The powers of the government are to be neither narrowed, because of probable conjectures about their impropriety, or fear of abuse, nor enlarged beyond their limitations because of fear that these limitations are impolitic. The fourth and final rule is that rules of verbal criticism and particular maxims arising from the use of words in practical life, shall be used to assist the interpretation of the instrument, insofar as their use stands well with the context and subject matter.

Id. at 141 (citing Christoper Wolfe, *A Theory of U.S. Constitutional History*, 43 J. POL. 292, 294–95

non[249] and students should ignore attempts to change our regime through interpretive cleverness. Yet, if law students examine the non-interpretivist literature that is exactly what they will find: so-called interpretation that turns the framers' design on its head.[250] Fifty years ago, some political scientists became infatuated with parliamentary systems; and today their non-interpretivist successors champion judicial power to impose their public policy preferences.[251] As I have already noted, this game is fraught with danger.[252] Non-interpretivists ultimately promote neither good scholarship, nor a sound basis for constitutional law.[253]

Non-interpretivists believe that a never-ending expansion of rights will foster a democratic regime far superior to the framers' republican de-

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(1981)).

249 Publius commented:

> All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications. Besides the obscurity arising from the complexity of objects and the imperfections of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment. The use of words is to express ideas. Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence it must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. . . .
>
> Here, then, are three sources of vague and incorrect definitions: indistinctness of the object, imperfection of the organ of conception, inadequateness of the vehicle of ideas. Any one of these must produce a certain degree of obscurity. The convention, in delineating the boundary between the federal and State jurisdictions, must have experienced the full effect of them all.

THE FEDERALIST NO. 37 (James Madison), *supra* note 4, at 229.

250 SAVING, *supra* note 3, at 267–69. "For it is substantive goals—like moral equality, private autonomy, and general economic well-being—that define 'democratic' when that term describes a community rather than a particular political institution." Geoffrey C. Hazard, Jr., *The Supreme Court as a Legislature*, 64 CORNELL L. REV. 1, 9 (1978).

251 *See* Committee on Political Parties, American Political Science Association, *The Need for Greater Party Responsibility*, *in* CONTINUING, *supra* note 156, at 403.

252 *See supra* note 37.

253 *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973) (while supporting the decision's substance, the author has grave reservations about its constitutionality, at least as the opinion was written). Gerald Gunther, like Ely, personally favors abortion legislation, but nevertheless describes *Roe v. Wade* as "an abomination, an outrage, one of the worst Supreme Court decisions in terms of constitutionally mandating what ought to be legislatively mandated responses to political pressures." Henry Steele Commager, *The Constitution and Original Intent*, CENTER MAG., Nov.–Dec. 1986, at 4, 17 (quoting Gerald Gunther). More recent decisions by the Supreme Court offer additional examples. *See* Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding affirmative action policies at the University of Michigan Law School). *Cf.* Gratz v. Bollinger, 539 U.S. 244 (2003) (denying the use of affirmative action in the admissions process at the University of Michigan undergraduate program). *See also* Lawrence v. Texas, 539 U.S. 558 (2003) (striking down a same sex Texas sodomy law, and presumably all state sodomy laws). Surely law students discern that these opinions rest more on sub-constitutional reasoning than constitutional principles? The issue is not whether these are good or bad public policies, but whether or not the Supreme Court is authorized to impose them.

sign. The faith required to sustain their belief also makes it difficult to repudiate it—until perhaps it is too late. As I have tried to demonstrate, however, one long term effect is predictable: *growing government incompetence.*[254] Even more pernicious is the probability that the distinction between rights illegitimately expanded or created by the Supreme Court, and rights actually ratified by the people, will eventually be lost. Faced with one unanticipated circumstance or another (such as provided by September 11, 2001), traditional rights may as easily be lost as illegitimately expanded ones.[255] To paraphrase Chief Justice John Marshall's well-known phrase, the power to create rights is the power to destroy them.[256]

When students examine Supreme Court decisions, they should ask themselves whether or not the Justices are acting as if they sat as a secular Chair of Peter.[257] In doing so, they have repeatedly ignored arguments challenging their right to do so. Non-interpretivist scholars sanction this new judicial role (particularly when it coincides with their own policy preferences), and because they do, they elevate what they consider good results over sound constitutional principles.[258] Of course, non-interpretivists do not see it that way. They believe that even if the Court has deviated from the framers' understanding or from long understood precedents, at best, these are minor matters when compared to the good results the Supreme Court has initiated or fostered.

In sum, while many scholars (unnamed here) proceed with good inten-

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254 Publius astutely observed that "liberty may be endangered by the abuses of liberty as well as by the abuses of power . . . ." THE FEDERALIST NO. 63 (James Madison), *supra* note 4, at 387.

255 That creates an environment where multiple factions perceive themselves as defenders of the Constitution, and that is a recipe for civil war. *See Inbau-Kamisar*, *supra* note 12, at 135–41. *See also* Terror, *supra* note 215.

256 M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 327 (1819) ("An unlimited power to tax involves, necessarily, a power to destroy").

257 *See* Michael J. Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278 (1981) [hereinafter *Human*]. "The Supreme Court is *not* an American Chair of Peter, such that when a majority of the Justices speak *ex cathedra* on matters of political faith and morals, they speak infallibly." *Id.* at 291 (first emphasis added). I would say many non-interpretive scholars think otherwise. *See* EISENGRUBER, *supra* note 29, at 7 ("I . . . argue that Supreme Court justices [sic] have a constitutional duty to speak about justice on behalf of the American people."). Many scholars ignore Justice Jackson's admonition that the "Bill of Rights [is not] a suicide pact." Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). As I comment later, this approach may have unanticipated consequences. *See infra* note 366 and accompanying text. The Secular Chair of Peter apparently needs priests as much as the papal one. Justice O'Connor implied that such priests would be drawn from the ranks of lawyers, and by analogy, the elite law schools have become our most important seminaries. She states: "A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges." *Excerpts from Justices' Opinions on Michigan Affirmative Action Cases*, N.Y. TIMES, June 24, 2003, at A24. *See also Grutter*, 539 U.S. at 332.

258 They abandon our tradition of self-government, ignore pertinent questions, and compromise their professional integrity. *See Expansionism*, *supra* note 21, at 62 n.472 (contending that various dilemmas confront those who put results ahead of principled scholarship—one such dilemma is that a professor may feel compelled, in one way or another, to lie to his students and perhaps to himself). *See supra* note 147. Today, the same judgment may be applied to those who fail to appreciate the complexity of politics and the Madisonian model, or who attempt to redefine it without the people's consent. *See infra* notes 304–352 and accompanying text.

tions as well as vivid imaginations, the work of other scholars (also left unnamed) cannot be so charitably described. Neither group, however, puts self-government center stage; that self-government should always be center stage is far more discernible from our history than the manufactured legacy of rights to which both groups subscribe. I do not wish to be unkind, but taken as a whole, the sub-text of much of contemporary scholarship seems to say: Look at how smart we are; we can construct premises and analogies and, from either, tease-out an unlimited number of principles (corollaries, nexus tests) about what must be done to make our governmental system what it *ought* to be (in their view).[259] Put another way, their version of constitutional law consists of repackaging their *intensely* held elitist public policy preferences and pouring them into constitutional phrases they unceasingly redefine. In that manner, their preferences become the law of the land. Sadly, they have often successfully convinced other public policy participants, most of whom already share those preferences, that there is some compelling constitutional reason that requires yet another imposition. If law students swallow such reasoning, I suggest they might be interested in the Emperor's new clothes.

Had these non-interpretivist scholars followed the footsteps of their more confident progressivist predecessors by attempting to persuade the people or, the people's representatives, of their preferences, more likely than not they would have been met with stifling apathy.[260] They, of course, know that. So, to avoid the frustrating and perhaps humiliating experience of having their most cherished beliefs rejected by their fellow citizens, they instead run to the courts—citing inadequate structures of representation (they have polls to prove it!), the cumbersomeness of the legislative and amendment processes, or the self-interest of their opponents. All these obstacles, they claim, prevent their pet proposals from getting a fair hearing in the existing and *obviously defective* political process. They charge that our system resists change, and they are certainly right on that score. For these non-interpretivist scholars, the fact that judges are unaccountable at the polls has become a virtue rather than the traditional mark of judicial limitation.[261]

Point out that the framers certainly did not envision the judicial power

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259 In their minds the premises they embrace, or the analogies they posit or construct, are integral to the American system of government—as if Americans had *approved* them. Then using the standards *they* created, these authors arrogantly identify our vices. But if the premises, analogies, and so on, are false or defective, the entire structure collapses. The fact that they never were approved is an additional reason for their illegitimacy. These premises, analogies, and so on are usually based on nothing more than a fragment of relevant experience. They perhaps begin with an experiential truth, but before long, that truth is distorted. *See* SAVING, *supra* note 3, at 181–90.

260 *See supra* notes 221–223 and accompanying text. With the non-interpretivists, the start-up costs are very low: to get the ball rolling all you need is to convince one judge. After all, every judge has the same authority as a Justice of the Supreme Court. The only difference is that the Supreme Court Justices speak *last*.

261 SAVING, *supra* note 3, at 202–05; *Expansionism*, *supra* note 21, at 52–53; *Intentionist*, s*upra* note 22, at 264–68. It is amusing when some of these same people accuse the framers of being undemocratic!

as non-interpretivists do, and they reply, "Why should that restrict us today?" Demonstrate that precedents (those that survive) are contrary to the proposed imposition they have in mind, and they reply, "Well, so what?"[262] Show that their premises are defective, and they reply, "Who is to say they are defective?" Prove that their historical assumptions are faulty, or that in pursuing the object of their heart's desire other important considerations are obliterated, and more often than not they respond by saying (some more subtly than others) that those considerations are of little consequence, since—in the *big picture* (the one their preferences create of course)—the net result is good. If any of this disturbs you (as it should), please study the complexity of politics as understood by James Madison,[263] because when law students only see the Constitution through a rights prism, to that proportionate degree, self-government will inevitably whither and die.

In order to consider precedents from an *un*-modern perspective, I wish to add, as promised earlier, a few words on interpretation. Interpretation is not a science—it is a craft, one dependent upon both acquired skills and integrity in application. We already noted that the complexity surrounding interpretation has been around for quite some time.[264] Today, as then, it is about applying common sense rules acquired over centuries.[265] Some rules are comparatively simple, such that the granting of a larger power usually encompasses the exercise of a lesser power, or when two laws conflict and cannot be reconciled the last shall prevail.[266] Other rules require training to master. But once Raoul Berger published his seminal work, all hell broke loose because he dared to argue that the ratifiers' understanding of constitutional phrases ought to be respected.[267] Put more specifically, he con-

262 SAVING, *supra* note 3, at 154.

263 *See infra* notes 306–354 and accompanying text.

264 *See supra* note 249.

265 Publius described "rules of legal interpretation [as] rules of *common sense*, adopted by the courts in the construction of the laws." THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 4, at 496. Throughout *The Federalist Papers*, Publius provides examples of such rules: (1) "NEGATIVE PREGNANT," THE FEDERALIST NO. 32 (Alexander Hamilton), *supra* note 4, at 200; (2) "every part of the expression ought, if possible, to be allowed some meaning," THE FEDERALIST NO. 40 (James Madison), *supra* note 4, at 248; (3) "where the several parts cannot be made to coincide, the less important should give way to the more important part," *id.*; *see also* THE FEDERALIST NO. 41 (James Madison), *supra* note 4, at 263; THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 4, at 497; (4) "A specification of particulars is an exclusion of generals," *id.* at 496. *See also* THE FEDERALIST NO. 41 (James Madison), *supra* note 4, at 263; *infra* note 266.

266 THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 4, at 468. "[T]he last in order of time shall be preferred to the first." *Id. See also* Peter S. Onuf, Forum, *Reflections on the Founding: Constitutional Historiography in Bicentennial Perspective*, 46 WM. AND MARY Q. 341 (1989). Onuf observes that the "[Federalists] emphasized the document's similarity to the state constitutions, promising that traditional canons of construction would be applied to its provisions." *Id.* at 369.

267 *See generally* GOVERNMENT, *supra* note 56. When speaking of intent Berger most commonly refers to the publicly and contemporaneously expressed understanding of a constitutional provision. Sometimes intent is also described as the ratifiers' will. Such will refers, not only to the intentions of the framers of the original document, but equally to those who framed and ratified the Bill of Rights and all subsequent amendments. The initial task of interpretation is to identify, if possible, that intent. Let me provide two examples. I still find the arguments in *The Federalist Papers* (defending the unlimited re-eligibility of the president) far more persuasive than those defending the Twenty-Second Amendment. *See* THE FEDERALIST NOS. 71–72 (Alexander Hamilton). Nevertheless, as a constitutional scho-

tended that the Supreme Court had ignored the intent of those who framed and ratified the Fourteenth Amendment.[268]

I concurred in Berger's assessment, but as already noted, non-interpretivists often do not. Instead, they accuse those who share Berger's views as advocating a literal or fundamentalist interpretation of the Constitution.[269] In turn, I for one reject such characterizations as not on point and assert that those denying an allegiance to the framers' intentions inevitably rewrite the framers' constitutional schema and/or distort our tradition of republican self-government.[270] Clearly there are important differences of opinion for law students to consider. Unfortunately, this is not the place to explore the definition of intent—what it means (and what tools can be used to discern it) or what it does *not* mean—and why it does not amount to an attempt to read the framers' minds.[271] All agree, however, that considera-

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lar I am obliged to put my personal views aside, and when asked to do so, clearly articulate the intentions of those who framed the amendment against any misconstructions. It is not that I am prohibited from putting forth my personal assessment, only that I should not confuse my personal preferences with an accurate discernment of relevant intent. So too I think the Seventeenth Amendment's repeal of state legislative election of United States senators has damaged the original constitutional structures, but again, my professional obligation is to articulate what that Amendment was intended to accomplish, and how it modified the original document.

268 GOVERNMENT, *supra* note 56.

269 *See* SAVING, *supra* note 3, at 145–50.

270 A unanimous 1872 Judiciary Committee Report noted:

> In construing the Constitution we are compelled to give it such interpretation as will secure the result which was intended to be accomplished by those who framed . . . and adopted it . . . . A construction which should give [a] phrase . . . a meaning different from the sense in which it was understood and employed by the people when they adopted the Constitution, would be as unconstitutional as a departure from the plain and express language of the Constitution . . . . A change in the popular use of any word employed in the Constitution cannot retroact upon the Constitution, either to enlarge or limit its provisions.

Raoul Berger, *"Government by Judiciary": Judge Gibbons' Argument Ad Hominem*, 59 B.U. L. REV. 783, 785 n.12 (1979) (second ellipses in original) (citing A. AVINS, THE RECONSTRUCTION AMENDMENT DEBATES 2, 571–72 (1967)).

Judge Thomas Cooley wrote:

> The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time. . . . [T]he object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it.

Id. (quoting T. COOLEY, CONSTITUTIONAL LIMITATIONS 69 (6th. ed. 1890)).

271 *See generally, Expansionism*, *supra* note 21; SAVING, *supra* note 3, at 150–62. Here, I suggest that the reader put aside issues such as difficulty in ascertaining intent, and the nonexistence or application of a known intent to new circumstances (e.g., *ex post facto*). These are relatively minor issues where disputes will occur, and as always, you have to discern and weigh the best arguments. But am I a literalist because I reject the contention by Richard Saphire that a judge would be justified in claiming eligible a candidate for the U.S. Senate who had not yet achieved the age of thirty? Saphire argues that this requirement should be placed in the context of its time, and when interpreting it—at the right level of generality—the 30-year requirement conveys only the framers' concern with "maturity." His contention therefore is that today a younger candidate, certified by a judge, would be eligible. Raoul Berger, *Lawyering vs. Philosophizing: Facts or Fancies*, 9 U. DAYTON L. REV. 171, 194–95 (1984).

> "[A]t some future time the senatorial age requirement might . . . plausibly be deemed ambiguous [?] . . . [or] interpreted in a nonliteral sense," viewing it as a "symbolic reference to maturity." The Court would not be "overstepping its legitimate function . . . to hold that a twenty-nine-year-old is eligible for election to the Senate."

Id. (alterations in original). Or, can a judge confidently update the Constitution by excising the "natural born" requirement (known in some circles as the "Arnold" clause) as no longer relevant in today's day

tions of intent are part of the interpretive craft.

I often ask law students what interpretive rules they are learning, and whether or not they believe these rules are being equally and fairly applied, for example, to statutory as well as constitutional law. Are these rules applied evenhandedly in structural cases (such as separation of powers) as well as in personal rights cases?[272] If not equally applied in either of those situations, do your professors explain why? Are you satisfied with their explanations? Are the explanations a variation of the parental one: "Because I said so?" Do your professors embrace mastery of such rules as an integral part of your legal training and do they insist that applying them fairly is a measure of your professional integrity? Or, do you get the impression that your professors look upon the rules as tools that can be manipulated to reach some preordained result?

When I ask such questions my impression is that the teaching of interpretative rules has declined in direct proportion to the intensity of their professors' public policy beliefs. The trend is to ignore canons of construction or to sanction their manipulative use. Of course, when pursuing results, such occurrences are hardly unprecedented.[273] While this decline in the

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and age? I also suggest that students put aside issues such as the difficulty of discerning the intent of a group, whether it be the ratifiers or legislators. In the end, the argument proves too much; that is, it renders all deliberative processes irrational, and that denies every day reality. Michael Perry bluntly advised:

> Those who seek to defend noninterpretive review—"judicial activism"—do it a disservice when they resort to implausible textual or, more commonly, historical arguments; nothing is gained but much credibility is lost when the case for noninterpretive review is built upon such frail and vulnerable reeds.

Michael J. Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 275 (1981) [hereinafter *Freedom*].

272 *See* REDISH, *supra* note 150, at 131–33.

273 *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). Chief Justice Taney cites *The Federalist Papers* with respect to the acquisition and regulation of territories acquired as a result of the Revolution, charging that the national government under the Articles of Confederation had exceeded the powers ceded to it by the states. *Id.* at 447. From that discussion the Chief Justice concludes that Publius "urges the adoption of the Constitution as a security and safeguard against such an exercise of power." *Id.* Curiously, having just warned readers of the danger of taking remarks out of context, *id.* at 442–45, Taney does just that. If you examine *The Federalist No. 38*, Publius scolded his Anti-Federalist critics for wanting their cake and eating it too. THE FEDERALIST NO. 38 (James Madison), *supra* note 4, at 238–39. They wanted a strong central government, but Publius charged they were unwilling to give the new national government sufficient powers to accomplish national ends. *Id.* Thus, Publius concludes (speaking about actions of the Confederate Congress with regard to the acquired territories) that "[a]ll this has been done; and done without the least color of constitutional authority." *Id.* at 239. Publius' remarks imply that any new proposed constitution *ought to be prepared to deal with such matters from the very beginning*. *See supra* note 214. Taney's interpretation, however, implies Publius' disapproval of the actions taken under the Articles. *Dred Scott*, 60 U.S. at 447. That is not confirmed by Publius' concluding paragraph which was *ignored* by Taney:

> I mean not by anything here said to throw censure on the measures which have been pursued by [the Confederate] Congress. I am sensible they could not have done otherwise. The public interest, the necessity of the case, imposed upon them the task of overleaping their constitutional limits. But is not the fact an alarming proof of the danger resulting from a government which does not possess regular powers commensurate to its objects? A dissolution or usurpation is the dreadful dilemma to which it is continually exposed.

THE FEDERALIST NO. 38 (James Madison), *supra* note 4, at 239–40. The context of Publius' remarks

lawyerly craft is of course disturbing, it should have been anticipated. The original purpose for demanding consistent and conscientious application of the rules of interpretation was to restrict judicial discretion. Indeed, if anything, mastery and dispassionate application of interpretive rules were an integral part of defining judicial temperament. Judges, after all, were not presumed to have any special capability or insight (or responsibility, for that matter) in determining desirable public policy. For these reasons Publius argued that there was nothing to fear from the creation of an independent judiciary. Judges only had the soundness of their judgment.[274]

Returning to the matter of precedents, the *first* obligation of a constitutional scholar (unlike political scientists in general, and political theorists in particular—who should trace reconfiguration of power within society) is to convey the ratifiers' meaning of the text.[275] Assuming that task is a rele-

leads one to believe that Taney's narrow reading of the clause in question did not reflect the Philadelphia convention's intent as much as Taney's preference. Certainly Publius' remarks—as Taney suggests—cover the Northwest Territories, but to so confine them would be to ignore another Publius caution about "the danger resulting from a government which does not possess regular powers commensurate to its objects[.]" *Id.* at 240. Taney's interpretation leaves the Union Congress in the same boat as the Confederation Congress. It also ignores Chief Justice Marshall's advice that where doubtful intent exists, courts ought to defer to *legislative* interpretation. I share that view. To take another example, in *The Federalist No. 83* Publius recognizes that canons of construction could be abused, but that is no reason to deny their usefulness. He states that "certain *legal maxims* . . . [could be] perverted from their true meaning . . . ." THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 4, at 496. Publius is perfectly consistent on this topic throughout their discussions, arguing that the potential for abuse is not in itself an adequate reason to deny a needed power. *See* SAVING, *supra* note 3, at 27–29 (noting that governments ought to have powers sufficient to achieve their objectives, the possibility of abuse of power is a secondary consideration, and that any other approach will result in incompetent government or its dissolution). In an article, Professor Allen specifically discusses *No. 83* to demonstrate her contention that the framers' understanding of the "plain meaning rule" was more sophisticated than had been characterized by other scholars. Allen, *supra* note 101, at 1712–13.

274 "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body." THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 4, at 469. Elsewhere Publius refers to the constitutional text which provides for appellate jurisdiction "with such Exceptions and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl.2. *See, e.g.*, THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 4, at 481 (noting that Congress has the authority to "make such *exceptions* and to prescribe such regulations" as necessary). In *No. 81*, Publius quotes from that provision observing that "the Supreme Court would have nothing more than an appellate jurisdiction 'with such *exceptions* and under such *regulations* as the Congress shall make.'" THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 4, at 488. Several pages later he repeats the point, claiming that it is only proper that a power first be couched in broad terms and then provide "that this jurisdiction shall be subject to such *exceptions* and regulations as the national legislature may prescribe." *Id.* at 490. The purpose for doing so is also clearly described: "This will enable the government to modify [jurisdiction] in such a manner as will best answer the ends of public justice and security." *Id.* His complete statement reads: "To avoid all inconveniences, it will be safest to declare generally that the Supreme Court shall possess appellate jurisdiction both as to law and fact, and that this jurisdiction shall be subject to such exceptions and regulations as the national legislature may prescribe." *Id.* (emphasis omitted). Two paragraphs later, for the fourth time Publius refers to the power to regulate and make exceptions to the appellate jurisdiction. The context of these remarks leaves little doubt that it was Publius' belief that, given the impressive precautions taken against the possible abuse of judicial power, the nation had much more to gain than to fear from the creation of a truly independent judiciary. "[A]n ordinary degree of prudence and integrity in the national councils will insure us solid advantages from the establishment of the proposed judiciary without exposing us to any of the inconveniences which have been predicted from that source." *Id.* at 491.

275 SAVING, *supra* note 3, at 150–57. To find fault with the framers' meaning or to suggest alter-

vant and doable one, they must examine pertinent case law for—among other things—the injection of illegitimate assumptions. I present this challenge: If law students put aside modern non-interpretivist shadows and approach *any* body of case law with an objective eye, in *any* subject area, they will find that even after adoption of the Bill of Rights Congress retained considerable discretion with respect to rights definition.[276] Congress of course was (and still is) prohibited from breaching the specific restriction imposed on them, and if they did breach it, the framers anticipated courts would strike the law down as unconstitutional.[277] If Congress perhaps came close, but did not breach a provision's strictures, the people still could vote them out of office. But, of course that is what I have been saying all along: We must respect the framers' understanding of constitutional provisions, and if respect is not given by Congress, or the President, or both, the Supreme Court is to protect the meaning given by those who gave the Constitution life. The people could also show their displeasure, or support, in forthcoming elections. The Bill of Rights, singularly or collectively, did not supersede the people's right of self-government—which, after all, ultimately is the right to create and define individual rights, both statutory and constitutional.[278]

Today, more discriminating law students might discern a double standard in how various constitutional provisions are treated. The Supreme Court, ignoring its past errors, repeatedly informs us that it must scrutinize legislative decisions affecting personal rights much more strictly than those touching upon economic ones. Can students locate any justification for doing so in the text, in the framers' intentions, or in our history? Or does such an assessment ultimately depend upon assumptions intimately related to the desired results? Are law students aware of additional corollaries that support the preceding assumptions? First, personal rights should only ex-

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natives, are important responsibilities of the scholar, but their first obligation is to understand and convey that meaning. Furthermore, the responsibility to veto unwise legislation is the *President's*—not the Supreme Court's! I concur with those who contend that as the clarity of the framers' intentions diminish, the judicial power *decreases*—not increases. *Legislatures* gain discretion—not courts. Robert Bork puts it this way: "The judge who cannot make out the meaning of a provision is in exactly the same circumstance as a judge who has no Constitution to work with. There being nothing to work with, the judge should refrain from working." ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 166 (1990).

276 *See supra* note 115 (noting that the Alien and Sedition Acts liberalized First Amendment free speech standards); *supra* text accompanying note 136.

277 As we noted, for example, First Amendment protections did not encompass private or seditious libel, obscenity, or even blasphemy. *See supra* note 114. With respect to other Bill of Rights provisions and particulars in general, see HICKOK ET AL., *supra* note 61.

278 *See* BASIC, *supra* note 156, at 63–67. All I am saying is that it is the ratifiers' specific understandings of which protections were included that must be respected by the legislature and defended by the courts. Beyond that, canons of interpretation would apply. *See Sixth*, *supra* note 133, at 82–84; SAVING, *supra* note 3, at 236–49. *See generally* KRAMER, *supra* note 34. I also put aside the doctrine of selective incorporation. Professor Louis Henkin observed: "Selective incorporation finds no support in the language of the amendment, or in the history of its adoption[,] . . . [and is] more difficult to justify than Justice Black's position that the Bill of Rights was wholly incorporated." Louis Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74, 77 (1963). *See supra* note 62; SAVING, *supra* note 3, at 103 n.79.

pand, not contract. Second, precedents inhibiting the expansion of personal rights should be overruled, while those expanding such liberties should be defended. Finally, state experimentation with respect to personal liberties (as distinct from state experimentation with economic policy) are to be struck down as being inconsistent with Fourteenth Amendment requirements.[279] Can students find one iota of support for such corollaries outside of the logical construction created by the theorists themselves?

Additionally, there is a high degree of probability that the perceptions students have about personal rights are dependent upon their professors overemphasizing Warren Court precedents. If some departure from those precedents is suggested, do your professors characterize them as dangerous "retreats"?—assuming of course they have not already run screaming into the street predicting imminent book burnings, a police state of the same character as the Nazi one, a Taliban-like government just around the corner, or some other Chicken Little "the-sky-is-falling" scenario. Or, in our post-9/11 environment, if some modification of personal liberties is undeniably necessary, do your professors guiltily confess to abandoning civil liberties he or she has long embraced? But the framers understood that self-preservation and government competency are related, and in a republican government the people ultimately must approve or disapprove of any government actions taken, including a diminution of liberties enjoyed under ordinary circumstances.[280] That is the essence of self-government. So when you evaluate the soundness of any body of existing precedent, understand that your starting point—self-government or individual rights—makes all the difference in the world.[281]

D. Approaching Contemporary Scholarship

Of all the topics discussed in this part of the article, standards of contemporary scholarship are the most important. Unless you grasp the dis-

279 *See* SAVING, *supra* note 3, at 216; *Expansionism*, *supra* note 9, at 45–47 (rejecting justifications of a double standard of judicial scrutiny for economic and personal rights cases). *See supra* note 54.

280 Justice Holmes stated, "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." Schenck v. United States, 249 U.S. 47, 52 (1919).

281 One may not assert some abstract principle (massaged until it is to their own liking) and then choose to begin an inquiry from that vantage point. Evidence must justify one's starting point, and given our history, to claim that rights—in any modern sense of that term—constituted our beginning, is an impossible task. Said statement is not equivalent of contending that individual rights were *un*important, or that by taking that position, it is legitimate to conclude that rights become "meaningless," or other such characterizations. *See* SAVING, *supra* note 3, at 175–94. There is another underlying assumption among the rights-are-first crowd, namely, that an enormous gap divides *us*—individual citizens—from *them*—the government. That attitude was not shared by the framers. They believed the government is *our* servant, which is to say that they shared the same view as the good citizens of Massachusetts. *See supra* notes 209–219 and accompanying text. In fact, until the damage wrought by the Warren Court, that view is the only one that would emerge from an unbiased examination of our history and precedents. *See generally* Larry Kramer, *We the People: Who has the Last Word on the Constitution?*, 29 B. REV. 1, 6–7 (2004).

tinctions made herein, you are unlikely to appreciate the damage wrought on subjects such as the limits of judicial power, the character of our tradition, and how to approach precedents. Arguably, this section should have been discussed first; yet, I chose not to, hoping to both provide a broader context as well as to pique the reader's interest.

Let me begin by noting that more than ever before, scholars today have enormous difficulty mastering a specialized field. The problem is not simply unparalleled access to materials in any one specialty, or even in one discipline: it is the need to grasp the relationship between one's specialty and the general discipline, and then, between one's general discipline and allied fields.[282] All scholars must separate important information from unimportant information, and to do that he or she—explicitly or implicitly—creates criteria of inclusion and exclusion. And remember this—more often than not, to one degree or another, the scholarly criteria used in one generation are eventually found partially or wholly defective by succeeding generations.[283] But between the time criteria are initially explicated in one discipline, and the time they are eventually found deficient or defective (partially or completely) in that discipline, that criteria also is embraced by scholars in allied disciplines where almost inevitably they are then distorted or overextended—usually by less discerning scholars.[284]

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282 This discussion proceeds along traditional analytic lines, and as such is open to challenge by behaviorists, feminists, critical legal scholars, and deconstructionists.

283 That is why, if you recall, well-intentioned editors excised words they believed (under their criteria of relevance) were unimportant to the Mayflower Compact. Using another set of criteria, Kendall and Carey found them crucial. *See supra* note 195 and accompanying text.

284 Chance is also at work here, that is, there must be scholars from two or more generations with the same multiple interests. When one acquires greater historical perspective, students will find that at various times physicists, biologists, and economists each believed they could explain *all* reality; eventually each retreated to study only their proportionate part. *See* SAVING, *supra* note 3, at 94–96, 274–76. *See generally* MIRCEA ELIADE, IMAGES AND SYMBOLS 9–21 (Philip Mairet trans., Sheed & Ward Search Book ed. 1969) (1952) (describing how modern society relies on myths); HANS JONAS, THE GNOSTIC RELIGION xv–xvii (2d ed. 1963) (discussing Gnostic manipulation of concepts); ERIC VOEGELIN, ANAMNESIS 143–46 (Gerhart Niemeyer ed. & trans., 1978) (discussing noetic and non-noetic interpretations). For example, my colleague, Dr. Robert Pecorella, recounted the origins of the Rational Choice Theory. He observed that its roots had been in principles of micro-level economics, utilizing two-person and multi-person "games" to explain the outcomes of political conflicts. It was then applied to "studies of negotiation and ultimate equilibrium points based on two-person and multi-person 'prisoner dilemmas' or 'games of chicken' (employed in international relations); analyses of voting studies based on 'spatial modeling' of party positions," and so on. As of late, it "employs highly mathematical modeling as its primary communication tool," although there has been criticism that "it appears to be empirical when in fact it is a decidedly deductive application of general principles to a set of particular situations." Thanks to attempts made "to refine the model by more closely reflecting 'empirical reality,' it has become more burdensome—and consequently less useful"—as a basic model. Rational Choice Theory also attracted "theological" interest. Email from Dr. Robert F. Pecorella, Associate Professor, Dep't of Gov't & Pol., St. John's Univ., to William Gangi, Professor, Dep't of Gov't & Pol., St. John's Univ. (Jan. 21, 2003) (on file with author). This recounting provides a concrete example of the problem noted in the text, namely, the creation of criteria of relevance in one area, its subsequent extension to other areas, and the difficulty of later assessing whether its original premises remain viable, especially after they have been partially or completely discarded within the original discipline. Upon what possible grounds can we believe that unelected judges are better equipped to make public policy choices than legislators we can refuse to reelect? The track record of the Court (slavery and laissez-faire) is not impressive. *See* KRAMER, *supra* note 34, at 209–23. *See also, e.g.*, NLRB v. Yeshiva Univ., 444 U.S. 672 (1980). Even at the time this case was decided, labor-

Given this reality, why anyone would think we are exempt from a fate similar to that of preceding scholars is beyond my comprehension. Having mastered aspects of a single discipline, how many are equally capable of the same degree of mastery in specialties other than their own? The current generation of scholars is equally susceptible to applying those insights to their specialty or to their general discipline; competently deciding whether the insights are in fact defective; and finally, recognizing that such insights have been distorted or over extended. These issues barely scratch the surface. During the time the criteria are first enunciated and applied to allied disciplines, twenty-five years or more may lapse. A similar time-lapse may again occur before the criteria are found deficient. Thus, fifty or more years may lapse before the process comes full circle. Not to be facetious, but law students today must decide whether the "tides" they embrace (and which perhaps surround them) are coming or going! Even how one approaches *that* problem requires adequate criteria.[285]

There is no reason to believe that judges are better equipped than legislators to sort out this constantly changing flux of ideas, practical applications, and unanticipated consequences. If anything—contrary to what non-interpretivists would have us believe—the fact that judges are unaccountable at the polls probably makes them *less* objective. They remain *experientially* insulated from shifting social, economic and political currents, or they grow overly dependent upon friend-of-court briefs. These briefs are by parties who often share the current intellectual mindset and who thereby probably exaggerate the potency of those currents. Intellectual elites habitually find convincing arguments when they share the same premises.

The fact of the matter is, at momentous turns in American history (such as with respect to slavery and economic cupidity), members of the judiciary remained far more infatuated, for far longer, with both, than did legislators. Many judges, in fact, resisted change, more so than the framers ever imagined they could, exacerbating economic and social strains and rendering the national and state governments incompetent—because then,

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management relations already had changed drastically, from the Samuel Gompers model of confrontation to greater cooperation.

285 Given such considerations, one may approach topics such as slavery, racial segregation, the treatment of Native Americans, or gender issues, differently than before. As befitting a scholar, one should abhor moral arrogance and flip judgments of hypocrisy. *See supra* note 201. The objective of course is not to shrink from our historical blemishes or to deny their pertinence to contemporary politics or policy-making. Rather, it is to better grasp the complexity of our history and to distinguish constitutional from sub-constitutional issues so that under our constitutional schema we, as a people, know at what legal level we should address the legacy before us. One of the dangers that exists in model-building, for example, is that the models become *more real* to their builders and subsequent adherents than either the framers' design, constitutional history, or the original milieu of concerns that defined those ideals, models, rights, or needs, not to mention present experience. So, when Packer used the Crime Control and Due Process models, he remained rooted in reality. *See supra* note 9 and accompanying text. Ten years later Professor Chase used Packer's legal and *factual* guilt concepts as if they had always been part of constitutional interpretation and mistakenly implied that both concepts may be attributed to the framers' design! *See* Edward Chase, *The Burger Court, the Individual, and the Criminal Process: Directions and Misdirections*, 52 N.Y.U. L. REV. 518, 518–19 (1977). His entire article is dependent upon those two assumptions.

as now, the Justices were reading their own predilections into the Constitution. In contrast, legislators have consistently adapted our society to changing circumstances, despite occasional initial resistance.[286] They did so, or they lost their jobs.

Bringing prior analysis to bear, it is apparent that for several generations thesis books have distorted our history.[287] They undoubtedly have influenced how law students viewed our traditions, precedents, Supreme Court decisions, and, of course, the interpretivist-non-interpretivist debate. That is why the issue of appropriate standards of scholarship is so crucial. Let us get a little more particular. Take the hypothetical example of a scholar convinced that American history is a tale of progress; that is, the increasing actualization, dissemination, and expansion of liberty. In 1941, he decides to investigate how a particular right was understood during the American Revolutionary period.[288] Given his above-noted conviction, when this scholar approaches *primary* materials he may find it difficult to put aside how that provision came to be understood *after* the Revolutionary period, that is, between 1776 and 1941. And so our scholar might inadvertently discount facts which, within the revolutionary time period, might illustrate with greater clarity what that right was perceived to protect. This scholar's conviction that American history is a tale of unfolding and increasing liberty, may well lead him to interpret the historical materials before him in such a way as to emphasize *only* those aspects he *knows* would eventually emerge; writing in 1941 one has the benefit of hindsight. In short, scholars who view history as the progressive evolution of liberty and equality have a tendency to smooth out rough edges (noted inconsistencies) in order to demonstrate that the continuity was "natural"—nay, almost *inevitable*. In sum, their works are not so much about scholarship as they become the means of self-prophecy. Our hypothetical scholar's view of history takes on the characteristics of any good novel; for instance, selected revolutionary activities become the seeds of the liberty that eventually grow and bear the fruit of what is, or is perceived to be, the public posture in 1941.[289]

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286 JAMES WILLARD HURST, DEALING WITH STATUTES (1982). Too often, it seems to me, non-interpretivists recount legislative *failures*, rather than their overall success.

287 *See generally* GILMORE, *supra* note 10; DEFENSE, *supra* note 30, at 8–17, 122–23. As a result, scholars subsequently rely on skewed research, and primary sources may not be reexamined for considerable periods of time. Supreme Court decisions over the past one hundred years are permeated with various assumptions of progress or moral progress. *See supra* note 197.

288 *See, e.g.*, ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 1–35 (1941). As I mentioned earlier, every age has its *Zeitgeist* or "tides," *supra* note 4, and thus in every era, *some* common assumptions will be made. If this was not the case, a societal consensus would be impossible to forge. I am not suggesting that scholars, past or present, are guilty of committing intentional fraud, only that we must seriously take to heart the fact that every age has its climate of opinion—its own distinctive set of common (and uncritically accepted) assumptions. These assumptions will probably distort scholarship. We must therefore strive to understand what these assumptions are, and how they may have influenced scholarly works. We should also recognize that we are probably guilty of doing the very same thing (that is, allowing the commonplaces of our day to influence our work).

289 *Cf. e.g.*, CLINTON ROSSITER, SEEDTIME OF THE REPUBLIC (1953).

Such thesis books have influenced our precedents. Citing to thesis books, a judge justifies the decision before him (and up the appellate ladder), and the next thesis book writer uses that court's decision(s) to justify yet another expansion of the original thesis—and so on.[290] Can you now see how such scholarship has swept through our body of precedents for three generations? The likelihood of the preceding occurrence increases exponentially *when the word studied* (free speech) remains identical throughout.[291] Scholars should no more take a word or phrase from the constitution, and retroactively read their current understanding into them, than they should judge the actions of prior generations by today's standards and sensibilities. They may use impeccable logic or a vivid and creative imagination to explicate protections that the word *could* or *should* today guarantee, but law students should recognize the speculative nature of such efforts, as well as how it provides the means by which scholars and judges inject their own predilections into constitutional law under a pretense of *interpreting* the Constitution. Such an approach is totally inadequate and should be rejected regardless of how *clear* the meaning of the word or phrase, or how natural or favorable the consequences appear to these speculators.[292]

Before students can determine what the ratifiers of the Constitution intended by the words they used, the words must be placed in context.[293] Historical studies purport to provide that context should possess at least four characteristics:

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290 *See supra* notes 195–197. As noted, for some time now, the Supreme Court and its non-interpretivist supporters have engaged in that aforementioned shell game (casting more and more shadows) with respect to protected and unprotected "speech." They are creating more and more doctrines, and making more and more distinctions, in order to hide the fact that they have illegitimately broadened the meaning of the word "speech" far beyond what the framers ever intended it to encompass. *See supra* Part III.D.

> [W]hatever fine declarations may be inserted in any constitution respecting [First Amendment rights], must altogether depend on public opinion, and on the general spirit of the people and of the government. And here, after all, as is intimated upon another occasion, must we seek for the only solid basis of all our rights.

THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 4, at 514–15. *See generally* KRAMER, *supra* note 34. The non-interpretivist understanding of First Amendment provisions are shot through and through with progressivist assumptions. The accompanying litany of created rights and the doctrines used to impose them, frequently usurp federal and state legislative power and rest only on the personal theoretical preferences of their advocates. In the end, because the American people have never embraced them, they can never amount to anything more than sub-constitutional arguments. Congress and state legislatures, of course, could adopt such reasoning by statute or amendment, or direct courts to apply them, but imposing their strictures on the American people is illegitimate.

291 *See, e.g.*, LEVY, *supra* note 115, at vii–xii. After studying the historical evidence Levy "reluctantly" concluded that the framers of the Bill of Rights did not envision a "broad scope for freedom of expression." *Id.* at xxi. However, he believes that the framers fashioned the language of the First Amendment to permit future broadened interpretations. *Id.* at xxiii–iv. For Levy, non-interpretivist interpretative methodology is a legitimate attempt "to breathe a liberality of meaning into [the First Amendment], in keeping with the ideals of our *expanding* democracy." *Id.* at xxvi (emphasis added). I reject his view as imprecise, masking the imposition of views he favors, and contrary to the evidence. *But see* H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 680 n.48 (1987).

292 Powell, *supra* note 291, at 659. *See also,* SAVING, *supra* note 3, at 180–90.

293 I refer, not only to the specific words used but also to their purpose, that is, the use of adequate canons of construction. *See supra* note 248; SAVING, *supra* note 3, at 48, 139–44.

1. The understanding of the words used by historical figures should be conveyed as the figures themselves understood them.[294]
2. The meaning those principles or words acquired *after* the period being studied should be exorcised from any purported reconstruction.[295]
3. If, during the period studied, the principles or words had several usages, scholars or judges should determine which views *dominated* and how influential were those who shared those views.[296] Accordingly, scholars should not focus on a *minority* point of view because they *know* that a century later that view will become the dominant one.
4. Perhaps most importantly, scholars should test the word's *alleged* meaning against *actual practice*. Scholars should not be satisfied with logical explications: they must zero in on the *action*. A people's actions provide a crucial context for the interpreter, just as, in adjudication, concrete facts provide a more appropriate setting than do hypotheticals. Students should be leery when discrepancies between belief and action are characterized as ignorance of the words' true meaning, or are due to the people's alleged hypocrisy.[297]

In sum, law students must realize that the debate between interpretivists and non-interpretivists goes far beyond perceptions of judicial power, specific public policy disputes, or even tradition and precedents. It is a quarrel about appropriate standards of constitutional interpretation. In that regard, interpretivists find themselves between a rock and a hard place. Their very operating premises make them necessarily dependent upon historians. (Who else can provide context and insight to the ratifiers' specific understandings?) Yet regrettably, historical scholarship is often marred—uncritically biased in favor of progressivist or personal rights assumptions. The legal literature has probably become even more damaged than the historical literature because it is the last to embrace the contemporary criteria of relevance. We have alluded to the "tides in the affairs of men," but I want to remind readers that this is not the first time, nor will it be the last, that various academic disciplines have engaged in shadow construction.[298]

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294 Leo Strauss observes that "[o]ur most urgent need can then be satisfied only by means of historical studies which would enable us to understand classical philosophy exactly as it understood itself . . . ." LEO STRAUSS, NATURAL RIGHT AND HISTORY 33 (The University of Chicago Press) (1953); *see also* LEVY, *supra* note 115, at xiii-xx (understanding historical principles is made difficult by gaps in relevant evidence).

295 *See* BERGER, *supra* note 56, at 5–6. Nothing has distorted historical materials more than those who relate past events though present perceptions or others who delude themselves into thinking they can predict future developments.

296 *See, e.g.*, LEVY, *supra* note 115, at 313–20 (questioning actual impact of Lockean principles on eighteenth-century thought in America). The reader may refer to earlier comments and sources on such topics as First Amendment interpretation, or other court doctrines relating to coerced confessions or the exclusionary rule. *See supra* notes 9, 16, 43, 62, 66.

297 *See supra* text accompanying note 204.

298 *See supra* note 34 and accompanying text; sources cited *supra* note 72 and accompanying text (discussing developments during the laissez-faire period). *See also* Charles E. Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property"*, 4 HARV. L. REV. 365 (1891) (developments today parallel those at the beginning of the laissez-faire period).

While all of these considerations prompt cautious treatment of contemporary scholarship, at the same time, we must be cautious lest we throw the baby out with the bath water. Even within prejudiced assumptions, one might still discern important insights.[299]

Far too much legal scholarship encountered over the years has fluctuated between the "rah-rah" and "boo-hoo" varieties. The former claims a commitment of the American people to a personal rights tradition that far exceeds the evidence, or assumes that judicial redefinition of personal rights is without practical or theoretical consequences. The "boo-hoo" literature pines over our failures as a people, but when it is examined more closely, one is forced to conclude that our predecessors were human beings capable of error—errors often related to the "tides" of their day. Once students appreciate how much modern scholarship is biased by thesis books, and how much our history, political traditions, and legal precedents have been distorted, the more they will appreciate that the dispute between interpretivists and non-interpretivists is ultimately about the nature of republican government—the subject to which I now turn.

V. POLITICS AND THE REPUBLICAN SCHEMA

Political theory is (or should be) about *deep thinking*—an inquiry into how human beings live in an organized society under an infinite variety of favorable and unfavorable circumstances. Politics, then, is about people—their beliefs as a society as much as the institutions they create. This is a startlingly broad subject that we are forever destined to explore. A disproportionate share of legal theorizing today, however, concentrates on system-building, that is, theoretical constructions in which logic is substituted for experience. Characteristically, portions of this literature consist of thesis books run amok.[300] Theorists create intricate logical systems or enticing analogies, but once prodded, one understands that either they rest upon faulty or incomplete premises, or they reflect only fragments of reality in which an author attempts to persuade the reader to ignore all other experience.[301]

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299 Interpretivists certainly are not exempt from reading their own prejudices into the framers' intent. *See* Powell, *supra* note 291, at 680. Liberals are subject to similar criticism from Critical Legal Studies scholars; as are many male scholars from female scholars and many white scholars from minority scholars.

300 *See supra* notes 196–197 and accompanying text.

301 Publius wisely rejected that approach: "But theoretic reasoning, in this as in most other cases, must be qualified by the lessons of practice." THE FEDERALIST NO. 43 (James Madison), *supra* note 4, at 276. Elsewhere Publius adds: "Imagination may range at pleasure till it gets bewildered amidst the labyrinths of an enchanted castle, and knows not on which side to turn to escape from the apparitions which itself has raised." THE FEDERALIST NO. 31 (Alexander Hamilton), *supra* note 4, at 196. Eric Voegelin elsewhere comments:

> [T]hat I can build a system on a false premise is not even considered. The system is justified by the fact of its construction; the possibility of calling into question the construction of systems, as such, is not acknowledged. . . . [W]e now see more clearly that an essential connection exists between the suppression of questions and the construction of a system.

VOEGELIN, *Science*, *supra* note 134, at 44. *See also* BALL Review, *supra* note 224 (commenting on

Madison appreciated that free citizens disagree over the wisdom and appropriateness of public measures. That is natural. He also understood that anticipated alliances might never materialize, and even if they did, they would not remain cohesive for any length of time.[302] People engage more than just logic into their politics, just as they do in the rest of their daily lives. Much to the chagrin of system-builders (academic and political), people even *ignore their own logic*.[303] For example, should any of us become jammed in traffic, we often rile in disgust at rubber-neckers who are obviously slowing things down, only to find ourselves inexorably sneaking a glance as we pass the accident scene. One might say, "that is only human nature." That is exactly my point. Humans conduct themselves according to more than simple logic, and a good government schema—our Madisonian one—was designed with that in mind. In contrast, over at least the past sixty years, Supreme Court decisions taken cumulatively, evince a disturbing pattern of rights re-definition, expansion, creation, and destruction, which—whatever the variant—has markedly reduced the right of the American people to govern themselves.[304] Many non-interpretivists remain undisturbed because over the years they have simultaneously redefined republicanism in order to make it more compatible with the activist judiciary they endorse.[305]

At the heart of the Madisonian approach is the recognition that "people feel[ ] strongly *against* legislation or policy . . . [as well as] *for* legislation or policy[,]" which is to say, "that the normal situation in democratic policies *is* the 'apathetic' majority . . . ."[306] Though often maligned

Howard Ball's redefinition of American democracy and his defense of Warren Court decisions). For a contemporary, bolder and franker model of judicial power, see EISGRUBER, *supra* note 29. Elsewhere I dissect contemporary model-building which is a very different animal than Packer's original approach. *See Exclusionary*, *supra* note 9, at 107–10; *supra* notes 5–9 and accompanying text.

302 After all, citizens are fathers, sons, brothers, mothers, daughters, sisters; male or female; of different races, religions, and ethnic backgrounds; of varying professions and skills; of distinct economic or employment status; and much more—all interwoven into a complex tapestry. *See* THE FEDERALIST NO. 10 (James Madison).

303 Law students should investigate the inclination of various human types to the legal profession. By discovering their own personality preferences, they learn where their weaknesses lie. *See* DAVID KEIRSEY, PLEASE UNDERSTAND ME II: TEMPERAMENT, CHARACTER, INTELLIGENCE (1998).

304 During the laissez-faire period many Americans embraced property rights with the same passion that today is afforded privacy rights (or First Amendment, or equality rights). Most of us perceive "the switch in time to save Nine," *see supra* note 222, that is, the rejection of laissez-faire premises by the Supreme Court, as the beginning of the modern constitutional law era—or at least the scholars who taught my generation did. But during the transition (the abandonment of the laissez-faire belief structure by the nation and courts), laissez-faire adherents probably believed that the country was going to hell in a hand-basket. That of course, is precisely what current supporters of judicial power think will happen if law students embrace this article as a legitimate point of view! Some pundits already are crying chicken-little. *See* Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1. As I mentioned at the beginning of this article, my inclinations are conservative, but I do not favor injecting those predilections into the Constitution any more than I do injecting liberal ones. Taken as a whole, all this article urges is that non-interpretivists return to the same faith in the people as did their Revisionist predecessors.

305 It would be more accurate to say that many non-interpretivists believe that their particular variation poses no theoretical, practical, or legitimacy issues—but they are *not* too sure about some of their non-interpretive competitors. *See* Tribe, *supra* note 152.

306 *Intensity*, *supra* note 187, at 469, 485.

in the legal literature, Congress is quite good at seeking consensus and muddling through complex public policy debates.[307] However, many contemporary democratic theorists and proponents of judicial power simply do not think Congress is good enough. These non-interpretivists look suspiciously at the division or separation of powers when either obstructs their non-interpretivist goals.[308] But the framers made no attempt to deceive the Constitution's ratifiers.[309] They explicitly informed them that should the proposed constitution be ratified, limitations would be placed on sovereignty, and limitations on the people's right to govern themselves were intended to guard against excess. To accomplish this goal, obstacles had to be placed in the path of both good and bad *ordinary* legislation, and even greater obstacles in the path of amendments.[310] The framers believed that over time, most of the good laws or amendments would pass through the so-called "filter puzzle."[311]

Frankly put, our system was intentionally designed to *delay* legislative proposals (although that comment elicits surprise from some law students). Delay, I remind my students (with a glint in my eye), has the tendency to diminish *all* passion! It provides time for reflection (such as, "Do we really want to do that?"; "In the way proposed?"; "What happens if . . . ?"), as well as an opportunity for opposing forces to coalesce. That, in turn, usually leads to better (more moderate) laws—ones that enjoy wider subscription (and therefore, greater conformity with its dictates). In sum, Publius reasoned that it was far better to consistently delay and perhaps defeat many *bad* laws, even if as a result, a few *good* laws were temporarily thwarted. Different constituents, staggered terms, and competition amongst the three branches were intended to prevent public passion from being immediately injected into public policy-making—an occurrence that had ren-

307 Furthermore, Carey notes, *The Federalist Papers* "treats *deliberation*, that is, dialogue back and forth among members of the assembly and among the 'branches' of the government, as the be-all-end-all of the democratic process, and claims for it that it will produce the 'sense' (*not* the will) of the people as a whole." *Id.* at 500–01. Put another way, the Madisonian model "regards elections as means through which the voters express not their 'preferences' on issues of policy . . . but their considered judgment, amongst the candidates who present themselves, as to which is the 'best' [person] they can send forward to participate in the deliberative process . . . ." *Id.* at 501. That of course is not to say that at times it is better than at other times.

308 *See* BASIC, *supra* note 156, at 108–18.

309 That is why I urge law students to read *all* of *The Federalist Papers*.

310 In my lectures I challenge students to think about the non-interpretivist allegation that our amendment process is cumbersome. I suggest that if they find that charge valid, they should explain to the American people why they think so, and ask them if they want to amend the amendment process to make it less cumbersome. Law students soon realize that making the amendment process less demanding (cumbersome) may not be such a good idea—particularly given the framers' concern with passion injection. On that score the New York Times recently reported that internet communication, coupled with radio talk hosts, successfully lobbied legislators to reject a compromise immigration bill. Julia Preston, *Grass Roots Roared, and an Immigration Plan Fell*, N.Y TIMES, June 10, 2007, at A1. Such passion injections cannot be prevented, only controlled—the great lesson of *Federalist Paper No. 10*! *See* THE FEDERALIST NO. 10 (James Madison). Sometimes the fruits of the amendment process will be good; other times it will be bad, and, of course, over time the more it is used the less effective it will be.

311 BASIC, *supra* note 156, at 109.

dered past popular governments ineffective, indecisive, or erratic.[312] Our system integrates institutional delay with the faith that, given adequate time, most Americans will opt for justice.

The framers' design is often portrayed very differently by non-interpretivist proponents. Some wish raw voter sentiment to be quickly translated into public policies, while others have unceasingly cajoled and flattered the judiciary to become our moral preceptor.[313] The former at least remain within the democratic genre, but the latter want courts to *impose* (under the ruse of interpretation) what they cannot secure through either the elective *or* the deliberative processes. That is why I have repeatedly stated that our *aristocratic* framers had far more faith in the American people than our non-interpretivist brethren.[314] We will return to these themes later.

Consider this oft-ignored seminal question: Why has the Constitution placed "severe limitations upon temporary majorities, and left the path to the statute-book open only to serious, deliberate majorities—that is, majorities able to keep themselves in being long enough to gain control of both houses of Congress, of the Presidency, and of the Supreme Court[?]"[315] Even a casual reading of the Constitution puts Congress (the *maker* of the law) at the center of our compound republic. After all, laws ultimately reflect how a people rank their values, and that certainly can be influenced by considerations of self-interest as well as by concern for justice or rights.[316] Public policy clashes habitually divide us as a people, and when those divisions become intense, instability occurs—a serious danger to *all* governments regardless of form. James Madison believed that consensus-building through deliberation would provide the means for an enduring government. But for consensus-building to work, the relatively *indifferen*t citizen had to

312 *See supra* notes 233—237 and accompanying text.

313 Even if we assume that judges are more intelligent than you or I, there is no reason to believe that intelligence would have *any* bearing on the passion-injection issue. Publius commented: "Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob." THE FEDERALIST NO. 55 (James Madison), *supra* note 4, at 342. Professor Kramer expresses doubts about assumptions of judicial competence in such matters, and describes the apparent lack of deliberation among the Justices. KRAMER, *supra* note 34, at 237–40. Faculty members routinely experience the truth of this statement at department meetings—with or without the presence of prima donnas—as well as at conventions, where intense personal preferences are often masked by mathematical formulas and intellectual razzle-dazzle.

314 Carey contends that a close reading of the *Papers* reveals that while Publius was reluctant to appeal to the people on "horizontal distribution of powers between the legislature, executive, and judiciary[,]" he "was willing to allow the people to 'hold the scales in their hands,'" with respect to "maintaining the proper equilibrium between the state and national governments. And this proper equilibrium turns out to be whatever the people declare it to be." DESIGN, *supra* note 43, at 114–15. *Contrast* KRAMER, *supra* note 34, at 79, 98, 108, 142. Professor Kramer largely ignores Hamilton's remarks, *see* THE FEDERALIST NOS. 79–83 (Alexander Hamilton), which would add weight to his position that the people had a significant role to play through the political process.

315 *Intensity*, *supra* note 187, at 470.

316 *But see* RONALD DWORKIN, LAW'S EMPIRE 97 (1986). *See* William Gangi, Book Review, 15 PERSP. POL. SCI. 186 (Winter 1986) [hereinafter Dworkin Review]; Raoul Berger, *Ronald Dworkin's* The Moral Reading of the Constitution*: A Critque*, 72 IND. L.J. 1099 (1997) [hereinafter *Moral*]; JOHN RAWLS, A THEORY OF JUSTICE (1971). *See also* DEFENSE, *supra* note 30, at 189.

play a pivotal role.[317]

Let me explain. To build a consensus you need players who embrace the rules of the game, that is, they possess skills other than just logic. Each participant or group of participants—factions if you will—must have the capacity to assess just how intense they feel about the issue before them, and also, be able to assess, as *accurately* as possible, how intense their opponents feel about the same subject.[318] Without such skills, how can factions prioritize what they want, and what the other factions may or may not be willing to give them, so as to obtain their cooperation? When either or both skills are lacking, the likelihood for serious miscalculations increases—the result of which can be anything from an inability to reach a consensus on topics of common concern, to the equivalent of civil war.[319]

Why did Madison consider relative indifference essential?[320] Perhaps a simple example will illustrate the answer. One member of your group of friends suggests, "Lets go to XYZ restaurant," only to find that some are intensely for the suggestion, some equally against it, and the remainder are indifferent. Assume the group adopts majority rule as a fairest basis for reaching a decision.[321] This possibility now arises: In the course of the group's deliberation, some of the previously indifferent suggest they could be swayed to join one side or the other if one side is willing to make an unrelated concession, for instance, "We'll go to restaurant XYZ, if next week all of us go to the jazz club."

Measuring political intensities on an almost infinite variety of subjects is of course far more complex than our example. Or, is it? Factions, for example, frequently "fake" ("manufacture") a nonexistent intensity in a calculated ploy to obtain some advantage, that is, to get a little more from the other faction than would otherwise be possible, or even to get something entirely different—something they *suspect* the other faction feels *less* intense about than they do.[322] Faking occurs, mind you, in the larger context of normal citizen *apathy*.[323] On an infinite number of public policy is-

317 *See supra* note 307 and accompanying text. I put aside another facet of the schema mentioned earlier, that is, Madison's insistence on fewer representatives.

318 *Intensity*, *supra* note 187, at 483–86.

319 Such occurrences are hardly new or surprising in either the personal or the international arenas. The former may well be reflected in our nation's divorce rate (an inability of at least one, but probably both parties, to assess each other's intensity, or the use of tactics of intensity which backfire). And with respect to the latter, diplomatic miscalculations have had the same impact on international relations since the dawn of time. For recent examples one may point to the European community's inability to assess the impact of September 11th on American foreign policy, or the American failure to gauge the European reaction to the American led invasion of Iraq, or perhaps France and Germany's inability to understand that Americans did not care what they thought.

320 *Intensity*, *supra* note 187, at 470.

321 I put aside here considerations such as a desire for all of you to remain together which, of course, some might feel *more* intensely about than *where* the group goes, or the desire to avoid a decision that would hurt the feelings of some of your group (again, which *some* members may (silently or verbally) judge as important as any decision made).

322 *Intensity*, *supra* note 187, at 478–79. Of course I simplify all these issues.

323 *Id.* at 485.

sues typically before Americans, few citizens feel intensely about more than one—if any. For instance, when it comes to horse-trading on various issues, particularly at the end of congressional sessions, one must put one's cards on the table and demand a reasonable "payment" for support (taking intensities on both sides into account). If the price is perceived by opponents as being too high, or the attitude that compromise is unacceptable is conveyed (because of some strongly-held principle or ethical concern), some of those who started out as your allies may swing their support to your opponent—because they sense there is more to be gained by "selling" their support to the other side. Instead of getting *something* for joining a potential majority, you may wind up totally ignored. They call that politics.[324]

Consider for a moment—regardless of whether you are pro-choice or anti-abortion; for or against capital punishment; for or against legal recognition of gay rights or affirmative action—do not some of your bedfellows' proposals appear to go *too* far? Do you not shy away (if not cringe) at seeing your beliefs carried to their *logical* end? And, even if *you* do not, surely you recognize that some of your bedfellows will. Single-minded advocates may judge their potential allies weak-minded or illogical, and that may be infuriating, but Madison *depended upon* a disinclination toward the extreme, to *moderate* the adverse consequences of factions. For Americans who believe that tempering principles is *itself* unprincipled or illogical, those individuals often find themselves condemned to political irrelevancy, that is, at least those who seek election.[325] Every husband and wife (or those who cohabitate), as do participants in organizations or businesses (especially family-run businesses), recognizes the realities of intensity, even if they do not fully comprehend it. If relationships are to endure, compromise is required. As Billy Joel astutely observed in *Piano Man*, even the waitress practices politics.[326]

Our governmental schema encourages consensus-building even among competing factions and parties.[327] Preferences, whether personal or societal, however, "must be weighed as well as counted, and weighed in such a manner that the heavier ones tip the scale more than the lighter ones."[328] While those who feel intensely are perhaps best equipped to raise

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324 Does this not merely parrot what we know about the dynamics at the 1787 Philadelphia Convention—large states against small ones, pro-slavery versus anti-slavery states, and so on? Professor Kramer does an admirable job discussing the realities and responsibilities of politics. KRAMER, *supra* note 34, at 205, 236.

325 And that is why non-interpretivists often chose to circumvent the political system as understood by the framers, or redefine our political system, confining their appeal to the intelligentsia.

326 BILLY JOEL, PIANO MAN (Columbia 1973).

327 Divided government nonsense. *See* William Gangi, Professor, St. John's University, New York, Department of Government and Politics, Lecture No. 5 on Chapter Seven: Political Parties: Essential to Democracy, MAGLEBY ET AL., *supra* note 85, (2006) *available at* http://members.aol.com/gangibill/lecture5.htm; William Gangi, Professor, St. John's University, New York, Department of Government and Politics, Lecture No. 8 on Chapter Twelve: The Presidency, MAGLEBY ET AL., *supra* note 85, (2006) *available at* http://members.aol.com/gangibill/lecture8.htm.

328 *Intensity*, *supra* note 187, at 475.

public consciousness, or to help define all the stakes, more often than not, their intensity jeopardizes their objectivity. Focused as they are on the subject, they tend to view the stakes or weigh competing values very differently than do those who feel less intensely. Deliberation and decision-making become cooler, as Madison suggested, when the relatively apathetic control those processes.[329]

Law (public-policy) is an imprecise and very complex business. There are many uncertainties and the republican form of government makes matters infinitely more difficult because it places the ultimate responsibility in the hands of the people.[330] The people are responsible for the quality of their society, and we are, after all, human beings. We get frightened, embrace stereotypes, and—in one intensity or another—hold certain beliefs based on our experiences and our intelligence (though, Lord knows, the latter is exceedingly fragile). All of this, mind you, in the context of trying to anticipate eventualities so numerous, even today, they remain impossible to catalogue.[331] Nevertheless, even great constitutions depend on great execution.[332] Ultimately, good governance, like virtue, exists in an unnamable mean, which *is* the object of deliberation and consensus building.[333]

Members of the judiciary are far more likely to misconstrue intensity, both their own and that of others.[334] They are poorly suited to make realistic assessments of opposing intensities, and they certainly cannot determine to what extent such intensities are "manufactured." It is hardly surprising, therefore, that courts and non-interpretivists have increasingly turned to

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329 *See supra* note 307 and accompanying text. Is not that the justification used by lawyers and courts when selecting a jury?

330 THE FEDERALIST NO. 51 (James Madison), *supra* note 4, at 322 ("[Y]ou must first enable the government to control the governed; and in the next place oblige it to control itself.").

331 As Publius put it, "there ought to be no limitation of a power destined to affect a purpose which is itself incapable of limitation." THE FEDERALIST NO. 31 (Alexander Hamilton), *supra* note 4, at 193.

332 In unusual circumstances, the line between statesman and demagogue is not so easily drawn. "Every man the least conversant in Roman history knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of dictator . . . ." THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 4, at 423. And do not forget for a moment that all constitutional provisions may fall before the exigencies that confront a nation's self-existence. Publius notes:

> If a federal Constitution could chain the ambition or set bounds to the exertions of all other nations, then indeed might it prudently chain the discretion of its own government and set bounds to the exertions for its own safety.
>
> How could a readiness for war in time of peace be safely prohibited, unless we could prohibit in like manner the preparations and establishments of every hostile nation? The means of security can only be regulated by the means and the danger of attack. They will, in fact, be ever determined by these rules and by no others. It is in vain to oppose constitutional barriers to the impulse of self-preservation.

THE FEDERALIST NO. 41 (James Madison), *supra* note 4, at 257. *See also* STRAUSS, *supra* note 294, at 160–61. Publius' position is in the Aristotelian tradition.

333 SAVING, *supra* note 3, at 260 n.15 (citing VOEGELIN, *supra* note 284, at 62–63).

334 Needless to say, even if it could measure intensity, many of the decisions of the past sixty years would still remain illegitimate. Again, I ask readers to separate their predilections from legitimate constitutional criteria.

polls (the more sophisticated of which include so-called intensity scales).[335] But such polls measure only initial preferences, that is, the "yes or no" (to whatever degree) responses of citizens. Far more often those responses reflect *not* deliberative thought, but surface attitudes, which in turn are usually based on emotions that are particularly susceptible to manipulation. Polls include only a finite scale of responses because they could not anticipate or encompass the variety of human choices possible on even the simplest subject. For instance, just stand in line at Starbucks and listen to the variety of coffee preferences![336] While polls record initial voter preferences (for example, the *direction* of public opinion),[337] any decision solely based on mere direction is the antithesis of the Madisonian model which assumed that converting immediate public sentiment into public policy was far more likely to be dangerous to the public good.[338] True enough, in a well-constructed and popular government, the expression of strong public sentiment deserves an initial political focal point (such as the House of Representatives), but only after the passage of time can voter sentiment be accurately gauged. How else may a popular government evaluate faction intensity—in other words, the faction's ability to endure?[339] To imagine that polls or consensus-building among members of the Supreme Court provide adequate substitutes for legislative deliberation, is to embrace that which the framers studiously *avoided*: the injection of passion directly into public policy-making.[340] Not surprisingly, as previously noted with respect

335 Such polls consist of questions which include phrases like "on a scale of 1 to 5" (or "1 to 10," or "very satisfied to very dissatisfied"), what are your preferences on A, B, or C? *See Intensity*, *supra* note 187, at 476 n.7. Frequently poll questions are biased—whether intentionally or unintentionally.

336 Try raising this question among friends: Should roast beef be served rare, well done, or somewhere in between? Record the variety (and intensity) of the answers. See if substituting lamb for beef changes the responses. The more apathetic among us might conclude that people are entitled to their own preferences, whatever they may be. In this context, consider a few of today's current public policy disputes: an effective and fair tax stimulus package, partial-birth abortions, equitable reform of Social Security, professional standards for accountants and lawyers, and how to reduce American dependency on foreign oil. Are you still apathetic? Equally so? On each topic?

337 *Intensity*, *supra* note 187, at 476 n.7.

338 *See id.* at 500–01. It was precisely that tendency that made pure democracies a defective form. It led to instability as popular emotion whipped one way and then another. *See supra* notes 231–246 and accompanying text. For example, a citizen might respond to the question, "Do you favor the death penalty?" with a "No." But polls rarely obtain from responders the deeper particulars that often confront a legislator who must then try to anticipate how intensely his constituents feel about the matter. He must discern whether or not other issues are more important to the voters, and of course, how their vote on the topic will affect his reelection prospects. Would a legislator's calculations differ if the death penalty legislation in question punished a child murderer? As a private citizen you might come down on punishing child murders one way or another, but as a legislator, you must assess whether the issue is of concern to your constituents. What if there was a recent child murder? Or perhaps you think there are far more important issues—for example, our presence in Iraq. But maybe your constituents rank this issue differently than you. On the level of theoretical principle we should not let the polling method determine how we look at politics. "The subordination of theoretical relevance to method perverts the meaning of science on principle." VOEGELIN, *supra* note 195, at 6.

339 In four years a faction may completely dominate the American political system. Believers get two chances to change the entire House of Representatives, elect two thirds of the Senate, and elect the President. If they can sustain a simple majority, they can even change the *number* of justices on the Supreme Court so as to fill vacancies with sympathetic nominees. If they can sustain an extraordinary majority they may amend the Constitution.

340 *See supra* note 312 and accompanying text. As George W. Carey notes:

to slavery and laissez-faire, judges are not immune from passion injection. In sum, modern democratic theorists and their non-interpretivist allies often champion a democratic model (an unauthorized one, of course) which is very different from Madison's *post-election* deliberative one.[341]

On such matters students certainly must make their own assessment, but it seems to me that much of our influential legal literature is dominated by scholars who elevate logic and imagination above common experience and our tradition of self-government.[342] They expend an enormous amount of energy to convince readers that each of their speculations, unlike those of competing scholars, is *really* important to the health of the body politic. Distracted thusly, truly gifted students are no longer guided by daily experiences or political realities as in Plato's prescription that political society is man writ large.[343] On that score—model builders of democracy,[344] jus-

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> Unlike the Congress, [the Court] has no reliable means to gauge the relative intensity of the interested parties, what the reactions will be to any given pronouncement or, *inter alia*, what obstacles are likely to arise in its execution. And once having embarked on a path, it can pull back or reverse itself only at great cost to its own prestige and the principle of the rule of law. Moreover, leaving aside the legitimacy of these activities, its members are ill equipped for such tasks because legal training scarcely provides the breadth of knowledge in fields such as philosophy, history, the sciences, and social sciences necessary for this mission.

DEFENSE, *supra* note 30, at 179. While I concur in Carey's assessment, SAVING, *supra* note 3, at 249–250, I don't think any scholar anticipated the statement by Justice O'Connor regarding *prospective* constitutionality:

> [R]ace-conscious admissions policies must be limited in time. . . .
>
> . . . .
>
> [The Court] take[s] the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions as soon as practicable. . . . [The Court] expect[s] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

Grutter v. Bollinger, 539 U.S. 306, 342–43 (2003) (citation omitted).

341 CONTRA, *supra* note 88, at 500–02. In the text I ignore Madison's argument that the extension of the territory will contribute to the moderating effect.

342 *See, e.g.*, DWORKIN, *supra* note 316; EISGRUBER, *supra* note 29; ELY, *supra* note 151; *Human*, *supra* note 257; *Freedom*, *supra* note 271; RAWLS, *supra* note 316; TRIBE, *supra* note 85. For additional sources on the subject, see the bibliography of *Expansionism*, *supra* note 21, at 904–06. Of course not all scholarship is inflicted to the same degree. Still, if younger scholars perceive this as the game being played, this is the direction they will take. My impression is that there are outstanding minds engaged in system-building (masked under economic, philosophical, or theological speculations) or preoccupied with minutiae stripped of context. *But see* INVESTIGATING SUBJECTIVITY 1–13 (Carolyn Ellis & Michael G. Flaherty, eds., 1992); IRA L. STRAUBER, NEGLECTED POLICIES: CONSTITUTIONAL LAW AND LEGAL COMMENTARY AS CIVIC EDUCATION 1 (2002). *But see* William Gangi, Book Review, 32 PERSP. POL. SCI., 46–47 (Winter 2003).

343 Plato comments:

> Are you aware, then, said I, that there must be as many types of character among men as there are forms of government? Or do you suppose that constitutions spring from the proverbial oak or rock and not from the characters of the citizens, which, as it were, by their momentum and weight in the scales draw other things after them?

PLATO, *Republic*, *supra* note 35, at 774. Earlier in this piece I used Plato's Cave analogy to convey that today the Supreme Court and its supporters, like the elite in Plato's Cave, cast shadows on the front wall of our national political life and mislead law students into believing these shadows represent the substance of constitutional law. *See* sources cited *supra* notes 35–36 and accompanying text. *See also* SAVING, *supra* note 3, at xiv–xv. But, the fact of the matter is that law students today are obliged (compelled) to master such shadows (tests, doctrines, etc.). Gaining mastery takes a considerable

tice,[345] or rights[346] fall short. What law students must rediscover and appreciate is the complexity of American politics, citizen participation in self-government, and our uniqueness as a nation. All of these require an understanding of our history,[347] the principles of our founding, and the way the Constitution (including the Bill of Rights) embodies those principles. Losing sight of any of these components leads us astray, not just temporarily (for that is inevitable), but permanently, which is the present danger. Instead of swallowing whole the simplistic analyses of modern democratic theorists (disguised by the illusion of complexity), students must learn to embrace political complexity (similarly disguised under the illusion of simplicity).[348] Law students remain equally subject to the dictates of Madisonian politics and the realities of intensity. Some of them have become so committed to one cause or another, they may find it impossible to travel the road I urge them to consider. I understand. But it may be the relatively indifferent who hold the fate of constitutional law in their hands.

VI. CONCLUSIONS

Non-interpretivists have succeeded in transforming the power of judicial review into a doctrine of judicial supremacy, and converting a constitution intended by its framers to "regulate and restrain the government" into one in which the Supreme Court "restrain[s] the people."[349] The mounting number of Supreme Court tests and distinctions chip away and erode constitutional law and government competency, political accountability, and common sense. But, as I noted,[350] the fact that both scholars and students acquire so-called mastery of these subjects, or expend a great deal of energy doing so, does not prove their legitimacy. Each time, for example, critics express doubt over how the Supreme Court balances First Amendment concerns with other considerations, do your professors evaluate the merits of such claims? Or do they simply warn of censorship's slippery slope or the practices of totalitarian regimes?[351]

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amount of time and energy, leaving little time for much else. The most proficient at mastering these shadows become authorities on the Court (and they are!). The shadows in turn create "realities" (i.e., more tests, distinctions) that erode constitutional law, political accountability, and common sense. But the fact that mastery is acquired or energy is expended, neither validates nor proves the shadows' assertions.

344 *See generally* ELY, *supra* note 151. *But see* Ely Review, *supra* note 151, at 53.

345 *See* RAWLS, *supra* note 316. *But see* DEFENSE, *supra* note 30, at 189 (describing Rawls' work as "a tedious and rather feeble philosophical defense of the secular welfare state.").

346 *See generally* DWORKIN, *supra* note 303. *But see* Dworkin Review, *supra* note 303; *Moral*, *supra* note 303.

347 *See supra* Part IV.B. On a related matter, Carey observes: "[G]iven its origins, the expression 'law of the land' . . . was not intended to limit the legislatures; instead, the expression 'law of the land' embraces the laws duly enacted by the legislature that apply to executive and judicial proceedings." DEFENSE, *supra* note 30, at 165. Put another way, the Massachusetts Body of Liberties contributes mightily to understanding the status of rights. *See supra* text accompanying notes 210–219.

348 *See generally* DEFENSE, *supra* note 30, at 34–121.

349 Kramer, *supra* note 281, at 14.

350 *See supra* note 343.

351 *See Exclusionary*, *supra* note 9, at 117–18.

I have mentioned that some non-interpretivists apparently believe the Supreme Court should act as the secular Chair of Peter,[352] contending that the Court can more objectively weigh competing principles—as if this (rather than the legitimacy of it doing so) was the issue. They further assert that the Court is able to more competently discern the meaning of a particular Bill of Rights provision, however the Supreme Court often ignores both the ratifiers' understanding and legislative preferences. Should not professors point students in the direction of where to find convincing evidence of those assertions?[353] Instead of providing elected representatives with considerable discretion to address change (as did the framers), non-interpretivists restrict that ability by wrongly elevating to constitutional status their own sub-constitutional public policy preferences. Unfortunately, many interpretivists, instead of confronting that development head on, have devoted their energies to seizing control of the judiciary. That may be a natural thing to do, but it fritters away the people's right to government.

So where do we stand? On the one hand, principled non-interpretivists (of one stripe or another—here unnamed) sincerely believe that the judiciary should adapt the Constitution to changing circumstances, wishing it to act as our moral conscience, or that judicial review and interpretation may be used to secure some process or substantive right. Many of them recognize that constitutional law has been altered. However, at the end of the day, all of them profess an allegiance to one desirable result or another, as opposed to the framers' understanding of judicial review, various constitutional provisions, or the Madisonian schema. Other non-interpretivists (again unnamed) are undoubtedly self-promoting opportunists. They care little about the implications of the legitimacy issue. They simply believe it is more cost-effective to convince *judges* of the policy preferences they espouse, than it is to convince a majority of state legislators, Congress, or the American people.

Interpretivists, on the other hand, remain defensive. Not that I fault them, but interpretivists lack a coherent strategy, instead reacting to specific judicial usurpations which they seek to minimize or halt. Some focus their ire on the judiciary's expansion of personal liberties; others object to the creation of some heretofore unknown rights; and still others are offended by judicially imposed challenges to traditional cultural mores. Minimally, some interpretivists seek to stop new usurpations from occurring, and at their most aggressive, they want to reverse decisions they find distasteful. More often than not, they focus tactically on specific public policy content rather than the broader issue of legitimacy. The net result of their strategy, however, has been to alarm non-interpretivists, making judicial

352 *See supra* note 257.

353 For example, legislators have *always* brought their ethical and religious values (or lack thereof) to public policy debates. *See How to Read*, *supra* note 174, at xii ("American political life has re-enacted . . . [a process whereby individuals are] prepared to submerge their individual personalities, their individual political philosophies, in the common enterprise.").

appointments more contentious, with both camps fearing control of the judiciary by the other. Legislative resistance to judicial usurpations—by such traditional means as slashing judicial appropriations, removal of Supreme Court appellate jurisdiction, or commencing impeachment proceedings against judges—are either no longer attempted or, in the specific context in which they occur, seem excessively partisan.

Congressional resistance to acts of judicial illegitimacy has lost its potency, not because the tools would be ineffective, but because evidently a majority of *Congress* unknowingly embraces non-interpretivist premises.[354] Congress currently lacks the strong *institutional* pride upon which the framers so heavily depended. It has chosen to ignore the "Court's self-aggrandizing tendencies" and the growing elitism "among lawyers, judges, scholars, and even politicians . . . [who believe] that ordinary people are foolish and irresponsible when it comes to politics . . . [which is] grounded less in empirical fact or logical argument than in intuition and supposition."[355] In sum, many members of Congress are ill-equipped today to preserve and defend our republican regime.[356]

Occasionally, interpretivists advocate issue-oriented constitutional amendments. Such proposals, however, do not challenge the non-interpretivist legacy—the creation of a judicial oligarchy. The situation grows increasingly ironic. The framers (many, aristocrats by birth and certainly among the intelligentsia of their day) turned out to have greater faith in the people, as well as the constitutional structures they created, than do their congressional successors. Even in the 1930s, the Progressivists (similarly part of the intelligentsia of their day) never dreamed of circumventing elected officials. At least *initially*, they concentrated their efforts on halting illegitimate judicial vetoes of legislative economic reforms.[357] For example, as a private citizen, Felix Frankfurter sought political remedies,[358] and as a Justice of the Supreme Court he cautioned that "[t]he Court is not saved from being oligarchic because it professes to act in the service of humane ends."[359] Today the situation could not be more different. Our in-

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354 I am sure the motivations are the usual suspects: sincere belief, ignorance, and opportunism. *See The Jury and the Search for Truth: The Case Against Excluding Relevant Evidence at Trial*, *Hearing on S.3 Before the S. Comm. on the Judiciary*, 104th Cong. 27–28 (1998) (comments by William Gangi, Professor, Dep't of Gov't & Pol., St. John's University) [hereinafter Hearing].

355 Kramer, *supra* note 281, at 18.

356 *See* Hearing, *supra* note 354, at 28.

357 SAVING, *supra* note 3, at 99–102 (detailing how the Court majority eventually coalesced around personal rights—initially those of criminal defendants, and more recently, those with respect to the First Amendment and privacy).

358 Professor Holland explains that Felix Frankfurter was one of the formulators of "Robert La Follette's platform plank in 1924 which called for a constitutional amendment giving Congress power to override Supreme Court invalidation of federal statutes by a two-thirds vote. Frankfurter even advanced the modest proposal of excising the due process clause from the fourteenth amendment [sic]." *See* Holland, *supra* note 223, at 1036 n.23.

359 Jesse H. Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 815 (1974) (quoting AFL v. American Sash & Door Co., 335 U.S. 538, 555–56 (1949) (Frankfurter, J., concurring)). *See also*, CHRISTOPHER WOLFE, JUDICIAL ACTIVISM: BULWARK OF FREEDOM OR PRECARIOUS SECURITY? 74–77 (1991).

telligentsia, including elected officials, have become part of the problem—not any possible solution. They evince an unprecedented lack of faith in the very people who have elected them, standing idly by as members of the judiciary claim to know what is *best* for the very constituents who elected them. Still, they deny the pertinence of a comparison to their laissez-faire predecessors. Worst of all (though not unusual), our intelligentsia deceives itself. Far too many elected officials have swallowed judicial deception (even self-deception)—hook, line, and sinker—that is, the judicial pretension that the *Constitution* commands the various public policies they assert, policies which in fact, only reflect the preferences of non-interpretivists, a majority of justices, and some legislators.

With our intelligentsia (most of the Justices of the Supreme Court included) having become so enamored with judicial power, it will be exceedingly difficult for Americans to extricate themselves from the inevitability of subsequent judicial usurpations. Surely, law students also understand that the interpretive tools employed by non-interpretivists are inherently expansive. Is that not what some law students find so enticing about the law or the prospect of becoming a judge? The chance, as they say, to make a difference or to do the right thing?[360] Fertile imaginations will continuously redefine constitutional phrases, and impeccable logic again and again will be used to destroy competing values. Once the judiciary creates a "right" (e.g., privacy), or redefines a constitutional phrase (e.g., free speech), logic either will brush aside competing values not enjoying similar status, or the Court will create yet another *balancing test* by which it can mask the majority's predilection imposition. Considerations such as the republican character of our regime; our tradition of self-government (which in fact placed much of the balancing of rights in legislative hands); or the framers' understanding of the limited scope of judicial power, become, at best, secondary considerations subject to redefinition by imagination and logic. Subsequently, this redefinition will take on a life of its own, inevitably drawing the judiciary deeper and deeper into areas traditionally reserved to the legislature.[361]

At times the Justices crudely attempt to replicate the Madisonian con-

360 The causes change but the thirst for power never goes away. It is not that Publius did not expect such occurrences, in fact, they took precautionary measures. "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place." THE FEDERALIST NO. 51 (James Madison), *supra* note 4, at 322.

361 *Compare* Bowers v. Hardwick, 478 U.S. 186 (1986) (refusing to adopt a more expansive view of the Court's authority to find fundamental rights not explicitly stated in the Constitution, noting that the Court is most susceptible to attacks of illegitimacy "when it deals with judge-made law" having "no cognizable roots" in the language of the Constitution) *with* Lawrence v. Texas, 539 U.S. 558 (2003) (noting that the *Bowers* Court failed to appreciate the liberty at stake, found by this Court, in the Due Process Clause of the Fourteenth Amendment). These cases again illustrate themes in this article. The problem initially was that the *Bowers* decision did not fit in with the various "shadows" previously cast on the front wall of American political life. In *Lawrence*, the majority acknowledged that fact. For an excellent discussion, see Jeffrey Rosen, *Immodest Proposal*, THE NEW REPUBLIC, Dec. 22, 2003, at 19 [hereinafter REPUBLIC]; Cass R. Sunstein, *Federal Appeal*, REPUBLIC, *supra*, at 21; Richard A. Posner, *Wedding Bell Blues*, REPUBLIC, *supra*, at 33.

sensus-building schema. They either try to demonstrate wide-based public support for their decisions, or try to bluntly reject one or more of their encyclicals. These devices are all geared to support an institutional desire to retain its power and prerogatives.[362] True, under fortuitous political circumstances, each time the Court has gone too far, it has retrenched sufficiently to enable it to retain popular support. It did so with the establishment of the religion line of cases, as with the rights of criminal defendants, death penalty, abortion, and perhaps racial discrimination cases. But if my analysis is sound, such retreats are only tactical and temporary. They provide respite—an opportunity for consolidation or the emergence of new alliances among the justices—before the Court marches forward in a particular direction.[363] Since the Warren Court, no majority has foresworn expansionary and illegitimate non-interpretivist premises. Sooner or later creative imagination and/or political exigency will spark subsequent attempts to secure, expand, and invent new rights.

There is no way to predict the outcome of this interpretivist/non-interpretivist clash over the nature of constitutional law and republicanism. Interpretivists, already a minority, may simply fade away, because they either die off, or cannot attract sufficient numbers of adherents to sustain intellectual or political coherence. Such has always been a constitutionalist's greatest fear.[364] Or conversely, interpretivists may be revitalized should a Court majority seriously misjudge hostility to one of its policy impositions.[365] Or—as is quite normal in Madisonian politics—some *non*-interpretivist proponents may reconsider, and splinter off from or leave the existing coalition as new or more complex issues work their way through the fabric of American politics; thereby paving the way for a *new* majority faction to emerge within the Supreme Court, as the current non-interpretivist reform agenda is increasingly actualized. There are those who are far more astute than I at analyzing the many possibilities.[366]

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362 *See* Stump v. Sparkman, 435 U.S. 349 (1978).

363 The non-interpretivist fear is that a new majority will march in the opposite direction! *See supra* note 304. Upon what *principles* do they object to such a move? They abandoned any applicable principles in their rush to acquire good results.

364 *See* Shattuck, *supra* note 298.

365 *See, e.g.*, Kelo v. City of New London, 125 S. Ct. 2655 (2005).

366 There is also the matter of unintended consequences. For example, the manner in which European scholars perceive judicial power in the United States. Actually, they are more discerning than their American counterparts. They recognize that the public policy-making role performed by the federal judiciary (as well as the *American* preoccupation with rights) is relatively recent. Nevertheless, the power wielded by the Supreme Court is accepted by Europeans as a distinctive American symbol. *See* HERBERT JACOB ET AL., COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE 38 (1996). Thus, we are exporting to an admittedly skeptical audience (many Europeans find it odd that Americans place that much power in a judiciary) "judicial supremacy" rather than "judicial review." *See supra* text accompanying note 30. As an interesting example take this comment by Hassan Khomeini, the former ayatollah's grandson, in Iran: "'We should value the achievements of the revolution,' he said. 'This is a country that elects its own president, its own Parliament, its own leadership.' By contrast, he said, George W. Bush was elected president 'fraudulently with the power of the judiciary behind him.'" Elaine Sciolino, *Iran's Revolutionary Fervor is Now All but Spent*, N.Y. TIMES, Feb. 2, 2003, at A6. Still—and especially in the context of the emergence of multi-nation courts—Europeans remain intrigued with our experiment.

What disturbs me most, however, is the growing gap between what our ratifiers understood as the power of the people to govern themselves, and the non-interpretivist empowerment of the judiciary to determine public policy. That gap far exceeds the one which initially served the non-interpretivists' cause so well.[367] Elsewhere, I propose confronting non-interpretivists through amendment,[368] but here my focus is on students. To that end, I advise them to keep their eye on the ball.

First, *if* the framers' intentions can be reasonably ascertained, we as a people and our judges remain bound to that meaning. That is the *only* position consistent with constitutionalism in any meaningful use of that term. I categorically reject any other understanding as profoundly ignorant. Any implicit assumption that those who crafted our Constitution imagined that after it was adopted the need for change would cease, or that they envisioned *judges* to take on such a task, is patently ridiculous. Those who crafted our Constitution expected legislatures to address change. If constitutionalism means *anything*, it means that fundamental choices are made for both present and future generations. For example, the framers unquestionably intended that our nation would have a *republican* rather than an *oligarchic* form of government.[369]

Without ignoring the fact that the interpretive task is complex,[370] or denying that discerning the framers' intentions often is fraught with danger,[371] or creating unrealistic expectations, I ask: how may students pursue the craft of constitutional law? Lest we forget, it requires that every inquiry begin by attempting to discern, if available, the framers' intentions. However difficult this task may be, in the long run, it will entail less difficulty than any other approach suggested by non-interpretivists. If you omit that all-important first step under one guise or another, you most assuredly will impose your personal predilections on the American people, and at the same time, recast the fundamental principles of our republican regime. In short, you will rewrite the Constitution in your own image and likeness.[372]

Second, demand to know where *exactly* do non-interpretivists (and

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367 *Expansionism*, *supra* note 21, at 22–24; SAVING, *supra* note 3, at 199–200; *supra* text accompanying notes 28–29.

368 *See Expansionism, supra* note 21, at 46.

369 *See* SAVING, *supra* note 3, at 36–39. As a demonstration that we have strayed from the framers' intended government, more than twenty years ago I constructed a fictitious debate on the exclusionary rule that illustrated the circular reasoning, unsupported premises, and misconceptions typical of modern case law. *See Exclusionary*, *supra* note 9, at 36–38.

370 SAVING, *supra* note 3, at 125–68.

371 *See, e.g.*, Powell, *supra* note 291.

372 SAVING, *supra* note 3, at 267–69. There certainly are interpretative issues that fall outside the framers' intentions. One might even concede a tentative interpretive right to define twentieth century equivalents of eighteenth century prohibitions. But, by and large, the crisis today is caused by the Supreme Court's illegitimate assumption that they may *expand* the prohibitions. Judge Robert H. Bork concludes: "A theory of Constitutional law must . . . set limits to judicial powers as well as to legislative and executive powers; there is no theory of Constitutional adjudication that can set limits to judicial power other than the philosophy of original intent." Robert H. Bork, *The Inherent Illegitimacy of Non-interpretivism*, *in* BAER ET AL., *supra* note 41, at 111.

perhaps your professors) find justification for the role they believe the Supreme Court should play in our governmental system. As I hope I have demonstrated, they certainly *cannot* ground such a power in the Constitution, or in our history, or in the framers' understanding of judicial review. The *scope* of the power non-interpretivists support simply is incompatible with both the framers' understanding and with the republican design of the Constitution.

Let me raise this question: Are judicial actions today any less bound by the framers' understanding of constitutional limits than would be those of Congress or the President? Would law students entertain from either of those branches, claims regularly put forth by non-interpretivist champions of judicial power? For example, would you entertain a claim that their particular branch was legitimately *best suited* to manage our national budget, or the fight against terror? Would you sanction the same kind of unilateral actions you permit the Court, if either one of those other branches of government claimed that a *vacuum* existed that only it could fill? Or would Congress or the President be justified in acting unilaterally because, in their opinion, the other branch had *failed to act*? If you accept the non-interpretivist position, you must embrace such arguments. Such justifications for contemporary judicial power, however, are analogous to rewriting history. It is the same as claiming that World War I was fought to make the world safe for *judicial oligarchy*.

Third, to the degree that the framers' intent is either unclear or non-existent, should the judicial power increase or diminish? To preserve a limited constitution and the republican character of our government, any inability to determine the framers' intent, I suggest, increases *legislative—not* judicial—discretion. The absence of intent is akin to a court not having jurisdiction. As Judge Bork noted, having no authority, judges should cease their activity.[373] By the way, *that* is the true import of various quotations taken from Marshall's opinion in *McCulloch*: a caution to *judges* not to unnecessarily inhibit Congress' discretion, *not* a claim for expanding the narrow scope of judicial review sanctioned by the framers.[374]

As illustrated earlier, the framers carefully considered what structural devices were crucial to reducing the risk of governmental tyranny, how to reduce the risk of majority tyranny, and by what means they could foster deliberation. I repeat what I mentioned earlier—the framers believed moderation was far more likely if the relatively indifferent representative had a

373 *See supra* note 275.

374 According to Professor Gunther non-interpretivists frequently misconstrue Marshall's remarks in M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). *See* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 185 (Gerald Gunther ed., 1969). When *M'Culloch* came under attack, Marshall defended that he was pleading for elasticity in Congress' "choice of *means*," BERGER, supra note 56, at 376 (emphasis added), to execute existing powers and denied any "constructive assumption of powers never meant to be granted." *Id.* (footnote omitted). Again and again he repudiated any claim for "extension by construction," *id.* at 377, and flatly disclaimed a judicial "right to change that instrument." *Id.*

deciding voice. Possessing a powerful intellect does not make one immune to the human tendency to inject passions into one's theorizing. The unceasing barrage of legal literature based on little more than fertile imagination should be sufficient proof of that.

Fourth, remember that every state, as well as members of the Philadelphia Convention, relied on a shared tradition which put the common good and the right of self-government *before* individual rights. So allow me to raise this issue: if, under non-interpretivist methodology, the Supreme Court can legitimately expand the meaning of rights *beyond* those understood by the framers, may some future Supreme Court majority in like manner reduce them *below* what the framers understood? If your professors answer negatively, ask them *why*?[375] By my reckoning, under non-interpretivist criteria what the judges giveth, they can take away.[376] That is why interpretivists insist on being bound by the framers' discernible intentions. I have asserted this for more than twenty years—certainly before the recent appointments to the court. In contrast, modern constitutional theory has become the means to acquire, through judicial stealth, what neither the political right nor the political left might otherwise acquire through the hurly-burly of American politics.

Fifth, weigh the interpretivist position against the legitimacy issues non-interpretivists all too often refuse to acknowledge.[377] Any problems of interpretation associated with my position pale in significance when contrasted with those facing non-interpretivists. One is tempted to use a phrase allegedly attributed to Governor Arnold Schwarzenegger, that what this nation needs among our elected representatives are fewer "girlie men." But of course that phrase is both insulting and sexist. More important, it is inaccurate. What we need are more politicians of *both* genders and of every political persuasion, who are willing to fight for what they believe is good public policy, but who have in common an ability to separate their fondest desires from what is required by the Constitution. This principled type of politician does not run to the courts when they lose legislative policy debates, and they will not support judicial usurpations in order to achieve by coercion what they cannot obtain by persuasion. This goal may be naïve on my part and it may be simplistic, but it is what is needed if we are to preserve for our children's children's children, what we have inherited—the right to self-government.

Americans were gifted with a brilliantly crafted Constitution, one capable of responding to every imaginable crisis, while itself remaining open to

375 *See supra* notes 89, 101, 142, 163, 290.

376 It is no secret that the non-interpretivist literature is dominated by the liberal perspective. The danger to conservatives (such as myself) is that non-interpretivists find their own public preferences in the framers opinions, without locating them in the text, or crimping legislative discretion.

377 I am not insisting on any interpretive orthodoxy. Other interpretivists may reach positions, particularly on public policy measures, inconsistent with my own. Interpretivist inclined judges are in a tougher position still. They must weigh considerations of prudence, because their words have immediate consequences for specific people.

change—all of which is subsumed under the right of self-government. I therefore ask law students to give serious consideration to this final question: Why are you being counseled to hand over to five Justices—as so many current legal professionals are prepared to—the right to self-government, and why are so many legal professionals prepared to give to *five* Justices, what our forefathers risked their lives, fortunes, and sacred honor to secure in the Constitution?[378]

378 2 WILLIAM SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 319–26 (2d ed. 1985).

The Subtlety of State Action in Privatized Child Welfare Services

Sacha M. Coupet[*]

> [H]e [who] acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition [against deprivation of property, life or liberty] has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.

Ex parte Commonwealth of Virginia, 100 U.S. 339, 347 (1879).

INTRODUCTION

In ever increasing numbers, public agencies are contracting with the private sector to provide services and benefits—once assumed to be governmental "duties"—that had long been delivered primarily through public channels. Examples include, among others, privatized nursing home care, privatized prisons, and private military forces. Despite some adverse outcomes, broad shifts in service delivery continue unabated, and, according to some, "seem to be occurring especially around collective commitments to provide for the basic human needs for food, shelter, education, medical care, and justice."[1] It is therefore not surprising that we are witnessing a significant increase in the rate of private participation in child welfare services,[2] defined here as privately delivered out-of-home care for children formally placed by the state in the child welfare system and in the custody of the state.[3]

Far from a recent phenomenon, public-private partnerships have a

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1 MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD 22 (2002). *See also* Robin A. Johnson, *States Expand Privatization of Social Services*, 10 INTELL. AMMUNITION 10 (2001) ("[a] 1997 Council of State Governments survey found that social service agencies were the state departments most likely to report increasing their use of privatization over time. More than 85 percent of the responding agencies reported they had increased privatization in the five years prior to the survey. Seventy-five percent of respondents indicated they planned to increase privatization in the next five years.").

2 Marguerite G. Rosenthal, *Public or Private Children's Services?: Privatization in Retrospect*, 74 SOC. SERV. REV. 281 (2000).

3 For the purposes of this article, the term child welfare system is used to mean the entire spectrum of services available for minors involved in the dependency, but not the juvenile delinquency systems.

long history in child welfare practice, beginning with the period immediately following the Revolutionary War. From the inception of the union, the care of destitute and needy children has been characterized by a unique blend of private agency support coupled with public funding, regulation, and oversight.[4] However, the contemporary trend toward privatization appears anomalous in both its impetus and in the potentially deleterious consequences for recipients. Although recent privatization initiatives may be similarly "built on a [simple] model of using federal funds . . . to purchase services or care from private providers,"[5] they differ in, among other attributes, their attraction for a market approach and an orientation toward profit. Indeed, the proliferation of privatization and its embrace of a market approach has been both heralded as an exemplary and innovative social service strategy and lamented as a harbinger of the feared commodification of our most intimate and cherished investments—our children and families.[6]

Despite acknowledged risks inherent in the shift from public to private human services, especially as it relates to child welfare, "there is scant public debate about whether [public-private partnerships] jeopardize public commitments to equality, due process, [civil rights,] and democracy."[7] Included among the less explored aspects of privatization is the shift in risk assessment that occurs within public-private contracting and all the attendant consequences of risk assessment for state agencies and service recipients. For all the potential benefits that may come to fruition through continued privatization efforts, there are problems encountered with the delegation of authority and responsibility from public to private providers, particularly when the civil rights of recipients are curtailed by virtue of the ostensibly private garb in which service delivery is cloaked. Indeed, while the drive to privatize the delivery of public services continues unabated—too little attention is focused on the impact of privatization on the diminu-

4 HOMER FOLKS, THE CARE OF DESTITUTE, NEGLECTED AND DELINQUENT CHILDREN 13 (1902).

5 Rosenthal, *supra* note 2, at 294.

6 Use of the term "commodification" is meant to suggest that service and support of families, particularly poor families of color, continues to grow into a marketable enterprise. I am referring more so to the broader conception of commodification noted in Margaret Radin's seminal work. According to Radin,

> Narrowly construed, commodification describes actual buying and selling (or legally permitted buying and selling) of something. Broadly construed, commodification includes not only actual buying and selling, but also market rhetoric, the practice of thinking about interactions as if they were sale transactions, and market methodology, the use of monetary cost-benefit analysis to judge these interactions. Universal commodification embraces this broad construction in its most expansive form, limiting actual buying and selling only by the dictates of market methodology, and solving problems of contested commodification by making everything in principle a commodity.

Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1859 (1987). For a critique of the commodification of vulnerable children and families, see Barbara Bennett Woodhouse, *Making Poor Mothers Fungible: The Privatization of Foster Care*, *in* CHILD CARE AND INEQUALITY: RETHINKING CAREWORK FOR CHILDREN AND YOUTH 83 (Francesca M. Canican, et al. eds., 2002).

7 MINOW, *supra* note 1, at 2.

tion of constitutional protections for service recipients.[8] Although "[r]ecent expansions in privatization of government programs mean that the constitutional paradigm of a sharp separation between public and private is increasingly at odds with the blurred public-private character of modern governance[,] . . . little effort has been made to address [the] disconnect between constitutional law and new administrative realit[ies]."[9] There is, indeed, substantial evidence that "the growth of government contracting, coupled with an unrealistic and narrow understanding of state action, has created jurisprudence . . . 'significantly underprotective of constitutional rights.'"[10]

The thesis of this article is that in failing to sufficiently key the current state action doctrine to the present reality of privatization, courts do not adequately protect the rights of children and families caught in the swell of the child welfare privatization initiative. All too often, a private party dressed in state clothes is permitted to escape civil rights liability owing to an anachronistic state action doctrine that fails to reflect the unique dimensions of child welfare service delivery. Although traditional tort remedies remain, they fail to appropriately reflect the abuse of state authority and are less likely to affect systemic social norms that constitutional tort claims might. This article highlights the unique role of the state in this particular public-private partnership, the appropriateness of extending the analogy between foster children to other incapacitated or restrained individuals, and the role of § 1983 as a mechanism of redress.[11] It also explores the rationale for holding private providers of child welfare services liable as state actors for constitutional deprivations.[12] A rich discussion pertaining to the

8 Harold J. Sullivan, *Privatization of Public Services: A Growing Threat to Constitutional Rights*, 47 PUB. ADMIN. REV. 461, 461–67 (1987).

9 Gillian E. Metzger, *Privatization as Delegation*, 103 COLUMBIA L. REV. 1367, 1367 (2003).

10 Sheila S. Kennedy, *When is Private Public?: State Action in the Era of Privatization and Public-Private Partnerships*, 11 GEO. MASON U. CIV. RTS. L.J. 203, 204 (2001).

11 42 U.S.C. § 1983 is a federal statute which permits plaintiffs to challenge deprivation of constitutional rights. It provides in pertinent part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

42 U.S.C. § 1983 (2000). Although it provides no substantive rights, the statute "provides a mechanism for seeking redress for an alleged deprivation of a litigant's federal constitutional and federal statutory rights by persons acting under color of state law." KAREN M. BLUM & KATHRYN R. URBONYA, FED. JUDICIAL CTR., SECTION 1983 LITIGATION (1998) *available at* http://www.fjc.gov/public/pdf.nsf/lookup/sect1983.pdf/$file/sect1983.pdf. "The constitutional standard for finding state action is closely related, if not identical, to the statutory standard for determining 'color of state law.'" Ira P. Robbins, *Privatization of Prisons: An Analysis of the State Action Requirement of the Fourteenth Amendment and 42 U.S.C. § 1983*, 20 CONN. L. REV. 835, 836 n.2 (1988). Professor Steven L. Winter provides a cogent and brilliant examination of the contours of the metaphor "under color of law," exploring the inherent challenges posed by relying on this metaphor "to mediate the application of legal restrictions on the exercise of state power." Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323, 331 (1992).

12 This article does not address privatization of adoption services which, according to some, represents "the most successful and the least controversial component of child-welfare privatization."

mixed public-private identity of ostensibly private providers of child welfare services is long overdue, especially given that privatization's increasing role in service delivery appears all but unstoppable.

Specifically, in Part I, I explore aspects of privatization, defining privatization to include a myriad of public-private partnerships and the wholesale privatization of formerly public services. For purposes of elaboration, I discuss the history of privatization in the U.S. prison system, which illustrates the danger of minimized constitutional accountability in an era of privatization. In Part II, I provide a brief history of public-private partnerships in child welfare. Part III offers a critique of privatization, exploring the traditional justifications offered for increased reliance on the private market and the ways in which this altered service delivery may compromise public values as well as civil rights. This critique is contextualized within an understanding of the liability of the state for constitutional violations under § 1983, which is presented in Parts IV, outlining the contours of the Court's state action jurisprudence, and Part V, examining the accountability of the state and of private providers for constitutional deprivations under § 1983. In Part VI, I provide a few of the compelling justifications for framing harms suffered by children in care as constitutional deprivations over pure torts. Finally, Part VII presents a recalibration of the traditional state action test keyed to the new realities of public-private partnerships, as well as wholesale privatization in child welfare.

I. PRIVATIZATION OF PUBLIC SERVICES

A. Defining Privatization

Privatization is a rather amorphous and ill-defined term, as there are a variety of ways in which public-private partnerships have developed and expanded to deliver public services. While most "investigators generally acknowledge that public agencies have long purchased services from voluntary social service agencies, most have been impressed by the accelerated pace of 'privatization,' a term that has replaced the formerly used 'public/private partnership.'"[13]

B. Privatization in the Prison System

Although privatization of formerly public services has been widespread over the last century, I offer one example in which privatization has been harshly criticized as advancing too quickly without sufficient accountability—private prisons.

LISA SNELL, REASON FOUNDATION, POLICY STUDY NO. 271: CHILD-WELFARE REFORM AND THE ROLE OF PRIVATIZATION (2000), http://www.reason.org/ps271.html. Moreover, for the purposes of this article, the scope of privatization includes foster parents. Many of the same arguments underpinning the rationale for holding private non-profit and for-profit agencies liable as state actors apply with equal measure to foster parents.

13 Rosenthal, *supra* note 2, at 282.

Prison overcrowding is often regarded as the primary catalyst for the continuing growth of the private prison industry. For at least the last two decades, "private prisons and jails were seen as part of the solution to meet the increasing pressure for prison bed space at a time when taxpayers were reluctant to pay for correctional services" and did not support divesting resources "from other areas of state responsibilities and services."[14] Although there is a long history of contracting with private entities for medical, mental health, educational, and food services, in which "the correctional agency remains the financier and continues to manage and maintain policy control over the type and quality of services provided," more recent prison privatization initiatives have left governments with a limited or nonexistent role in the financial support, management, and oversight of prisons.[15] Rather than a partnership or subcontractor model, "[p]rivate companies, some of them publicly traded, now hold contracts to operate secure adult facilities and juvenile facilities around the country, and in some instances, private companies own the facilities as well as operate them."[16]

Corrections, like child welfare, has a rich history of extensive public-private partnerships,[17] but it was not until 1976 that a wholly privately owned, high-security institution began operating under contract to the state. The Weaversville Intensive Treatment Unit, located in North Hampton, Pennsylvania, and designed to handle male juvenile delinquents, "was the first modern institution for serious offenders to be completely operated in what has become an increasingly lengthy line of [private] institutions in the American correctional system."[18] The worldwide growth since then has been nothing short of dramatic, with 3100 inmates in privately operated facilities in 1987 and 132,000 just twelve years later.[19] Two corporations, Corrections Corporation of America and Wackenhut Corrections Corporation, account for more than three-quarters of the entire worldwide market.[20]

Privately operated prison facilities have often been plagued by problems associated with the quest for higher earnings. Indeed, "one of the central concerns raised by critics of correctional privatization is that firms motivated by financial gain might make decisions that enhance profits at the expense of the rights and well-being of inmates."[21] In some instances of private prison management, "[t]he profit motive produced such abominable conditions and exploitation of the inmates that public agencies were forced

14 JAMES AUSTIN & GARRY COVENTRY, BUREAU OF JUSTICE ASSISTANCE, EMERGING ISSUES ON PRIVATIZED PRISONS 1–2 (2001) *available at* http://www.ncjrs.gov/pdffiles1/bja/181249.pdf.

15 *Id*. at 2–3.

16 MINOW, *supra* note 1, at 20.

17 *See* West v. Atkins, 487 U.S. 42 (1988) (noting the history of private participation in prisons and prison management without challenging the state actor designation of private providers).

18 AUSTIN & COVENTRY, *supra* note 14, at 12 (citations omitted).

19 *Id*. at 3.

20 *Id*. at 3–4.

21 *Id*. at 17. (citations omitted).

to assume responsibility."[22] Frighteningly, the current movement towards privatization is based on an assumption that "modern entrepreneurs are somehow more benevolent and humanistic so that the exploitations of the past will not reoccur [sic]."[23] Critics disagree, however, and "contend that privately managed facilities will bring new opportunities for corruption."[24] These opponents "question the professionalism and commitment that privatized staff will bring to the job," given that private prison agencies often rely on "poorly paid, undereducated, and inadequately trained staff."[25]

C. Private Military Forces

The twin dangers of profit motive and minimal, or nonexistent, oversight or accountability have nowhere surfaced in a more controversial manner in the last few years than in the context of private military forces—a polite term for what was once referred to as "mercenaries"—who now serve in all areas of war, from construction to security, cooking food to conducting interrogations, and almost everything in between. "Mercenaries no more, the successors to the dogs of war . . . now call themselves private military companies and focus on [among other things] postwar reconstruction, mine clearance and humanitarian aid."[26] These private military firms (PMFs) "trade in professional services intricately linked to" various critical aspects of warfare—including "tactical combat operations, strategic planning, intelligence gathering and analysis, operational support, troop training, and military technical assistance."[27] Unlike American soldiers, sworn to uphold the Constitution and governed by the Uniform Code of Military Justice, PMFs are private agents, principally motivated by profit.[28] Subject neither to the military chain of command nor the restrictions of the Geneva Convention, they are, essentially, a law unto themselves, governed only by language in the contracts through which their services are retained.[29]

Given their broad involvement in many "traditional" aspects of warfare, PMFs have not surprisingly been linked to several incidents of abuse

22 *Id*.

23 *Id*.

24 *Id*.

25 *Id*.

26 Jeremy Lovell, *Privatized Military Wave of the Future, Firms Say*, REUTERS, May 14, 2003 *available at* http://www.commondreams.org/headlines03/0514-04.htm (last visited August 17, 2006).

27 Peter W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry and its Ramifications for International Security*, 26 INT'L SECURITY 186, 186 (2002).

28 Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1019–20 (2004).

29 In 2005, there were approximately 100,000 civilian contractors supporting a range of U.S. efforts, including 20,000 private security forces. *Frontline: Private Warriors* (PBS television broadcast June 21, 2005), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/warriors/view/. According to Peter W. Singer, a private military expert, "[w]hat you've done is privatize the fog of war." Jay Price, *Hired Guns Unaccountable*, NEWS & OBSERVER, Mar. 23, 2006, at 1A (detailing the underreporting of incidents with private contractors in Iraq that resulted in the death or injury of hundreds of Iraqi citizens and the lack of accountability for the conduct of private contractors); *see also* P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 228 (2003).

both in the current war in Iraq and elsewhere abroad. Notably, what distinguishes the atrocities committed by PMFs on civilians throughout the world from those occurring at the hands of the U.S. military is that the former, given the private status of the offenders, typically leave victims with no meaningful form of redress.[30] This is almost entirely due to the fact that although PMFs are equipped to kill, their actions are not governed by longstanding rules of engagement and since "they aren't legally considered [official] combatants," there are virtually no rules governing their use of force.[31]

Responding to these concerns, "[i]n 2000, Congress passed [the Military Extraterritorial Jurisdiction Act] allowing criminal prosecutions against Defense Department ("DOD") contractors working abroad."[32] The drafting of this legislation was prompted in part by "civilian contractors with El Segundo-based DynCorp [having] escaped prosecution on accusations in 2000 of running a prostitution ring in Bosnia."[33] While theoretically the law allows for prosecution in U.S. courts of contractors working alongside the military overseas, it has drawn criticism for being too narrow in scope.[34] For example, since the Military Extraterritorial Jurisdiction Act ("MEJA") covers only American citizens working for American forces, if they are "technically" employed by the sovereign host nation, they are exempt, as would be those contracted to work for the United Nations.[35] While some amendments have been made, including an extension of MEJA's jurisdiction to cover employees and contractors of other federal agencies in addition to the DOD, the law continues to pose problems in its interpretation of what kind of work falls under its scope and who exactly is covered—a 21st century iteration of the age old dilemma of defining the

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30 Peter Singer reports:

> In Colombia, for example, [a PMF] Airscan has been implicated in coordinating the bombing of a village in which eighteen civilians (including nine children) were killed. And in Peru, employees of [another PMF] Aviation Development Corporation who were working on aerial surveillance operations for the U.S. Central Intelligence Agency mistakenly directed the shoot[ing] down of a private passenger plane that was later found to be carrying a family of missionaries. An American mother and her seven-month-old daughter were killed in the attack.

Singer, *supra* note 27, at 218.

According to media reports, the United States has paid an undisclosed sum to the family of Veronica and Charity Bowers, who were killed in the incident, and to the Baptist missionary group they belonged to, but stopped short of admitting culpability. Aviation Development has never publicly accepted responsibility, and the U.S. government has never publicly accused the company of wrongdoing.

Robert Capps, *Crime without Punishment*, SALON.COM, June 27, 2002, http://dir.salon.com/story/news/feature/2002/06/27/military/index.html.

31 Ann Scott Tyson, *Private Security Workers Living on Edge in Iraq*, WASH. POST, Apr. 23, 2005, at A1.

32 Pratap Chatterjee & A.C. Thompson, *Private Contractors and Torture at Abu Ghraib, Iraq*, CORPWATCH, May 7, 2004, http://www.corpwatch.org/article.php?id=10828 (last visited Sept. 14, 2007).

33 *Id.*

34 Capps, *supra* note 30.

35 *Id.*

boundary between what is public and what is private.[36] Even with MEJA in place, as it now stands, "[t]hanks to a combination of factors—the jurisdictional conflicts of American law, the immunity provided to these contractors by international treaties, and the underdeveloped police agencies in host countries—many crimes committed by private military personnel while based overseas will likely go unpunished . . . ."[37]

There is a continuing and reasonable fear that unlike state military and police forces, private military forces–operating outside of the realm of legal accountability, legal constraints, and public oversight—are subject only to the market driven law of supply and demand. History has taught us, however, that the law of the marketplace has proven to be an ineffective regulator against abuse and a disturbingly impotent arbiter of justice. While critics of private military forces—including Gay McDougall, executive director of Global Rights, a D.C.-based human rights organization—argue that "people who are 'civilians and often outside of any given chain of command should be liable to prosecution for war crimes,'"[38] the mechanisms by which such accountability would take shape are currently lacking.[39] Opponents of this kind of private sector empowerment are, there-

36 Glenn R. Schmitt, *Amending the Military Extraterritorial Jurisdiction Act of 2000: Rushing to Close an Unforeseen Loophole*, ARMY LAW. 43 (June 2005).

37 Capps, *supra* note 30.

38 Jonathan Groner, *Untested Law Key in Iraqi Abuse Scandal*, LEGAL TIMES, May 11, 2004, at 1, 12.

39 At the time of this writing, David Passaro, a CIA contractor who was the first civilian to face criminal charges related to U.S. treatment of prisoners in Afghanistan and Iraq, was found guilty by a jury in North Carolina of two charges of assault and assault with a deadly weapon in the death of Abdul Wali, an Afghan detainee on a remote U.S. military base. Andrea Weigl, *Jury Finds Passaro Guilty of Assault*, NEWS & OBSERVER Aug. 17, 2006, http://www.newsobserver.com/497/story/476098.html (last visited Oct. 16, 2007). Ironically, Passaro's prosecution was not pursuant to provisions of the MEJA, but under the U.S. Patriot Act, which prosecutors argued allowed the U.S. government to charge U.S. nationals with crimes committed on land or facilities designated for use by the U.S. government. Estes Thompson, *Ex-CIA Contractor David Passaro to Stand Trial in Afghan Beating*, NEWS & OBSERVER, Aug. 5, 2006, http://dwb.newsobserver.com/news/ncwire_news/story/2987127p-9415445c.html (last visited Sept. 26, 2007). In a statement that both suggests growing support for increased accountability of private military forces, while also promoting a vague and ambiguous "quasi-state action" test, U.S. Attorney General George Holding stated:

> Today, a North Carolina jury sitting in Raleigh delivered a message to the world—nobody is above or beneath the law of the United States of America. The assault took place 8,000 miles away from here. The person assaulted was an Afghan farmer. The person who assaulted him was a U.S. citizen working for the CIA as a [private] contractor. But *because it was done at a U.S. base with an American flag flying over it, that victim found a little bit of justice*.

Weigl, *supra* (emphasis added). More recently, a September 16, 2007 shooting episode of 17 civilians in Iraq has cast the issue of oversight and accountability of private military forces once more into the spotlight. Blackwater, one of many private contractors in Iraq, supplies guards and training at many levels of war. Mounting frustration over numerous shooting incidents involving Iraqi civilians may lead to a shift in the response to private contractors whose conduct up to now has been generally insulated from prosecution by law and policies implemented by U.S. officials. Most notably, in 2004, the United States administration in Iraq wrote a provision into Iraqi law, Order 17, which granted immunity to private contractors by exempting them from Iraqi Law. "Since then, the number of security contractors has mushroomed and the question of their impunity has grown more pressing." John M. Broder, *State Dept. Official Resigns; Oversaw Blackwater and Other Private Guards*, NYTIMES.COM, Oct. 25, 2007, http://www.nytimes.com/2007/10/25/washington/25griffin.html?_r=1&oref=slogin. As an ex-

fore, rightfully cautious of the encroachment into inherent governmental functions coupled with the diffused responsibility and diminished public oversight. Given the unanswered questions about who monitors, regulates and punishes employees of private military forces, and most importantly, who holds private military forces accountable for violations of our most cherished constitutional or human rights principles, they represent an extreme, but apt, analogy to the unchecked power of private child welfare service providers.

The central tenet running through both of the above broadly defined "public services" is that government power vested in the private market, in the absence of sufficient accountability and adequate mechanisms of redress, results in more than mere fiscal loss, but human loss. In examining whether harmful conduct arising in the context of these public services is deserving of constitutional protection, the question is not whether history reveals any public services to have ever been touched by private forces, but rather whether in its current administration, private market providers are cloaked in state clothes.

II. CONTEMPORARY PRIVATIZATION IN THE CONTEXT OF CHILD WELFARE

The history of privatization in child welfare services is a long and varied one. This article focuses only on the more recent history, since the 1960s.[40] As the federal government began to take a lead in enacting laws

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ample of the existing lax standard of accountability, the *New York Times* reported that "[a]fter a drunken employee of Blackwater shot a man to death, . . . the employee was flown out of Iraq, docked pay and fired." *Id.* Many lawmakers and legal scholars are in agreement that the recent shooting highlights an urgent need to clarify the law governing private military forces operating in a war zone. "Workers under contract to the Defense Department are subject to the Military Extraterritorial Jurisdiction Act, or MEJA, but many, included top State Department officials, contend that the law does not apply to companies like Blackwater that work under contract to other government agencies, including the State Department." David Johnston & John M. Broder, *F.B.I. Says Guards Killed 14 Iraqis Without Cause*, NYTIMES.COM, Nov. 14, 2007, http://www.nytimes.com/2007/11/14/world/middleeast/14blackwater.html?pagewanted=1. As Professor Tyler Cowen aptly observes "[e]xcessive use of private contractors erodes checks and balances, and it substitutes market transactions, controlled by the executive branch, for traditional political mechanisms of accountability." Tyler Cowen, *To Know Contractors, Know Government*, NYTIMES.COM, Oct. 28, 2007, http://www.nytimes/com/2007/10/28/business/28view.html.

40 Although beyond the scope of this article, the early history of child welfare service delivery demonstrates a mix of public-private partnerships. There remains, however, a prevailing misperception that the earliest forms of child welfare were entirely private philanthropic enterprises with minimal or nonexistent governmental involvement. In detailing the early history of child welfare, some scholars have overlooked the import of nascent public-private partnerships that took shape soon after the Revolutionary War, many of which resemble contemporary privatization efforts. Mangold, for example, writes that "[b]efore the last quarter of the nineteenth century, there were no public or private agencies dedicated to the care of abused and neglected children. It was private philanthropic agencies that first began this work, intervening into 'private' families in the name of protecting vulnerable children." Susan Vivian Mangold, *Protection, Privatization, and Profit in the Foster Care System*, 60 OHIO ST. L.J. 1295, 1301–02 (1999). This is only partially true. As evidenced in an account of the history of care of children in the city of New York, care to neglected children had a governmental or public nature to it when regarded, as it was, as a subset of general aid to the poor.

> The common council [a body of elected city legislators] of [New York] whose minutes during the first three-quarters of the century afford many illustrations of aldermanic wisdom as

pertaining to child abuse and neglect in the 1960s, state child protective agencies were uniformly reformed to meet federal guidelines, to which critical operating funds were tied. Concurrently, for the first time states were permitted to subcontract with private, nonprofit companies, thus ushering in a new variant of public-private child welfare partnerships:

> The first significant growth in the number of public-private arrangements for the delivery of child welfare and other social services occurred between 1962 and 1974, as a result of amendments to the Social Security Act that allowed federal funding to be used to fund social services provided by private, nonprofit agencies.[41]

A pervasive philosophical shift at the federal level prior to, and particularly throughout, the Reagan administration prompted movement away from "the public commitment at the heart of the Great Society programs of the 1960s and [early] 1970s and toward individual and private solutions to social problems."[42] No area of social service emerged unscathed, and the shift inevitably set the stage for a diminished governmental presence in child welfare service delivery.[43] Indeed, an ongoing trend in welfare delivery since the 1980s has been "the political[affinity] toward privatizing many functions the government assumed during the New Deal and Great Society eras . . . . includ[ing] privatizing the government's function of providing a safety net to preserve the poor families by increasingly using private agencies to provide services to children . . . " [44] Added to this list is the increasing emphasis on the provision of services to children by private agencies.[45]

Most observers would agree that a lingering question is the degree to which "more recent trends to 'privatize' core child welfare functions" actually differ "from arrangements that have historically been in place."[46] Depending on the forms they take, contemporary privatization initiatives will vary in the degree to which the public sector retains ownership, finan-

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> applied to child-saving, appointed January 7, 1805, a committee to consider and report upon the expediency of granting the application of the commissioners of the almshouse for the establishment at the almshouse of a school for the pauper children.

FOLKS, *supra* note 4, at 13. Moreover, in 1831, legislative action is seen in the form of a committee of aldermen reporting on the status of children in the newly formed Bellevue establishment, and a subsequent resolution adopted by the assistant aldermen concerning the education and employment of the children in the almshouse to "render them less burthensome to themselves . . . ." *Id.* at 15–16. Similar legislative efforts to partially separate dependent children from the adult pauper population were seen in the other large cities of Philadelphia, Charleston, and Boston. *Id.* at 23–34.

41 MADELYN FREUNDLICH & SARAH GERSTENZANG, AN ASSESSMENT OF THE PRIVATIZATION OF CHILD WELFARE SERVICES: CHALLENGES AND SUCCESSES 13 (2003).

42 *Id.* at 14 (citation omitted).

43 *Id*.

44 Barbara Bennett Woodhouse, *Ecogenerism: An Environmentalist Approach to Protecting Endangered Children*, 12 VA. J. SOC. POL'Y. & L. 409, 411 (2005).

45 Woodhouse, *supra* note 6, at 84.

46 U. Ky Quality Improvement Ctr. on the Privatization of Child Welfare Servs., Status of Privatization, http://www.uky.edu/SocialWork/qicpcw/status.htm (last visited on Sept. 14, 2007) [hereinafter Quality Improvement Ctr.].

cial responsibility, and accountability.[47] "Specifically with regard to contracting out—the model most frequently used in the social services, in general, and in child welfare services in particular—government is likely to continue to finance services while private entities actually provide them."[48] Contracting out has historically been used to provide foster care services, as "public family law allowed philanthropic [private] providers to receive public funds and work cooperatively with public agencies to provide placement services."[49] A central feature of contemporary public-private contracting seems to be the extent to which the public agency "has transferred responsibility for day-to-day case management within the particular program to the private provider, and who maintains decision-making authority at critical junctures as the case progresses."[50] In contemporary public-private agreements, private provider agencies participate by delivering services to families voluntarily and by court order. However, unless they are involved in an "ongoing way with a family when new allegations arise, [private providers] do not usually participate in the front end or 'rescue' aspect of cases,"[51] as they once had and, instead, enter at the point of disposition, delivering services that are agreed on by the public agency and family and/or ordered by the court.

A second period of growth in private service participation occurred in the mid-1990s with amendments to the Social Security Act, which widened the channel of participation for private child welfare agencies. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 also ushered several amendments that permitted states to make Title IV-E foster care maintenance payments to for-profit and nonprofit private child care institutions.[52] Under then existing law, IV-E foster care payments were limited to nonprofit private or public child care institutions. Experiments with privatization have not stopped with mere contracting of certain services or a percentage of child welfare cases and have come to include the privatization of entire state systems in a number of states, including, Kansas[53] and Florida.[54] Such initiatives, which represent the most dramatic evidence

47 FREUNDLICH & GERSTENZANG, *supra* note 41, at 15 (citing P. Starr, *The Meaning of Privatization*, 6 YALE L. & POL'Y REV. 6 (1988)).

48 *Id*. at 3.

49 Mangold, *supra* note 40, at 1309.

50 Quality Improvement Ctr., *supra* note 46.

51 Mangold, *supra* note 40, at 1313.

52 42 U.S.C. § 672(b)(1)–(2) (2000).

53 "In 1996–97, Kansas became the first state in the nation to fully privatize its adoption, foster care, and family preservation services." Privatization.org, Child Welfare Services, http://www.privatization.org/database/policyissues/childwelfare_state.html (last visited Nov. 29, 2007). With that, "Kansas's Department of Social and Rehabilitation Services (SRS), previously the state's largest provider of adoption and foster care services, [became] strictly a purchaser of services and contract monitor with respect to child welfare services." *Id. See also* Kansas Dept. of Social and Rehab. Serv., Foster Care/Reintegration Services, http://www.srskansas.org/services/fostercare.htm (last visited Nov. 29, 2007) (noting that "[on] March 1, 1997, private contract agencies [in Kansas] assumed responsibility for foster care services including case planning, placement [and] service delivery.").

54 Although current versions of the Florida statute, as amended by FLA. STAT. § 409.1671 (2001), replaced the term "privatization" with "outsourcing," earlier versions of the bill made clear the intent to

of the rush toward privatization, have been marked by the dismantling of public systems of child welfare on a statewide level and largely disappointing results for beneficiaries.

III. DEBATE AND CRITIQUE

A. The Pros and Cons of Privatization

To better understand the debate over privatized child welfare service delivery, one must embed it within a broader discussion of privatized human services. An overly simplified assessment of this debate would read as follows: political conservatives, haunted by the specter of big government and the suppression of free market economics, favor increased diversion of government funds and authority to private for-profit and nonprofit entities. Our reliance on private support mechanisms for public purposes reflects a long-held belief that we as a nation have long expressed our "religious and moral conviction of responsibility for our fellow man" through our private social agencies.[55]

The "marketplace allure" argument is rooted in an unwavering admiration for a free market, competitive, economic system—one that views the delivery of public benefits as analogous to the production, sale, and consumption of commodities. This appeal is amplified by the presumed efficiency and cost savings. Indeed, the rush toward privatization is driven in part by dissatisfaction with the quality of public services and the perception that privatization will improve the situation. Even without consistent data to support the assertion, many are guided by the "belief that the marketplace and competition will discipline organizations that provide low-quality goods or services by driving them out of business . . . ."[56]

Free markets are themselves defined by the ability to engage in competitive exchanges of goods and services. Indeed, traditional "[e]conomic theory [would] suggest that social welfare rises as the level of competition

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privatize Florida's entire state child welfare system. *See* 57 FLA. JUR. 2D WELFARE § 114 (outlining Florida's plan for privatization of foster care services by 2003). *See also* Johnson, *supra* note 1, at 10 (noting that "[i]n 1998, Florida passed legislation facilitating a major reorganization of the Department of Children and Families (DCF) and mandating that foster children be placed in private care by 2003.").

55 Rosenthal, *supra* note 2, at 291 (quoting then Executive Director of the Child Welfare League of America, Joseph Reid). Reid's testimony before Congress was reflective of his broader policy work in promoting progressive child welfare practices and his call for "an expanded child welfare network that would require ever-increasing public expenditures to perform . . . traditional functions [pertaining to] child neglect and abuse, arranging for and supervising foster placement and adoption, and providing institutional care." *Id*. at 288–91.

56 PAMELA WINSTON ET AL., MATHEMATICA POLICY RESEARCH INC., PRIVATIZATION OF WELFARE SERVICES: A REVIEW OF THE LITERATURE 16 (2002), *available at* http://www.mathematica-mpr.com/PDFs/privatization.pdf. Not surprisingly, the absence of data might be attributable to our general distaste for the unappealing metrics involved in any cost-benefit analysis. Such a calculation would inevitably require weighing purely economic measures against the more nebulous ones around which human service delivery have long been oriented. In the case of child welfare, they include, among others, child well-being, family preservation, and permanency.

increases."[57] However, in practice, while many public services can accommodate competition, or even flourish under it, others are unable to so seamlessly adapt to competitive market forces. In a marked departure from this key feature of economic free market theory, competition has been noticeably absent from many child welfare privatization initiatives. In fact, certain models of child welfare privatization, such as the managed care model, have drawn criticism for the "undesired and unnecessary monopolies" they have created.[58]

In addition to the relatively objective rationales noted above, explanations for "[t]he acceleration of service contracting" of the more subjective ilk has included "ideological preferences for privately delivered services"; the perception of "greater professionalism" [in] private sector agencies; the presumption that privately provided services are more carefully "attuned to the needs of clients and communities"; and, finally, that such services are less stigmatized than are those delivered directly by public entities.[59] As Professor Martha Fineman observes, we "have an historic and highly romanticized affair with the ideals of the private and the individual, as contrasted with the public and the collective, as the appropriate units of focus in determining social good."[60]

An embrace of the private over public, however, is not universal. Political liberals, espousing many of the ideals of Progressive Era reformists, continue to "see volunteerism and civil society [as] harmed by the excesses of the market"[61] and view public participation in the provision of social services as a critical dimension and responsibility of government. They caution against a "market methodology" with its tendency toward "evaluating human actions and social outcomes in terms of actual or hypothetical gains from trade measured in money" and the universal market rhetoric that increasingly influences the social service sector.[62]

The National Association of Child Advocates, for example, takes issue with social service privatization due to the limited number of participants, noting that "[t]here tend to be only a few buyers and sellers, as opposed to

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57 Erwin Blackstone & Simon Hakim, *A Market Alternative to Child Adoption and Foster Care*, 22 CATO J. 485, 492 (2003) *available at* http://www.cato.org/pubs/journal/cj22n3/cj22n3-6.pdf.

58 *Id*.

> In 1996, Kansas drew national attention by adopting a managed-care system for its child welfare program statewide. Under this system, private-sector organizations were paid a set fee for each child referred, intended to cover the cost of all foster care, family preservation, or adoption services provided. However, the state's Department of Social and Rehabilitative Services recently terminated the managed care approach after discovering that it created significant financial difficulties for contractors. Private providers continue to play an important role in the state's child welfare system but are compensated with a per-child, per-month payment.

WINSTON ET AL., *supra* note 56, at 9 (citing, KANSAS ACTION FOR CHILDREN, THE KANSAS CHILD WELFARE SYSTEM: WHERE ARE WE? WHERE SHOULD WE BE GOING? (2001)).

59 Rosenthal, *supra* note 2, at 282.

60 MARTHA FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY, at xiv (2004).

61 MINOW, *supra* note 1, at 27.

62 Radin, *supra* note 6, at 1861.

the many buyers and sellers typically needed to support [genuine] competition. The buyer in human services is a single government agency, and the few sellers of human services often hold a virtual monopoly."[63]

As Judge Jean Shepherd, a juvenile court judge for the Seventh District in Kansas, noted,[64]

> Privatization, . . . has led not to the healthy free competition one might expect, [but] instead . . . has created enormous service monopolies in this state. Before privatization we had four or five family preservation choices in our county . . . . [W]e no longer have the choices that we had before. . . . [I]n the past if we had questions as to abuse or neglect or quality of services in one placement or with one provider, we would attempt not to send our children to that entity until problems were resolved . . . . Our provider [today] operates the only show in town.[65]

Despite the professed fiscal gains on which many privatization initiatives are based, there is surprisingly little empirical evidence that privatization of human services, and child welfare services in particular, saves dollars or meets any of the stated public aims of the program. "While a number of surveys have collected information on state and local governments' use of privatization, few focus specifically on social services," the area where its use is, arguably, most complicated.[66] According to a policy report of the Urban Institute:

> The little empirical analysis comparing the effectiveness of public versus private service delivery shows no clear evidence that private service delivery is inherently more effective or less effective than public service delivery, although the public, private, and non-profit sectors each have their own relative strengths and weaknesses. There are examples of success and failure in both sectors.[67]

There is a disturbing underlying contextual factor that lends further support to the arguments raised by privatization opponents—that of agency. The absence of agency for direct recipients of social services poses a particular risk of harm when less altruistic and charitable aims (i.e., profit) might influence agency decision making and drive the behavior of participants. Recipients of social services may have a limited capacity for choice and are typically not the actual decision makers. Young children, for example, are unable to make serious decisions. Instead, the person making critical decisions is likely to be someone other than the recipient—often the third-party beneficiary of a public-private partnership contract. Of course,

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63 FREUNDLICH & GERSTENZANG, *supra* note 41, at 7 (citing NATIONAL ASSOCIATION OF CHILD ADVOCATES. FACT SHEET: PRIVATIZATION OF HUMAN SERVICES—IS IT THE BEST CHOICE FOR CHILDREN? (2000)).

64 The SRS Transition Oversight Committee before whom Judge Shephard testified was convened to review a number of programs undertaken by the Kansas Department of Social and Rehabilitative Services, including the agency's privatization of adoption, family preservation and foster care programs. Roger Myers, *Judge Questions Program Benefits*, TOPEKA CAP. J., Nov. 5, 1997, at 1-A.

65 Luke Andrew & Steven Demaree, "*Tiny Little Shoes": The Privatization of Child Welfare Services in Kansas*, 69 UMKC L. REV. 643, 646–47 (2001).

66 WINSTON ET AL., *supra* note 56, at 7.

67 DEMETRA SMITH NIGHTINGALE & NANCY M. PINDUS, PRIVATIZATION OF PUBLIC SERVICES: A BACKGROUND PAPER (1997) http://www.urban.org/url.cfm?ID=407023.

although the decision maker may have the best interests of the recipient in mind, it cannot be merely *assumed* that the best interests of the recipient will always win out, especially when the decision maker is under pressures wholly distinct from traditional social service aims. It is reasonable, therefore, to imagine instances in which the private market decisions "may not produce optimal outcomes for the recipient."[68] Indeed, "the more vulnerable the client and the more involuntary the client's participation (e.g., hospitals, prisons, child welfare), the higher the risk" that diminished recipient agency will operate to their detriment.[69]

Particularly worrisome is the manner in which agency and accountability interact to the detriment of recipients. The lack of direct recipient agency has implications for the ability of states to hold private providers accountable for any wrongdoing, as "[n]either voter nor consumer sovereignty [which are the most typically reliant strategies] can secure accountability when public and private realms merge."[70] As Professor Minow comments with respect to illusory market-style consumer choice, the assumption that consumers will "vote with their feet"—as private markets inherently assume—is so unlikely that meaningful accountability simply cannot be guaranteed.[71] Moreover, although the newest trend in public services—performance-based contracting—may appear to take the views of service recipients into account, the degree and manner to which that input realistically influences actual service delivery is in no way the functional equivalent of agency.[72]

B. Diminished Accountability in the Eyes of the Law

In addition, far less is known about the intangible costs and risks of privatization, some of which are fairly elusive and difficult to quantify in a straightforward cost-benefit analysis. Among the most troubling of these risks is that of diminished accountability, which in turn poses a greater risk of harm in the event that private providers fail to meet acceptable standards of service delivery. This diminished accountability is due largely to the limited remedial scheme that governs conduct between ostensibly private actors. It poses a particular risk in the context of human service delivery, where the inherently discretionary dimension places human service reci-

68 Rebecca M. Blank, *When Can Public Policy Makers Rely on Private Markets?: The Effective Provision of Social Services*, 110 ECON. J. C34, C37 (2000). This issue is particularly problematic in the context of private prisons, as some opponents claim it is inappropriate to operate prisons based on a profit motive. "In many instances, private prison operators are paid according to the number of inmates housed. Arguably, it is in the operator's financial interests to encourage lengthier sentences for inmates [or lobby to amend criminal law so that more offenses are punishable with incarceration] to keep bed spaces filled." AUSTIN & COVENTRY, *supra* note 14, at 16. Moreover, "[c]ritics of prison privatization argue that firms will cut corners, from construction materials to hiring inexperienced personnel, forsaking security and quality of service in the process of making a profit." *Id.*

69 NIGHTINGALE & PINDUS, *supra* note 67.

70 MINOW, *supra* note 1, at 29.

71 *Id*. at 34.

72 This query itself raises a critical question about whether constitutional rights ought to hinge on the drafting of contracts.

pients at greater risk than beneficiaries of other traditionally public or governmental services. For this reason, "[i]t has been generally assumed that social services are more difficult to privatize than [any] other government function[,] because defining and measuring performance [and, therefore, ensuring accountability] is more challenging."[73] As Johnson so aptly stated, "[p]icking up garbage is easier to oversee and monitor than ensuring foster children are properly placed."[74]

Despite these acknowledged risks, especially in child welfare, "there is scant public debate about whether [public-private partnerships] jeopardize public commitments to equality, due process, [civil rights,] and democracy."[75] For all the potential benefits that may accrue to privatization, the delegation of authority and responsibility from public to private providers remains problematic, particularly when the civil rights of recipients are curtailed by virtue of the ostensibly private garb in which service delivery is cloaked. Indeed, too little attention is focused on the impact of privatization on the diminished constitutional protections for service recipients.[76] Although recently, the growth "in privatization of government programs mean[s] that the constitutional paradigm of a sharp separation between public and private is increasingly at odds with the blurred public-private character of modern governance . . . . [L]ittle effort has been made to address th[e] disconnect between constitutional law and new administrative realit[ies]."[77] As Professor Sheila Kennedy notes, "[t]here is significant

73 Johnson, *supra* note 1, at 10.

74 *Id.* Kennedy also notes that:

> [E]ntrusting the most vulnerable citizens and the most delicate service tasks to private agencies is not simply a matter of choice between "making" or "buying" services. This might be the case when one considers contracting out for pencils, computer services, or strategic weapons. But when it comes to purchasing the care and control of drug addicts, the safety and nurturing of children, the relief of hunger and the regulation of family life (through child protective activities) from private agencies, other values than efficiency are at stake.

Kennedy, *supra* note 10, at 206. Not surprisingly, the debate is far more nuanced than such a simplistic assessment could ever capture, and the subtleties beyond the more narrow focus of this article. Proponents of increased privatization wrap their support around a free market driven philosophy whose purported strengths include "efficiency, self-determination, consumer choice and cost effectiveness within an enterprise culture." FREUNDLICH & GERSTENZANG, *supra* note 41, at 1 (quoting C. Sampson, *The Three Faces of Privatization*, 28 J. BRIT. SOC. ASS'N 79–90). At its core, "one of the most powerful [causal] factors [to which increased public-private partnerships can be attributed] may be 'the persistence of value-laden preferences for private solutions to public problems in the American context.'" *Id.* (quoting Rosenthal, *supra* note 5, at 292). One might indeed be correct in concluding that, based on the widespread and increasing private market participation in social service delivery, there is no human service that could be better delivered through governmental rather than private channels. Moreover, in an era of tightening state budgets and ballooning government deficits, reliance on the private market is only likely to increase. Opponents of privatization, specifically in the area of child welfare, temper their enthusiasm for a free-market driven system by highlighting the dearth of empirical evidence that would definitively establish substantive benefits to the public, particularly as they concern efficiency and quality of services through competition. *Id*. at 5. Moreover, they express concerns that the outcomes associated with increased privatization do not outweigh the concerns about how reliance on privatized mechanisms effect children and families within the child welfare system. *Id.* at 16.

75 MINOW, *supra* note 1, at 2.

76 Sullivan, *supra* note 8, at 461.

77 Metzger, *supra* note 9, at 1367.

evidence that the growth of government contracting, coupled with an unrealistic and narrow understanding of state action, has created a jurisprudence that . . . is significantly underprotective of constitutional rights."[78] Opposition to privatization in the legal community is based on an underlying premise that there is a fundamental distinction between that which is public and that which is private, and this difference is to be found in law, not economic functions or other market-oriented justifications for privatization.[79]

Even if distinctions between public and private child welfare service agencies have little measurable impact on actual service delivery, they emerge as paramount to the context and scope of rights granted to service recipients when they seek redress for harm inflicted by a private, rather than a public, provider. Because "[t]he requirement of state action is a necessary prerequisite to most civil rights actions . . . . the state action inquiry serves as a threshold in the protection of individual civil liberties."[80] Accordingly, the question to ask is, "[i]f we are altering traditional definitions of public and private by virtue of these new relationships, what is the effect of that alteration on a constitutional system that depends upon the distinction as a fundamental safeguard of private rights?"[81] In an aptly cautionary tone, it is observed that "[b]ecause private institutions generally are not subject to constitutional restraints . . . debate over the merits of . . . [privatization] must be informed by a real understanding of the different legal positions of the public and private sectors."[82] Of course, the degree of "publicness" versus "privateness"[83] of the agency delivering services, therefore, matters insofar as "[r]ights secured by the U.S. Constitution are in every instance . . . protected from only government [public, and not private,] infringement."[84] When the service is delivered through purely public means, rendering the service provider a state actor, a panoply of rights is made available that is simply nonexistent when the provider is regarded as a

78 Kennedy, *supra* note 10, at 204.

79 Ronald C. Moe, *Exploring the Limits of Privatization*, 47 PUB. ADMIN. REV. 453, 454 (Nov.–Dec. 1987). It is for this reason that in 1986 the American Bar Association issued a resolution cautioning that the privatization of prisons and jails should not proceed "until the complex constitutional, statutory, and contractual issues are satisfactorily developed and resolved." *Id.* at 457. This opposition is applicable with arguably equal force to the privatization of child welfare as it is to the privatization of prisons and jails, and has compelled some in the legal profession to oppose privatization largely on constitutional and statutory grounds.

80 David E. Lust, *What to do When Faced with a Novel State Action Question? Punt: The Eighth Circuit's Decision in* Reinhart v. City of Brookings, 42 S.D. L. REV. 508, 508 (1997).

81 Kennedy, *supra* note 10, at 206.

82 Sullivan, *supra* note 8, at 461.

83 I borrow the terms "publicness" and "privateness" from Prof. Ruth Hardie Shane, whose work focuses on the implications for public administrators of legal and constitutional distinctions of publicness and privateness in the delivery of public services and the import of this distinction in the Supreme Court's state action jurisprudence. Ruth Hardie Shane, Private Actions—Public Responsibilities: Reflections on *West v. Atkins* (1988) (Nov. 19 2003) (unpublished dissertation, Virginia Polytechnic Institute) (quoting Interview with Gary Wamsley Professor, Center for Public Administration and Policy, Virginia Tech, in Blacksburg Virginia) (addressing the legal and constitutional distinctions between publicness and privateness and the implications of that distinction for public administrators).

84 Sullivan, *supra* note 8, at 461.

purely private entity.

Under the Supreme Court's current interpretation of the state action doctrine and the varied corollary interpretations espoused by lower courts, lingering questions remain about which precise constellation of factors favors identifying public-private partnerships as purely private entities or as sufficiently aligned with the state as to have assumed its identity.[85] Especially as the state action doctrine is applied in the context of private child welfare service delivery, the lines between public and private easily blur, for as Professor Martha Minow notes, "The lines themselves are historical inventions."[86] Unfortunately, the accelerated pace toward privatization is occurring in the absence of necessary clarity regarding where the lines are, or should be, drawn. Although "[n]ew forms of governmental activities, developing within the growing scope of . . . privatization [have changed] the reality of state actions,"[87] the content of the legal doctrine of state action has not changed and ceases to serve its professed aims.[88]

There remains, in each case, a feature unique to child welfare, with the exception of prisons—the overarching coercive presence of the state at the very core of the child welfare system. It is perhaps so self-evident as to be taken for granted, but the fact that children may only be legally removed and formally placed in the child welfare system through a court order renders this conduct arguably the least ambiguous form of state action. Its existence is itself grounded in the notion of the state as *parens patriae*, with state law serving as "the very foundation for what [a child welfare] agency is supposed to, or able to, do."[89] Indeed, it is the specter of the omnipotent state that provides a gloss of authority through which private agencies are empowered to do great good, and potentially great harm. Not only does the state enjoy a monopoly on the legitimate use of force, it also possesses the unique authority to break apart one of the most fundamental units of society: the family.[90] When, where, and how aspects of this awesome authority are delegated to private providers is the subject of continued debate. What is largely absent from the debate, however, is a full assessment of the consequences of extending the authority of the state to private providers gener-

85 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 18-1, at 1690 (2d ed. 1988) ("[T]he Supreme Court has not succeeded in developing a body of state action 'doctrine,' a set of rules for determining whether governmental or private actors are to be deemed responsible for an asserted constitutional violation.").

86 MINOW, *supra* note 1, at 22.

87 Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169, 1191 (1995).

88 *Id.*

89 Shane, *supra* note 83, at 10 (citations omitted).

90 Daniel Bergner, *The Case of Marie and Her Sons*, N.Y. TIMES, July 23, 2006, (Magazine), at 28. Bergner's article "tells the story of a mother who wants to raise her five sons despite her struggles with drugs and violent men—and of the child-welfare worker who must decide whether to take away those children for good." *Id*. at 3. In describing the awesome responsibility which her job entails and explaining how it might contribute to the constant and quick turnover of her colleagues, the child-welfare worker offered the following: "It's almost hard to comprehend that we have [the prerogative to enter a family's home and split it apart] . . . . It's so huge." *Id.* at 31.

ally not constrained in the same manner as traditional state actors from unconstitutional conduct, and the corresponding need to tread more cautiously down the path toward privatization.

Contracts and monitoring are conceivably one source of accountability and protection. However, contract provisions provide only marginal and risky guarantees of accountability. Moreover, although comprehensive contracts might offer sufficient guarantees of service provision, what of accountability for constitutional deprivations that arise in the context of service delivery? Most would find it unacceptable that constitutional guarantees might rest on the details outlined in a contract, especially one to which the direct recipient, and potential victim of harm, is not even a party.

Contract monitors may serve a useful watchdog function; however, their role is limited to the terms of the contract itself. The City of Philadelphia Department of Human Services, a municipality that spends nearly 82% of its budget on contracted private services,[91] defines the purpose of contract monitoring (the Division of Contract Administration and Program Evaluation) to include the translation of "the Department's goals and objectives into service provision contracts"; centralization of "the process of evaluating what works"; and assurance that "all contracts contain performance standards that monitor achievement."[92] Although the aims may be laudable, they have not insulated the department from controversy stemming from private agency conduct.[93] Indeed, effective contract monitoring is quite often stymied by the "'short supply' of usable management information systems, auditing capability, and skilled contract managers,"[94] all of whose scarcity undermines meaningful accountability in the context of privatized social services.[95] Ideally, beyond merely contracting with private entities, state and local governments must assess their "capacity in terms of both resources and expertise, to appropriately design, implement, and over-

91 City of Phila. Dep't. of Human Servs., Contract Administration Home Page, http://dhs.phila.gov/intranet/pgintrahome_pub.nsf/content/contractadminhomepage [hereinafter DHS Homepage] (last visited Sept. 15, 2007).

92 *Id.*

93 The Philadelphia Department of Human Services has been the object of much scrutiny following 50 child deaths that have occurred since 2000 and a recent multi-million settlement in a civil rights claim against the agency. In November 2006, Philadelphia Mayor John Street appointed a Child Welfare Review Panel, consisting of child welfare experts from across the state and country to examine, among other issues, how the Department of Human Services hires and evaluates private contractors. John Sullivan, *City DHS Panel Looks at Hiring of Contractors*, PHILA. INQUIRER, Dec. 20, 2006, at B1. Cited as an example of egregious contract monitor failing is the case of a private child welfare agency, MultiEthnic Behavioral Health, Inc. which "won city contracts to watch over children at risk of abuse and neglect." Nancy Phillips and Craig R. McCoy, *DHS Gave Psychologist a Contract Despite Personal, Career Problems*, PHILA. INQUIRER, Dec. 10, 2006, at A1. Although the private agency's director lost his state certification due to an assault conviction, he was awarded a $3.5 million contract with DHS until the death of a 14-year old client under the care of the private contractor. Nancy Phillips and Craig R. McCoy, *Mounting Failures Left Girl to Die*, PHILA. INQUIRER, Dec. 10, 2006, at A1.

94 FREUNDLICH & GERSTENZANG, *supra* note 41, at 9 (quoting H.B. Milward, *Nonprofit Contracting and the Hollow State*, 54 PUB ADMIN. REV. 73, 78 (1994)).

95 *Id.*

see privatization efforts."[96] Even those in favor of increased privatization admit that, "[i]n the end, contract monitors simply make sure that the work promised will be delivered," and nothing more.[97] For these reasons and more:

> Critics are . . . [rightfully] skeptical about the actual degree of accountability that exists when social services are privatized. . . . Even when there are adequate systems to ensure accountability, the question often is "[a]ccountability for what outcomes?" Although the expectation is that private contractors will be held accountable for results, Bardach and Lesser argued that, at most, accountability is "for a better quality of effort directed toward the results being measured" as opposed to higher quality outcomes."[98]

In light of the implicit challenges to developing adequate accountability mechanisms, contract compliance alone may ring hollow as an adequate gauge. One of the challenges might be the elusive definition of the term accountability itself, which can be understood to encompass a broader scope than the mere performance standards outlined in contract terms. Accountability in this sense reflects the democratic accountability within a constitutional system in which elected persons in power are held accountable to the voting public. This is accomplished by levying an obligation that the party accountable report performance outcomes and be subject to sanctions. Neither of these markers is meaningful, however, unless the relevant parties base their actions on information about the actual performance of elected persons, governments, private enterprises, or other activities.[99] In a business context, "[c]onsumers and investors have power to hold others accountable because they can vote with their feet, but they cannot exercise this power if they do not know how or even whether to judge." [100] Child welfare service recipients, unlike traditional consumer or investors, are generally powerless to exert any direct influence over the private agency. Service recipients are by and large[101] not independent actors volitionally contracting for services, but individuals compelled by force of law to engage with private providers who are sometimes the proverbial "only game in town."

As previously noted, the lack of service recipient agency looms even larger when this view of accountability is assessed, given that service recipients are increasingly restrained in their exercise of democratic powers as private systems of care eclipse public ones. Service recipients might then

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96 *Id.*

97 CONNA CRAIG ET AL., REASON FOUND, POLICY STUDY NO. 248: BLUEPRINT FOR THE PRIVATIZATION OF CHILD WELFARE 13 (1998).

98 FREUNDLICH & GERSTENZANG, *supra* note 41, at 9 (quoting E. Bardach & C. Lesser, *Accountability in Human Services Collaboratives: For What? And to Whom?*, 6 J. OF PUB. ADMIN. RESEARCH & THEORY 197, 201 (1996)).

99 MINOW, *supra* note 1, at 153

100 *Id.*

101 Note that the focus of this article is children who are in the legal custody of the state and whose families are compelled by the state to engage in private child welfare service delivery. I am not addressing the circumstance of families referred on a voluntary basis for services.

be said to at best enjoy only an attenuated measure of oversight, which can be exerted through pressure on the elected representatives who appoint key public officials, who in turn contract with private providers. In this chain of effects, it is indisputable that because "the use of private firms places 'the influence over, and sometimes even control of, important decisions one step further away from the public and their elected representatives,'"[102] service recipients are left with a diminished capacity to hold private firms directly accountable.[103] Moreover, even this minimal influence, moreover, is wholly dependent on the ability to access information regarding private providers and the contracts into which they enter. Access to such information is a critical component of accountability, since "[c]itizens [may] vote with ballots, petitions, and speeches, but they . . . cannot pursue these actions meaningfully if they do not know what is going on."[104] Unlike the voting public, service recipients do not have access to private agency performance in a manner which would permit them meaningful review.[105]

C. Civil Rights and Constitutional Protections

Although "[t]he concern over accountability of private actors performing public functions is a ripe debate in administrative law and in other substantive law areas,"[106] it is nowhere more important than in the constitutional rights of public service recipients.[107] At the heart of the American system of constitutional accountability is "the distinction between government and other realms," which matters insofar as context "trigger[s]. . . constitutional protections guaranteeing due process and equal protection."[108] Commitments to, for example, due process and equal protection operate only as a constitutional matter when the state, and not a private party, acts.[109] "The notoriously tricky question is how exactly to draw the line between state and private action, which polices the boundary between the application and nonapplication of the Constitution."[110] Application of constitutional duties to private providers of public services would be assured were the Constitution to give direct horizontal effect to such protections; however, such is not the traditional leaning of our constitutional jurispru-

102 Singer, *supra* note 27, at 218.

103 *Id.*

104 MINOW, *supra* note 1, at 153.

105 Kelsi Brown Cokran describes this dynamic as a type of "information symmetry" in foster care contracting in which "the individualized nature of service goals and the absence of meaningful performances measures make it very difficult for the government as principal to determine the quality of foster care services provided by its agents—i.e., the nonprofit agencies with which it contracts." Kelsi Brown Cokran, *Principal-Agent Obstacles to Foster Care Contracting*, 2 J.L. ECON. & POL'Y 29, 30 (2006). When, as in the case of private child welfare foster care contracting, the purchaser of the service (the government) is different from the consumer (the parent and child under the court's jurisdiction), "the market institutions that address quality uncertainty work far less effectively." *Id.* at 34.

106 Mangold, *supra* note 40, at 1318.

107 *Id.*

108 MINOW, *supra* note 1, at 31.

109 Sullivan, *supra* note 8, at 461.

110 Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 412 (2003).

dence.[111] The constitutional regulation of third party, nominally "private," conduct is referred to as the "third party effect."[112] Only were this doctrine the norm would enforcement of constitutional rights easily apply to private parties and individuals with equal force as enforcement against the state.

The ability to hold private providers of public services accountable for constitutional deprivations rests on the outcome of this search, for it remains unclear as a normative matter the extent to which private agencies providing public services should or do have any constitutional duty to the clients they serve. As Professor Sullivan warns "privatization may undermine constitutional protections, because private entities, unlike public agencies, are not politically accountable nor are they bound by principles regarding the protection of citizens' rights."[113] He concludes, in the end, that "privatization and protection of civil liberties [and constitutional rights] may prove to be mutually exclusive goals."[114]

IV. A CLASH OF REALITIES: THE TRADITIONAL STATE ACTION DOCTRINE CONFRONTS THE 21ST CENTURY

A. Traditional State Action Doctrine

Because constitutional limitations and checks on constitutional accountability do not generally apply to acts of private parties, the basic query that courts aim to resolve in the context of state action claims is whether the private conduct complained of may fairly be attributed to the state. To say that determining which conduct is public and which private has been fraught with controversy and confusion is a considerable understatement. Although "[t]he Supreme Court has established a number of approaches to this general question, which it has recently said are essentially 'facts that can bear on the fairness of such an attribution,'"[115] the weight attached to certain facts and the manner in which they bear on the fairness

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111 Stephen Gardbaum, *Where the (State) Action is*, 4 INT'L J. CONST. L. 760, 773 (2006). Gardbaum reviews a spectrum of conceptualizations of horizontal application of constitutional rights, which includes no horizontal effect, weak and strong indirect horizontality, and direct horizontality. *Id.* at 762–67. As Professor Gardbaum summarizes:

> [T]here are three very general positions a constitutional system can take regarding the effect of constitutional rights on private actors . . . . These are: (1) no effect at all, direct or indirect, because constitutional rights only govern public law—regulating the relations between the individual and the state; (2) indirect effect, because although private actors are not bound by constitutional rights, such rights govern the laws that private actors invoke and rely on in their relations with each other; and (3) direct effect, because constitutional rights do bind the actions of private actors.

Id. at 778.

112 Mark Tushnet, *The Relationship Between Judicial Review of Legislation and the Interpretation of Non-Constitutional Law, with Reference to Third Party Effect*, *in* THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM 167, 167 (2005).

113 FREUNDLICH & GERSTENZANG, *supra* note 41, at 10 (citing Sullivan, *supra* note 8, at 461–67).

114 *Id.* (citing Sullivan, *supra* note 8, at 466).

115 Crissman v. Dover Downs Entm't. Inc., 289 F.3d 231, 239 (3d Cir. 2002) (quoting Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n., 531 U.S. 288, 296 (2001)).

of the attribution is a process better approximating divination than a systematic application of any clear rule of law.[116] In the end, state action attribution has been far easier articulated in theory than realized in practice, as the Court "has applied [the view that private actions should be construed as those of the State] very narrowly, considering most actions as private despite clear traces of government involvement."[117]

In lieu of establishing one uniform standard for determining state action, lower courts, guided by Supreme Court jurisprudence, have cited a varying range of factors and tests.[118] Among the traditional approaches that assess whether the state requires, encourages, or is otherwise significantly involved in nominally private conduct are (1) the "compulsion" test, exploring the manner in which the state has exercised any affirmative conduct compelling the conduct complained of,[119] (2) the "nexus" test, examining the degree of state involvement in private conduct,[120] and (3) the "public function" test, which looks substantively to the nature of the function performed to assess its public versus private identity.[121] Any assessment of the Court's state action jurisprudence reveals that, while useful as a guidepost, these tests remain rather loosely applied.[122]

As the public function test is the most frequently used in the context of child welfare civil rights litigation, it is the only one that will be discussed here at length. It is a distinct approach to state action that focuses primarily on the "nature of the activity engaged in by the private person or entity"[123] and inquires whether the private person or entity exercises a traditional and exclusive state function.[124] In its original incarnation, the public function test operated to cut through the private façade of conduct fairly attributable to the state, making the state responsible for private actors carrying out a traditional function of the state.

The influence of the public function test can be said to have reached its apex in the 1968 case of *Amalgamated Food Employees Union v. Logan*

116 *See id.*

117 Barak-Erez, *supra* note 87, at 1172.

118 Michael Han, Note, *Civil Rights—Requirements for Fourteenth Amendment and § 1983 Protection—Attributing State Action to a Private Athletic Association*, 69 TENN. L. REV. 521, 524 (2002).

119 Barak-Erez, *supra* note 87, at 1173.

120 *Id.* at 1174.

121 *Id.*

122 *See generally* Barak-Erez, *supra* note 87, at 1173–83. No doubt there is merit to the claim that there is a serious lack of consensus methodology in the area of the state action doctrine. The Court has unpredictably vacillated among and between variants of these tests, at times applying one distinctly, while elsewhere appearing to collapse both. The "entwinement" theory represents such an amalgam, in which the nexus and public function tests are combined to ostensibly form a new test. More recent jurisprudence has focused instead on the broad legal principles that unite all of the tests together. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n., 531 U.S. 288, 296 (2001). Daphne Barak-Erez examines Sec. 1983 claims through 4 tests, including the rarely relied upon "subsidies test." In applying a subsidies test, the Court looks to whether the financial support granted by the government is substantively an official approval of the subsidized activity. *See* Barak-Erez, *supra* note 87, at 1173–83.

123 1 SHELDON NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION § 2:10, 2-26 (4th ed. 2006).

124 *Id.*

Valley Plaza[125], in which the Court held that a privately owned shopping mall could not avail itself of private trespass laws to restrict picketing by union employees. Relying heavily on its earlier holding in *Marsh v. Alabama*[126], in which the Court appeared to advance an argument not terribly dissimilar to "if it walks like a duck and quacks like a duck, it's a duck," the Court reasoned that the privately owned mall in question was "the functional equivalent of the business district" in the company town in *Marsh*, which, ostensibly public, was subject to First Amendment restrictions.[127] In so doing, the Court stretched the reach of the public function test in so incredulous a manner as to never again be repeated. Indeed, in subsequent cases leading up through the 1980s, the Court narrowed the definition of public function by requiring a duality of conduct such "that the questioned task be a traditional *and* exclusive function of the State."[128] In the evolving iterations of the public function test, the Court would over time come to focus more narrowly on the challenged conduct than the identity of the actor. Two public function cases from what is collectively known as "the Blum trilogy" aptly depict the new narrower lens through which the public nature of private conduct would henceforth be assessed.[129] In *Blum v. Yaretsky*, the plaintiffs attempted unsuccessfully to characterize the challenged conduct of a private nursing home facility as that of the state, basing their arguments on the nursing home's substantial receipt of state and federal Medicaid funds as well as heavy state regulation.[130] In reasoning that the private entity did not exercise powers "traditionally the exclusive prerogative of the State,"[131] the Court declined to extend the constitutional protections the plaintiffs sought into the private realm. Similarly, in *Rendell-Baker v. Kohn*,[132] a case which has been often analogized and heavily relied upon in cases exempting private providers of child welfare services from accountability for constitutional harms,[133] the Court found that the conduct of the private school employer was not attributable to the state under the public function test because, although education of students is indeed a public function, the provision of such is not "the exclusive prerogative of the State."[134] Nor, under this reasoning, could the employment related decisions of the school be attributed to the State.

125 391 U.S. 308 (1968).

126 326 U.S. 501 (1946).

127 *Amalgamated Food Employees Union*, 391 U.S. at 318. Harkening back to *Marsh*, the Court quoted from its earlier opinion, "[i]n short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation." *Id.* at 317 (quoting *Marsh*, 326 U.S. at 502–503).

128 Han, *supra* note 118, at 525 (emphasis added).

129 *Id.*

130 457 U.S. 991 (1982).

131 *Id.* at 1005.

132 457 U.S. 830 (1982).

133 *See, e.g.*, Robert S. v. Stetson, 256 F.3d 159 (3d Cir. 2001); Leshko v. Servis, 423 F.3d 337 (3d Cir. 2005); Willis v. Georgia Dept. of Juvenile Justice, No. 7:05-cv-59 (HL), 2007 U.S. Dist. LEXIS 70012 (M.D. Ga. 2007).

134 *Rendell-Baker*, 457 U.S. at 842.

The narrow focus on traditional exclusivity rendered the public function test relatively "impotent until the early 1990s,"[135] when the Court held in *Edmonson v. Leesville Concrete Co.*, that the use by a private litigant of peremptory challenges based on race was violative of the Due Process Clause of the Fifth Amendment.[136] Departing from the duality of conduct—exclusive and traditional—test that the public function inquiry had become after Blum, the Court instead stressed the traditional nature of the public function test, focusing on the attributes of the actor as well as the challenged conduct itself.[137] Although it can be argued that, per Edmonson, "the Court had reset the bar to a lower level,"[138] the view of some lower courts is that the public function test, particularly when conceived as still requiring conduct of a traditional and exclusive state nature, "imposes a 'rigorous standard' that is 'rarely . . . satisfied.'"[139] As the logic goes, "[w]hile many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'"[140] In his observation of the diminished influence and inherent "definitional weakness" of the public function test, noted scholar Paul Verkuil suggests that "the Court . . . seems to have abandoned the quest for an adequate definition of public function,"[141] perhaps a harbinger of its recurring impotency.

V. ACCOUNTABILITY FOR CONSTITUTIONAL DEPRIVATIONS UNDER §1983

The first hurdle of a § 1983 claim is easily surmounted when the state agency alone is named as a defendant, as the agency is unquestionably a state actor for § 1983 purposes. Moreover, the issue of constitutional accountability was more narrowly circumscribed at a time when almost all child welfare services were administered by and delivered through the state. Every public provider in the system was conceivably a state actor by formal state designation. However, determining when and under what circumstances the thread of responsibility would be projected outwards to encompass private providers, in addition to or entirely apart from the state, remains controversial. Although the Court offers only minimal guidance in determining which precise constellation of factors supports the claim that "a private actor has acted 'under color of state law,' one directive emerges

135 Han, *supra* note 118, at 526.

136 500 U.S. 614, 616 (1991).

137 Han, *supra* note 118, at 526 (citing .*Edmonson*, 500 U.S. at 624). It can, however, be argued that Justice Kennedy dispensed with the need for an analysis of the exclusivity prong of the public function test in Edmonson with an earlier discussion of the unique participation of the state in which he noted, "[i]t cannot be disputed that, without the overt, significant participation of the government, the peremptory challenge system, as well as the jury trial system of which it is a part, simply could not exist." *Edmonson*, 500 U.S. at 622.

138 Han, *supra* note 118, at 526.

139 Robert S. v. Stetson, 256 F.3d 159, 165 (3d Cir. 2001) (quoting Mark v. Borough of Hatboro, 51 F.3d 1137, 1141 (3d Cir. 1995)).

140 *Id.* at 166 (quoting Flagg Brothers Inc. v. Lefkowitz, 436 U.S. 149, 158 (1978)).

141 Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, at 415 (2006).

clearly from the Supreme Court's jurisprudence: the facts are crucial."[142] In the Court's "often-quoted words, '[o]nly by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance.'"[143]

The facts, indeed, do matter. However, even in the face of sufficiently similar factual circumstances, courts have been inconsistent in whether cases involving foster children are analogous to the right to safety of incarcerated individuals or those involuntarily hospitalized, as the Court indicated in *DeShaney v. Winnebago*.[144] Evidence of this inconsistency includes the Supreme Court's limited review of right-to-safety cases only in the context of inmates and mental patients, counterpoised with the lower courts' acceptance that the doctrine applies to situations involving foster children injured while in care.[145]

In 1989, the Court attempted to bring clarity to the complex and blurred lines between public and private by elaborating the circumstances under which the State would bear a duty to protect citizens from harms inflicted by private actors and the circumstances under which a § 1983 claim could proceed on the basis of private conduct. In the seminal case of *DeShaney*, the Court recognized a limitation on state agency liability when children are harmed by private actors—in this case, the father of a child whose risk of harm was made known to the State child welfare agency.[146] As the Court made clear, the defining element in *DeShaney* was the custodial context and the duty, or lack thereof, that arose from any kind of custodial or special relationship between the child and the state.[147] The Court unequivocally limited a child's right to safety and the state's liability for constitutional deprivations to only those children who were in the custody of the State, not those whose circumstances were merely made known to state officials.[148] The majority opinion in *DeShaney* established that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."[149] Moreover, "[b]ecause there was no constitutional requirement that the government provide such protection, the Court reasoned the state could not be liable for injuries that resulted when protective services were not provided [to protect the child from privately-inflicted harm]."[150]

142 Crissman v. Dover Downs Entm't. Inc. 289 F.3d 231, 233–34 (3d Cir. 2002).

143 *Id.* at 234 (quoting Burton v. Wilmington Parking Auth, 365 U.S. 715, 722 (1961)) (alteration in original).

144 DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 201 n.9 (1989).

145 Sharon Balmer, *From Poverty to Abuse and Back Again: The Failure of the Legal and Social Services Communities to Protect Foster Children*, 32 FORDHAM URB. L.J. 935, 947 (2005).

146 *Deshaney*, 489 U.S. at 192–93.

147 *Id.* at 200.

148 *Id.* at 201–02.

149 *Id.* at 195.

150 Carolina D. Watts, Note, "*Indifferent [Towards] Indifference": Post*-DeShaney *Accountability for Social Services Agencies When a Child is Injured or Killed Under Their Protective Watch*, 30 PEPP. L. REV. 125, 137 (2002).

The Court rejected the special relationship doctrine[151] that the Third Circuit had found persuasive in an earlier matter with similar facts and the notion that a constitutionally based special relationship can exist outside of a custodial context.[152] According to Chief Justice Rehnquist's opinion, "the only kind of special relationship that [can] trigger[] affirmative duties [i]s one in which the State takes someone into 'custody,' thereby depriving him of liberty and the ability to protect himself, as was the case of the inmate in *Estelle*, and the developmentally disabled man in *Youngberg*."[153]

Pursuant to *DeShaney* and subsequent case law, therefore, the state may be liable for constitutional wrongdoing visited on children in the custody of the state:

> [I]n what has now become a famous footnote, on which many circuit courts have based a right to safety in foster care, the majority opinion [in *DeShaney*,] provided [but did not expressly endorse,] that '[h]ad the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect.[154]

While post-*DeShaney* cases make clear that constitutional accountability by state agencies may follow for harms suffered by children in state custody, if, for example, the standards described below are met, it remains unclear and inconsistent as a matter of common law under what circumstances constitutional accountability will extend to the private providers with whom state agencies now increasingly contract for services. The Court's footnote in *DeShaney*, making reference to a plausible analogy between children in foster care and prisoners or involuntarily civilly committed individuals, provides strong support to the argument that private providers contracting with the state to carry out child welfare services are state actors for the purposes of § 1983, thus expanding the scope of constitutional accountability beyond the state itself.[155]

Although divining state action has remained an unpredictable and frustrating exercise, Supreme Court state action jurisprudence has widened the

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151 *See* Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL RTS. J. 1165, 1169 (2005) (citing *Deshaney*, 489 U.S. at 197 n.4).

152 Estate of Bailey v. County of York, 768 F.2d 503 (3d Cir. 1985) (recognizing that a duty to protect a child from abuse is not limited to situations where the child is in state custody, since a special relationship between a child and agency gives rise to liability for agency's failure to act).

153 Oren, *supra* note 151, at 1170 (citing *Deshaney*, 489 U.S. at 199–200). Oren notes that:

> In *Estelle*, the Court acknowledged that state inaction through conscious indifference to the serious medical needs of an inmate, could violate the Eighth Amendment . . . . In *Youngberg*, the Court recognized a due process right of an involuntarily committed man, who had the intelligence of a very young child, to safety and protection from assaults by other patients and from his own self-destructive acts.

Id. at 1168 (citing Estelle v. Gamble, 429 U.S. 97, 97 (1976); Youngberg v. Romeo, 457 U.S. 307, 316 (1982)).

154 Balmer, *supra* note 145, at 946–47 (quoting *DeShaney*, 489 U.S. at 201 n.9) (third alteration in original).

155 *DeShaney*, 489 U.S. at 201 n.9.

path. Most noteworthy is the Court's reasoning in *West v. Atkins*,[156] which arguably opens the door to the extension of private provider liability, provided the analogy of foster children to prisoners is successfully made.[157] In *West*, a prisoner brought suit under § 1983 against his treating physician, Dr. Atkins, a private orthopedist under contract to provide services on a part-time basis to a North Carolina state prison hospital.[158] The question presented to the Court was whether the physician's treatment of the prisoner was fairly attributable to the state and, thus, whether he was acting under color of state law.[159] The Court agreed that "the resultant deprivation was caused, in the sense relevant for state-action inquiry, by the State's exercise of its right to punish [the prisoner] by incarceration and to deny him a venue independent of the State to obtain needed medical care."[160] The Court continued, explaining that "[t]he State bore an affirmative obligation to provide adequate medical care to [the prisoner]," which it delegated to the private provider.[161] Because the private provider willingly assumed the delegated function through contract, the prisoner retained his right to pursue an Eighth Amendment claim against Dr. Atkins.[162] The aim of this article is to extend *DeShaney* and *West* to assess the issue of constitutional accountability in the context of privatized child welfare services.

A. Suffering the Consequences in the Absence of Accountability

As the literature attests, the scope of the privatization debate is vast. This article is, however, particularly focused on the implications for children and families served by private child welfare service providers with respect to constitutional deprivations suffered while in the care of private, as distinguished from public, providers. The scope of private providers includes all nonprofit and for-profit providers of child welfare services, including those providing foster care, foster care case management, psychiatric treatment, and other related care delivered as a direct consequence of a child's placement by the state into the child welfare system and the corresponding custodial authority exercised by the state. Note that this cast of characters includes not only private foster care agencies, but also the staff and foster parents they employ.[163]

An illustration of the degree to which constitutional accountability might be compromised by the participation of private versus traditional state actors is *Robert S. v. Stetson School, Inc*.[164] The case involved Ro-

156 487 U.S. 42 (1988).
157 *Id.*
158 *Id.* at 43–44.
159 *Id.* at 43.
160 *Id.* at 55.
161 *Id.* at 56.
162 *Id.* at 56–57.
163 There is marked discrepancy as to whether foster parents are considered "volunteers" or "employees." Not only does the distinction have legal significance, it also carries a meaningful symbolic value with respect to whether foster parents constitute a core or fringe element of a private agency.
164 256 F.3d 159 (3d Cir. 2001).

bert, who had been placed in the custody of the state child welfare agency in Pennsylvania.[165] In this case, Judge Samuel Alito (now Justice Alito) affirmed a lower court ruling that a private treatment and educational facility specializing in the treatment and education of juvenile sex offenders was not a "state actor" as required for a § 1983 claim.[166] Although prior to his death, the initial district court judge denied the defendant's summary judgment motion pertaining to the defendant's designation as a state actor, the district court judge to whom the case was later transferred ruled that the defendants were not state actors for the purposes of plaintiff's § 1983 claim.'[167] In his complaint, the plaintiff, Robert S., "asserted [substantive due process] claims against the school and its staff members . . . for violating his federal constitutional rights by subjecting him to physical and psychological abuse."[168] Owing to the controverted public versus private identity issues, however, Robert's constitutional claims were quashed at the summary judgment phase, leaving him with only a state tort claim to take to the jury.[169]

By way of background—and because, as in all state action inquiries, the facts are crucial—it is necessary to trace the plaintiff's path from public to, ostensibly, private hands. At age 13, Robert, who himself had earlier been sexually abused and subsequently became abusive of his younger sibling, was found to be a "dependent child" under Pennsylvania statute and placed in the legal and physical custody of the Philadelphia Department of Human Services.[170] The statute defined dependency in a manner largely resembling that relied on in other child welfare jurisdictions across the nation: to be a child who is "without proper parental care or control."[171] Although the appellate opinion takes pain to note that Robert was placed in the custody of the state "with his mother's consent,"[172] it is clear that, under the statute, no parental consent is necessary for a finding of dependency. Not only is such consent unnecessary for the state to make a finding of dependency, but, in practice, such "consent" is either lacking entirely or illusory in light of the state's omnipotent power to coerce "consent" from vulnerable parents. Upon removal from his mother's custody, Robert was placed in a private residential institution, Stetson School, Inc., located in Massachusetts, which specialized in the treatment and education of juvenile sex offenders, where he alleged that he was physically abused by members of the Stetson staff.[173] Pursuant to the Child Protective Services Act,[174]

165 *Id.* at 161–62.

166 *Id.* at 161.

167 Robert S. v. City of Philadelphia, No. 97-6710, 2000 WL 288111, at *1. n.1 (E.D. Pa. Mar. 17, 2000).

168 *Stetson*, 256 F.3d. at 161.

169 *Id.* at 161, 164. As will be discussed later in this article, although civil state tort claims often remain an option, it is my belief that such tort claims are an insufficient vehicle for justice.

170 *Id.* at 161–62.

171 42 PA. CONS. STAT. ANN. § 6302 (2007).

172 *Stetson*, 256 F.3d at 162.

173 *Id.* at 162–63.

Stetson was one of many privately run institutions with which the Department of Human Services entered into a variety of financial and performance contracts. These contracts had the practical effect of transferring physical custody and direct care of dependent children to the private facilities.[175]

In the opinion of the Third Circuit, Stetson School, Inc., was not a state actor although it provided specialized treatment and education to children declared dependent by the Commonwealth of Pennsylvania, ordered into the custody of the state and placed by an order of the state, in Stetson's care.[176] The Third Circuit's reasoning relies most heavily on the Court's application of the public function test in *Rendell-Baker v. Kohn*,[177] an employment discrimination case in which the Court failed to find the defendant school to be acting "under color of law" when it dismissed a school employee.[178] Although strongly analogizing Stetson to the school in *Rendell-Baker*, Judge Alito's opinion selectively omits certain facts and larger contextual matters that would have the effect of favoring Stetson's designation as a state actor. The Third Circuit notes that "[a]s was true of the New Perspectives School in *Rendell-Baker*, the record here does not show that the Stetson School performed a function that has been traditionally the exclusive province of the state."[179] However, what was absent from the Third Circuit's opinion was a crucial analysis from the appellate opinion in *Rendell-Baker v. Kohn*, wherein the court stated that:

> The "public function" concept is strongest . . . when asserted by those for whose benefit the state has undertaken to perform a service, or when the state has lent its coercive powers to a private party. In this situation, for example, those *students* of the New Perspectives School who were placed there by [the state] particularly those who are compelled to attend under the state's compulsory education laws, would have a stronger argument than do plaintiffs that the school's action towards them is taken "under color of"" state law, since the school derives its authority over them from the state. . . . The school's authority over its faculty derives from the contractual relationship of employment, not from "state law," [therefore, even though] [t]he school does not perform any public function toward [the employees], . . . it may (although we do not now decide the issue) perform such a function toward some or all of its students [180]

This reasoning is consistent in its theoretical underpinning with the Court's analogy in *Deshaney* between foster children and other individuals whose liberty is restrained by the state. Moreover, although understood to be merely dicta in *Rendell Baker*, this reasoning has yet to be explicitly disavowed in any later Supreme Court opinion.[181]

174 23 PA. CONS. STAT. ANN. § 6301 (2007).
175 *Stetson*, 256 F.3d at 162.
176 *Id.* at 165.
177 641 F.2d 14 (1st Cir. 1981).
178 *Id.* at 23.
179 *Stetson*, 256 F.3d at 166.
180 *Rendell-Baker*, 641 F.2d at 26 (emphasis added).
181 Barak-Erez, *supra* note 87, at 1189 (noting that in *Rendell-Baker* the Court avoided the ques-

Although it would be an example of unduly simplistic reasoning to suggest that the designation of the private party as a state actor could rest solely on the fact that Stetson performs a public function— the Third Circuit's opinion appears to infer that this was the whole of plaintiff's case.[182] To the contrary, Robert S. argued that Stetson was a state actor because the children were ordered by the state into its care and their harm could not have occurred absent the state's exercise of coercive control over the child and his parents.[183] Nonetheless, the Third Circuit refused to regard Robert's placement as involuntary and instead appeared to reframe the relationship between the child, the state, and the private agency.[184] In a display of Kafkaesque reasoning, the Third Circuit's opinion mischaracterizes Robert's placement as "consensual" on the mere basis that his custodian, the state, consented to placing him in the confines of the private facility.[185] According to this logic, wherever the state would have placed Robert—be it in a locked, out-of-state residential facility, such as Stetson, or any other institution for that matter—his presence there would have been consensual, therefore forestalling any ability on his part to raise a civil rights claim against the facility on the basis of a deprivation of his liberty.[186]

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tion of the rights of the enrolled students who were there by the will of the state, because the petitioners in the case were, instead, employees of the institution).

182 *Stetson*, 256 F.3d at 165–66.

183 *Id.*

184 *Id*. at 166–67. In contrast to its lack of success at the appellate level, the analogy of foster children to other incarcerated or committed individuals was found to be persuasive in two Eastern District of Pennsylvania cases that preceded *Stetson* and *Leshko*. In *Estate of Earp v. Doud*, No. CIV. A. 96-7141, 1997 WL 255506 (E.D. Pa. May 7, 1997) and later in *Donlan v. Ridge*, 58 F. Supp. 2d 604 (E.D. Pa. 1999), the district court recognized that foster care agencies, private and public, perform a function that is the exclusive prerogative of the state, "namely the removal of children from their homes." *Donlan*, 58 F. Supp. 2d at 609. As Judge Fullham held in *Earp*, "while the day-to-day care of a child is not the exclusive prerogative of the state, the forcible removal of children from their homes most certainly is," thus rendering a foster care organization a state actor for the purpose of § 1983 liability. *Earp*, 1997 WL 2555606 at *2. Notably, despite the precedent set by *Stetson*, this reasoning found success yet again in *Harris ex rel. Litz v. Lehigh County Office of Children & Youth Serv.*, 418 F. Supp. 2d 643 (E.D. Pa. 2005) wherein the district court reinforced the view that the removal of children from the home is an exclusive public function of the state, thus conferring upon the foster care agency the designation of state actor.

185 *Id.* ("There is, . . . no factual basis for analogizing Robert's situation at the Stetson School to that of a prisoner or a person who has been involuntarily civilly committed. Whether or not Robert, a minor at the time in question, personally wanted to attend the Stetson School, his legal custodian, DHS, wanted him placed there, and his mother consented. Thus, his enrollment at Stetson was not 'involuntary' in the sense relevant here, i.e., he was not deprived of his liberty in contravention of his legal custodian's (or his mother's) wishes.").

186 *Id.* The court in *Stetson* distinguishes Robert's § 1983 claims from those successfully raised by students in *Milonas v. Williams*, 691 F.2d 931 (10th Cir. 1982), by pointing to both the voluntary manner in which Robert was placed at Stetson and the degree of freedom Robert enjoyed while there compared to students at the Provo Canyon School. *Stetson*, 256 F.3d at 167. Although the court somehow interprets the facts differently, it is clear from the findings in the district court that, like many of the students in *Milonas*, Robert was there following his designation by the court as a dependent child and the custodial authority the state accordingly exercised over him. Moreover, like the students in *Milonas*, Robert had limited independence while at Stetson, where phone calls were monitored and no student was permitted to leave campus alone without the police being notified for the purposes of affecting the child's return. *Id.* at 163. While Judge Alito was correct in noting that the district court had not found the limitations on Robert's freedom to be identical to those of incarcerated prisoners, the court's

Not only does the Third Circuit's opinion strain reality with respect to its characterization of the "voluntary" nature of Robert's designation as a dependent child and his placement in foster care, it also reveals a staggering insensitivity in its failure to appropriately regard public-private partnerships in the context of child welfare as distinct from most others. To assert that "the cooperation between the [state and the contractor] was only that appropriate to the execution of the subject matter of the contract and [that] the contractor's 'fiscal relationship with the State is not different from that of many contractors performing services for the state'"[187] fails to appropriately capture those features that make this kind of public-private partnership fundamentally different. Although it is largely absent from the court's reasoning in *Stetson*, the axiomatic and uncontroverted fact is that the state, and *only* the State, may involuntarily remove children from the custody of their parents, exercise legal and physical custody over them, and deliver them legally into the hands of private agents. This overarching contextual factor, which would have favored finding the private agent a state actor, was conveniently and curiously overlooked.

It is another Third Circuit case that highlights the risks faced by children in care whose private caregivers, paid foster parents, harm or abuse them. *Leshko v. Servis*[188] involved a case of a foster child who, alleging abuse by her foster parents, brought a civil rights claim against them. The plaintiff, Karen M. Leshko, was two-and-a-half years old when her foster mother, appellee Judy Servis, placed her in the kitchen sink of the Servis home to wash her.[189] There was a large pot of exceedingly hot water next to the sink and when Servis left the room, Leshko pulled it over on herself. She sustained severe burns across much of her abdomen, legs, and midsection. Both Servis and her husband failed to seek medical treatment for Karen for more than twelve hours.[190] When she reached the age of majority, Leshko brought suit against the county social services agency, various county officials, and her foster parents.[191]

As distinguished from the dependent child plaintiff in *Stetson*, Leshko's argument favoring classification of her foster parents as state actors was reasonably based on a 2002 Pennsylvania ruling holding that foster parents in Pennsylvania are considered county "employees" under Pennsylvania's Political Subdivision Tort Claims Act.[192] "In Pennsylvania '[a]ny person who is acting or who has acted on behalf of governmental unit, whether on a permanent or temporary basis, whether compensated or

finding of "obviously significant limitations on the freedom of students enrolled at Stetson" strongly supports any analogy to the facts in *Milonas*. *Id.* at 169 n.11.

187 *Stetson*, 256 F.3d at 166 (alteration in original).

188 423 F.3d 337 (3d Cir. 2005).

189 *Id.* at 338.

190 *Id.*

191 *Id.*

192 42 PA. CON. STAT. ANN. § 8501 (2007). Patterson v. Lycoming County, 815 A.2d 659, 661 (Pa. Commw. Ct. 2002).

not' is an employee of that governmental unit."[193] Although it would appear that this classification should be to Leshko's benefit, it was not. Although the court "acknowledge[d] the force of [Leshko's] argument," in another example of uniquely flawed logic, it failed to find these same state employees to be state actors for the purposes of a civil rights claim.[194] Moreover, in a proverbial "state action" catch-22, "[t]he District Court dismissed Leshko's [state] tort claim against the Servises[,] . . . holding that the immunity provided by Pennsylvania's tort claims statute applied to the Servises as county employees."[195] Not surprisingly, neither the district court, nor, later, the Third Circuit Court of Appeals, in a panel that included Judge Alito, authoring judge of *Stetson*, found that the foster parents were state actors as required by § 1983. Karen Leshko has never received any compensation for the injuries she suffered while in care.

Relying on its unique interpretation of *West*, the court in *Leshko* concluded that state-hired private contractors are not automatically state actors under § 1983, even if the state is their only patron.[196] Although this may be true, as with *Stetson*, the court in *Leshko* omitted the contextual factors that add another layer of "publicness" to the state action landscape. Even if their designation by the state as official employees presents an insufficient basis on its own on which to ground a state actor attribution, this designation in addition to, and in the context of, the state's exercise of a uniquely coercive power should have been sufficient.

VI. WHY A § 1983 SUIT RATHER THAN A TRADITIONAL CIVIL TORT SUIT?

Section 1983 provides a remedy against persons acting under color of state law who violate an individual's constitutional rights. Although it does not provide any substantive rights, it is a vehicle for holding accountable officials acting under color of law. Claims raised under § 1983 may be regarded as constitutional torts, as the basis of the claim is civil, rather than criminal, in nature. In the typical suit against private providers of child welfare services, plaintiffs allege deprivations of substantive due process rights under the scope of "right to bodily integrity,"[197] most often arising from physical, psychological, or sexual abuse. Despite the Supreme Court's reluctance to expand recognition of a broader scope of harms as constitutional torts, there are several compelling justifications for framing the harms suffered by children in the custody of the state as constitutional torts rather than civil ones.

193 *Leshko*, 423 F.3d at 342.

194 *Id.*

195 *Id.*

196 *Id.*

197 Albright v. Oliver, 510 U.S. 266, 272 (1994) (limiting the protections afforded by the substantive component of the due process clause to "matters relating to marriage, family, procreation, and the right to bodily integrity.").

A. Federal Forum

The Fourteenth Amendment protects citizens from abusive state action.[198] The Civil Rights Act of 1871, now codified as 42 U.S.C. § 1983, was intended to grant litigants access to federal court for civil rights violations. After its enactment in 1871, § 1983 experienced a period of dormancy, until 1961 and the landmark Supreme Court case of *Monroe v. Pape*, in which the Court articulated the purpose of the state as granting private litigants a federal court remedy as a first resort rather than only in default of, or after exhaustion of, state action. [199] As Professors Blum and Urbonya explain, "the statute was intended to provide a *supplemental* [federal] remedy . . . necessary to vindicate federal rights because, according to Congress in 1871, state courts could not protect Fourteenth Amendment rights because of their 'prejudice, passion, neglect, [and] intolerance.'"[200] Framing such violations as constitutional torts goes to the very purpose of § 1983 as an antiviolence measure intended to extend protection from constitutional deprivations inflicted by private parties acting in complicity with the state. In the continuing debate over the superiority of a federal versus state forum for §1983 claims, many civil rights attorneys prefer litigating such claims in federal court, where it is believed that federal judges are more removed from local and state politics, and where litigants may be provided a more level playing field.[201]

B. Recovery

In an era of increasing privatization, recovery can come from multiple sources in addition to the state agency itself. Although as noted earlier, immunities to constitutional torts might attach to the conduct of state officials and possibly those private actors "dressed" in state clothes, recovery is not affected by civil rights damages caps to the extent that it might be under tort caps. Some states have, for example, attempted to limit recovery from private providers of child welfare services through statutory tort reform. In 2005, a bill in Texas was introduced that "propose[d] privatization of substitute child care services statewide [at the same time capping] the liability of [private] agencies providing child welfare services on behalf of the state."[202] The proposed damages cap would have amended Chapter 97 of the Texas Civil Practice and Remedies Code to limit the liability of private providers of child welfare services within the state and read in pertinent part as follows:

> (a) In an action on a liability claim in which a final judgment is rendered against a non-profit agency that provides child welfare services on behalf of the state to

198 Shane, *supra* note 83, at 2.

199 365 U.S. 167, 183 (1961).

200 BLUM & URBONYA, *supra* note 11, at 2 (quoting *Monroe*, 365 U.S. at 180) (emphasis added) (second alteration in original).

201 STEPHEN C. YEAZELL, CIVIL PROCEDURE 192 (6th ed. 2004).

202 Michael W. Shore & Judy Shore, *Personal Torts*, 58 SMU L. REV. 1045, at 1070–71 (2005) (citing Tex. H.B., 79th Leg., R.S. (2005)).

> children in the conservatorship of the state, the limit of civil liability for noneconomic damages inclusive of all persons and entities for which vicarious liability theories may apply is a total amount, including prejudgment interest, not to exceed $250,000 for each person and $500,000 for each single occurrence of bodily injury or death.
>
> (b) The limitation on civil liability does not apply to reckless conduct or intentional, wilful [sic], or wanton misconduct of a non-profit agency.[203]

Although the measure failed to pass, efforts are clearly underway to protect private providers from liability at the same time that they are increasingly occupying the spaces previously assumed by the government. In a cautionary note, the Shores observe that while, "[i]mproving child protective services should be a top priority of the Texas Legislature, . . . privatizing child welfare services [as a means of achieving this aim] is a risky proposition."[204] They argue that "[l]imiting liability of the child welfare service providers is particularly dangerous because the caps make it economically feasible for them to commit negligent acts. The service providers should know that if they fail to provide reasonable services, they will be held accountable for the fullest extent of their liability."[205]

C. Immunities

The Court's denial of qualified immunity to private prison guards in *Richardson v. McKnight* suggests that there might be limited expansion of immunities to private providers of all public services.[206] In assessing whether two employees of a private prison management firm enjoyed a qualified immunity from suit under § 1983, the Court explained that because a private company subject to competitive market pressures when operating a prison is already restrained in its conduct by these same market factors, it did not require immunity from suit in order to perform its role.[207] Although "lawsuits may well 'distrac[t]' these employees 'from their . . . duties,' the risk of 'distraction' alone cannot be sufficient grounds for an immunity."[208]

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203 *Id.* at 1071.

204 *Id.*

205 *Id.*

206 Richardson v. McKnight, 521 U.S. 399, 412 (1997) (denying qualified immunity to private prison guards in § 1983 claim). Curiously, although the Court engaged in a thorough analysis of whether the private employees were entitled to qualified immunity from suit under § 1983, it passed on the issue of whether the private providers were even liable under § 1983. The Court instead noted that since the district court had assumed, but did not decide § 1983 liability, it was for the district court to determine whether "under this Court's decision in *Lugar v. Edmondson Oil Co.*, defendants actually acted 'under color of law.'" *Id.* at 413 (citation omitted).

207 *Id.* at 409. The Court noted that the most important concern with government immunity is unwarranted timidity. Such a concern is less likely present in a private prison because:

> Competitive pressures mean not only that a firm whose guards are too aggressive will face damages that raise costs, thereby threatening its replacement, but also that a firm whose guards are too timid will face threats of replacement by other firms with records that demonstrate their ability to do both a safer and a more effective job.

Id.

208 *Id.* at 411 (citations omitted).

D. Artificial and Unnecessarily Forced Dichotomy

It is implausible that in litigating a claim by a plaintiff harmed in private care, a plaintiff would be forced to select remedies either exclusively through a civil tort or civil rights law. Skilled litigators acknowledge that although this is an "underutilized area of the law," civil rights claims are effective in advancing the interests of children, particularly those whose harm is attributable to intervention by the state.[209] To exclude a civil rights claim merely on the basis of the availability of tort remedies requires reliance on an artificial and unnecessarily forced dichotomy.

E. Expressive Theory of Constitutional Harm

One of the less obvious, yet equally important, justifications for framing these claims as constitutional rather than civil is the ancillary effects. Indeed, the focus on purely monetary remedies tends to obscure the ways in which the law can otherwise influence behavior for the public good. Framing harm to children in the care and custody of the state as a matter of constitutional law prompts us to consider the ways in which official designation communicates a particular standard of due care, both to those so designated, on whom the public relies, and to the public itself. In essence, it prompts us to inquire into the symbolic value of framing certain harms as violations of individual civil rights.

Assuming that human behavior is significantly shaped by the framework within which interactions occur, it is reasonable to assume that in a private, versus public, setting, the inculcation of public values is less likely to guide individual conduct. I posit that designating the wrongdoer as a public figure, thereby framing the harm as a constitutional violation, will assist in establishing "rules so clearly defined and so generally accepted as effectively to control the actions of [private providers as they do] public officers."[210] Framing harms as constitutional in nature challenges the private agencies to comport themselves, and to order the conduct of their employees, in a way consistent with their designation as "agents of the state"—ideally placing public good above profit, and injecting public-oriented professionalism where an ethos of entrepreneurship may now dominate. In the most tangible example of the expressive ways in which a designation or label communicates a "public" persona, with all the atten-

209 Telephone Interview with Thomas F. Johnson, Esq., attorney in *V.M. v. City of Philadelphia*. (Jan. 16, 2007). Mr. Johnson was the plaintiff's representative in a tragic case of systemic failure on the part of Philadelphia DHS, the private child welfare agency with whom it contracted, and the child's own public guardian. In what is described as "one of the city government's biggest civil-rights awards in memory," the plaintiff was awarded a multi-million dollar settlement for harm she suffered while in the care of the Philadelphia Department of Human Services and the direct supervision of a private agency, Tabor Children's Services, who was paid by DHS to help oversee the child's foster care placement. Ken Dilanian, *A Tragedy that Money Can't Fix*, PHILA. INQUIRER, Dec. 22, 2006, at A1. Interestingly, according to Mr. Johnson, the private provider, Tabor Children's Services, did not challenge its designation as a state actor for the purposes of the suit and instead settled with the plaintiff for a sum of $1 million. Telephone Interview with Thomas F. Johnson, *supra.*

210 Shane, *supra* note 83, at 6.

dant public responsibilities, it would be unthinkable to not require some police officers, at least those who interact regularly with the public, to don uniforms that identify themselves as officers. The uniforms—the veritable "garb" of the state—represent and communicate something to the officer and to the public: that the officer and the State are one. My assertion is not merely speculative; we could easily measure the effect of state actor designation on ostensibly private actors. It is a question worthy of further empirical inquiry whether state actor attribution would translate into more "caring" or "responsible" providers or whether an official designation would provide private actors a greater incentive to adhere to a particular standard of care.

This communicative or expressive justification for state actor designation rests on a subjective application of the state action test, not from the vantage of the alleged state actor, but from the vantage of children and families in the system who are the direct objects of the state's actions. Applying the subjective expressivist theory advanced by Professor Godsil, this argument challenges the belief that "the meaning of government action should be determined from the perspective of an 'objective observer,'. . . [since] this objective observer standard [falsely] presumes that different . . . groups place the same meaning upon the expressive content of a government action that affects them differently." [211] In challenging this "universal" objective observer standard, Godsil acknowledges that "in charged contexts, the same actions or set of circumstances may be perceived very differently depending on the perspective of the observer . . . . [And that] the meaning assigned to such actions is inherently rooted in the perspective of the person interpreting them."[212] In "propos[ing] . . . that the meaning of a government action be determined from the perspective of a reasonable member of the allegedly affected community,"[213] Godsil's argument supports relying on the perspective of those ordered into state care to assess whether they perceive the private providers in whose care they

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211 Rachel D. Godsil, *Expressivism, Empathy and Equality*, 36 U. MICH. J.L. REFORM 247, 250 (2003). Although Professor Godsil does not use expressivist theory in the context of substantive due process rights, as I am attempting to do herein, I find her argument for a subjective assessment of harm in the context of governmental expression particularly useful. She attributes a restatement of expressivist theory to Elizabeth Anderson and Richard Pildes who she says "posit that the legality of an actors' conduct is dependent upon whether that conduct 'expresses appropriate attitudes toward various substantive values.' Actions that convey attitudes that are contrary to accepted norms constitute 'expressive harms.'" *Id.* at 274. As Godsil explains:

> An expression is an action, statement, or any other expressive vehicle that manifests a state of mind. The state of mind can be cognitive—beliefs, ideas or theories—but can also include "moods, emotions, attitudes, desires, intentions, and personality traits." Expression can also take place at the level of state action, where policies and deliberative principles can be interpreted as "expressing official state beliefs and attitudes." The role of expression is to bring a state of mind into the open for others to recognize and interpret. A particular action, statement or other vehicle may be more or less successful in conveying the state of mind of the actor.

Id. at 274.

212 *Id.* at 250.

213 *Id.* at 247.

have been delivered to be state actors or merely private persons.

F. Missing the Mark

Confusion in case law on the matter of liability of private providers arises from the focus on a number of arguably irrelevant factors that courts have nonetheless relied on when attempting to discern the degree of "publicness" or "privateness" of service delivery. I assert that these factors miss the mark with respect to the key underlying feature that bears the ultimate mark of "publicness"—exclusive state dominion.

Perhaps through a lack of understanding, experience, or empathy, courts that have failed to find private providers to be state actors have also rejected a more precise discernment of the role of the state in the tradition of child welfare, focusing instead on the mere participation of private parties in the provision of direct care. However, mere participation of private parties does not render the conduct itself wholly private, just as the mere participation of a state actor does not cloak the conduct under the garb of the state. The strongest example of this axiom would be in the area of privatized prisons. Although there is an extensive history in private enterprise of providing correctional services, most courts would be reluctant to regard incarceration as an historically wholly private affair.[214] There is something distinctly governmental about the deprivation of liberty that characterizes prisons, and something sufficiently parallel to the experience of children and families in foster care to warrant finding private providers to be state actors.

Both the *Stetson* and *Leshko* opinions take pains to note the presence or absence of parental consent to the placement of a child in state care. As noted earlier, such consent is either unnecessary or entirely illusory in the context of the authority wielded by the state against families in the child welfare system.[215] Although the Third Circuit did not explain at length in *Stetson*, it appears that the reluctance to analogize Robert's plight to that facing prisoners and other involuntarily civilly committed individuals appears to be based on an assumption that because minors are perpetually deprived of their liberty, they have as such no independent constitutional claims that can be based on facts suggestive of deprived liberties.[216]

VII. RECALIBRATING THE STATE ACTION TEST IN A NEW ERA OF PRIVATIZED CHILD WELFARE

Just what would an alternative test look like? The faulty application of the traditional state action doctrine and the failure to account for the myriad of services that fall within the category of inherent governmental func-

214 AUSTIN & COVENTRY, *supra* note 14, at 9 (tracing the private sector involvement back to shortly after the first English colonists arrived in Virginia in 1607).

215 Robert S. v. Stetson School, Inc., 256 F.3d 159, 162, 167–68 (3d Cir. 2001); Leshko v. Servis, 423 F.3d 337, 338, 347 (3d Cir. 2005).

216 *Stetson*, 256 F.3d at 169.

tions strengthens the call for a new state action test—one that assesses the intrinsic governmental nature of the function, and one that better reflects our current privatization realities.[217] Under an "intrinsic governmental function" test, rather than focus on the "traditional" and "exclusive" nature of the relationship, a new state action doctrine would regard the intrinsically public nature of the function and the corresponding actor delegated to carry it out as sufficiently indicative of state action.[218] Under such an analysis, the uniquely coercive character of the state intervention must form the backdrop against which any state actor designation is made. Although including factors related to the history of public-private partnerships, an "intrinsic governmental function" test would more appropriately recognize the exclusive kind of coercion that the state exercises when exploring the relationship between the private provider and the contracting public agency.

Although this is not a position advanced in this article, Professor Barak-Erez notes that "[a]nother way to criticize the constraints of the current doctrine is by revealing its unjustified differentiation between state contracting with individuals and state contracting with a [corporation]."[219] In an argument embedded with strains of the Court's symbiotic relationship test, she observes that the contractual relationship that essentially binds the employee to the state might have equal force when exploring the liability of private agencies contracting with the state. According to Barak-Erez,

> The Supreme Court never doubted that public sector employees are state actors . . . . However, looking more closely at the matter, public employees are identified with the state due to their contractual relations with it and, sometimes, the statutory powers given to them. Given this basis, close contractual relations, sometimes coupled with statutory status, should equally suffice with regard to corporations operating public institutions or public services.[220]

The key focus of a new state action test should involve an inquiry into whether the function "necessarily involve[s] the power properly reserved to the sovereign" or whether "the function is largely private in character, requiring none of the coercive powers of the sovereign" to be achieved.[221] Although the case for the continued use of the traditional state action doctrine is based, in part, on the interest of preserving freedom in the private domain from unnecessarily rigid restrictions, this argument proves to be rather misleading, especially in the case of those providing care to children removed from their homes, where such protections from harm are crucial.[222] The focus on the protection of private providers over that of vul-

217 *See* Sullivan, *supra* note 8 (noting varieties of arrangements between governments and private service providers that immunize both government and private groups from constitutional restraints under the Supreme Court's current state action jurisprudence). "Function" as used in the proposed "intrinsic governmental function test" is defined for these purposes as the care of children removed by the state.

218 *See* Metzger, *supra* note 9, at 1369.

219 Barak-Erez, *supra* note 87, at 1187.

220 *Id.*

221 *See* Moe, *supra* note 79, at 457.

222 Barak-Erez, *supra* note 87, at 1185–86.

nerable children is utterly misguided:

> The [critical] question is not whether "pure" private enterprises should be free of constitutional limitations. The question is how to conceptualize the divisions between public and private—whether privatized enterprises are always "private," or sometimes serve as new actors in the public domain. The question is really whether old tests should be applied to new realities.[223]

Ironically, it is the Third Circuit that again offers a relevant example in the attempt to discern a new state action test better, although imperfectly, reflective of the kind of line-drawing necessary in addressing the new public-private partnerships in child welfare. In a case, *C.K. v. Northwestern Human Services*,[224] which followed *Stetson* but preceded *Leshko*, the district court looked not only to the identity of the defendants, but to the purpose of the child's placement in finding that the private providers were state actors under § 1983. *C.K.* involved a child found to be delinquent and placed in the care of a private residential facility, Northwestern Academy,[225] where she alleged that she was sexually abused.[226] The district court found that the private facility and its employees, which had custody of the child pursuant to a state court order, were state actors acting under color of state law because they were performing a quintessentially governmental function.[227] The court described the purpose of her commitment to Northwestern Academy as rehabilitation, which it considered to be "a power that is traditionally exclusively reserved to the State."[228] According to the court,

> We see no basis to reach a different result than in *West* . . . simply because Northwestern Academy is a juvenile facility for delinquent children rather than a prison for adults. Both house persons involuntarily deprived of their liberty as a result of judicial process. Moreover, the court in *Stetson*, in finding no state action by a school for 'dependent child[ren],' was careful to distinguish it from an institution for 'delinquent child[ren].' The court's opinion, as we read it, strongly suggests that it would have found state action had Stetson been an entity having custody of children in the latter category.[229]

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223 *Id.*

224 255 F. Supp. 2d 447 (E.D. Pa. 2003).

225 *Id.* at 448. Northwestern Academy is a subsidiary of a Pennsylvania non-profit corporation, Northwestern Human Services, Inc., "which provides a variety of services to children and adults in Pennsylvania." *Id*.

226 *Id.* For the purposes of my argument, it is irrelevant to distinguish between findings of dependency and delinquency. The literature addressing children in state care supports the understanding that both systems operate for the purpose of treatment and rehabilitation of children and families. Moreover, many child welfare statutes, such as that in *Stetson* and *C.K.* have some overlapping distinctions of delinquency and dependency. For example, 42 PA. CONS. STAT. ANN. § 6302 (2007) defines a "delinquent" child as one who is "ten years of age or older whom the court has found to have committed a delinquent act and is in need of treatment, supervision or rehabilitation" and defines a "dependent" child as one "under the age of ten [that] has committed a delinquent act."

227 *C.K.*, 255 F. Supp. 2d at 451.

228 *Id.*

229 *Id.*

According to the district court, the only manner in which the *Stetson* court was willing to regard Robert as similarly situated to a prisoner were if he had been adjudicated delinquent rather than dependent. However, given that both designations—dependent and delinquent—fall within the scope of child welfare law, with the broadly defined aims of rehabilitation, treatment and substitute care, any distinction between the two, at least as it shapes the identity of the private provider, should be irrelevant. It is for this reason that I view the reasoning in *C.K.*, which reflects the same assumption, to be imperfect. Nonetheless, the court looked to the uniqueness of the role played by the state—to care for children deprived of their liberty—in attributing a public identity to the private providers. In a more sufficiently keyed application of the state action test, the court in *C.K.* explored not only the "links between the private person and the state, but also . . . the significance of each tie and the cumulative effect of the ties."[230]

In a hypothetical application of the intrinsic governmental test, were a child injured by a foster parent or staff member of a residential facility, the child would retain a right to pursue a civil rights claim for deprivation of a constitutional right if the child's placement in that setting were a direct result of the state's unique, exclusive and intrinsic authority to remove children from their homes, thereafter delivering them to the care of others. In this sense, the intrinsic governmental test largely resembles the approach embraced by the court in *C.K.*

On a practical matter, even in the absence of a new state action test, state child welfare agencies should continue to be alarmed about minimal or flawed accountability under the current contracting scheme. As previously discussed, few state agencies have sufficient staff devoted to reviewing private agency compliance with contractual terms. Moreover, there will always be a lack of meaningful review if the criteria for review are simply target percentages of the number of parents who will be satisfied with services and the number of children who reach permanency within a prescribed time frame. The absence of a more robust accountability scheme provides further support for the thesis of this article, that given the unique nature of foster care placement—one that reasonably parallels the circumstance faced by prisoners and individuals involuntarily committed by the state—courts should be more willing to extend liability for constitutional deprivations to those who contract with public agencies for the provision of care.

VIII. CONCLUSION

Regardless of where one stands in the debate on privatized child welfare services, it is clear that these longstanding public-private partnerships will continue to exist in some form or another. That said, the rush to privatization must be tempered by measured concern for the level and effective-

230 BLUM & URBONYA, *supra* note 11, at 11.

ness of accountability, constitutional and otherwise, to all relevant parties.

As it is currently conceived and implemented—often with only vague outcome measures, minimal oversight, and lax accountability—privatized child welfare services fail to sufficiently safeguard child well-being. The failure to address overall well-being is, moreover, accentuated within the context of privatized service delivery as the concept is, in and of itself, a challenging one to operationalize, let alone accurately assess, as a function of performance-based contracting, the now accepted metric in public-private partnerships. Many existing privatization models currently rely on outcome criteria that are not designed for human service evaluation, but rather a managed care model for delivery of health care. Reasonable arguments have been raised that the matter of safeguarding against harm and building in accountability can only be appropriately addressed with properly drafted contracts.

It is clear that privatization works best in the context of limited, discrete and easily measurable outputs. Think of the privatization of trash collection where the output is clearly delineated and assessed—trash must be picked up regularly. There are many similar transactions in the marketplace, with each private trash collection agency competing to deliver better performance within a fairly narrow range of measurable output. Moreover, because government can contract out trash collection or even allow consumers to select from government and non-government providers, trash collection is not an intrinsic governmental function. Since "[p]rivatization becomes less successful as the number of outcomes increases and their quantification is on different measurement scales[,]"[231] the use of outcomes-based metrics is too complex and ill-suited to the human service work that is at the core of child welfare. At the provider level, as well as at the direct service level, the focus should be on precisely defined longitudinal and well-being based assessments with recognition that they might very well clash with the fiscal demands of private for-profit and nonprofit agencies and the timeframe of most public-private contract arrangements. As Professor Kennedy notes, when it comes to purchasing the care and control of drug addicts, the safety and nurturing of children, the relief of hunger and the regulation of family life through child welfare interventions from private agencies, core values other than economic efficiency are at stake.[232] We must recognize "that the impact of this transformation on the future of the American welfare state has not received adequate attention."[233]

Even while acknowledging the importance of contract drafting, monitoring, and compliance, it is critical to admit that these interventions will do little to remedy actual harms caused to service recipients, and whose claims

231 Blackstone & Hakim, *supra* note 57, at 489.

232 Kennedy, *supra* note 10, at 207.

233 *Id.* at 206 (quoting STEVEN RATHGEB SMITH & MICHAEL LIPSKY, NONPROFITS FOR HIRE 11 (1993)).

can only be addressed in the course of litigation. Unlike the state agency that may cancel or decide not to renew contracts with private agencies on the basis of poor performance, the direct recipient of care has no remedy arising from contract compliance or performance monitoring, but only from suit brought against the state and/or private agencies that delivered his or her care. It is here where constitutional claims raised by plaintiffs have slipped through the cracks, as courts have clumsily attempted to graft an antiquated state action doctrine onto a new public-private reality.

The aim of this article has been to highlight this more particularly troubling aspect of the privatization transformation—that "[i]f the state action doctrine does not change to accommodate new realities, we are in danger of losing an important constitutional check on the exercise of administrative power."[234] It is evident that any workable state action doctrine will require flexible application, especially during a period in which we are "reinventing" government. That said, however, flexibility need not trump consistency and predictability. Certain characteristics of the relationship between government and private entities will always be relevant to the inquiry of whether an action can be fairly attributed to the state. Again using the trash collection analogy, it is easy to see how some public-private partnerships are more analogous to private exchanges of goods or services than others. Among the dispositive elements that must be considered are "the existence, nature and extent of government funding; the nature and extent of government control of the activity in question; the extent to which government has authorized a contractor to exercise government powers; and a functional (holistic) analysis."[235] It is my hope that this piece will add to the ongoing dialogue.

234 *Id.* at 207.
235 *Id.* at 219.

Reason and Common Ground: A Response to The Creationists' "Neutrality" Argument

Timothy Sandefur[*]

> What science has to teach us is not its techniques but its spirit: the irresistible need to explore . . . . It has created the values of our intellectual life and, with the arts, has taught them to our civilization. Science has nothing to be ashamed of even in the ruins of Nagasaki. The shame is theirs who appeal to other values than the human imaginative values which science has evolved. The shame is ours if we do not make science part of our world, intellectually as much as physically, so that we may at last hold these halves of our world together by the same values.
>
> –Jacob Bronowski[1]

In my opinion, a recent article in the *Chapman Law Review*, addressing the controversy over teaching evolution and/or creationism in public school classrooms, fell beneath the acceptable standard of scholarly discourse.[2] The author, Stephen Trask, failed to address obvious objections to his thesis, cited virtually none of the scholarly literature on the subject[3]—even the literature that might *support* his thesis[4]—and found not a shred of support in the caselaw. This might be good reason simply to ignore the article, except that the argument Trask advanced appears to be growing in

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1 J. BRONOWSKI, SCIENCE AND HUMAN VALUES 72–73 (rev. ed. 1965).

2 Stephen W. Trask, *Evolution, Science And Ideology: Why the Establishment Clause Requires Neutrality in Science Classes*, 10 CHAP. L. REV. 359 (2006).

3 *See, e.g.*, Matthew J. Brauer, *et al.*, *Is It Science Yet?: Intelligent Design Creationism And The Constitution*, 83 WASH. U. L.Q. 1 (2005); Jay D. Wexler, *Darwin, Design, and Disestablishment: Teaching the Evolution Controversy in Public Schools*, 56 VAND. L. REV. 751 (2003); Colin McRoberts & Timothy Sandefur, *Piercing the Veil of Intelligent Design: Why Courts Should Beware Creationism's Secular Disguise*, 15 KAN. J.L. & PUB. POL'Y 15 (2005).

4 *See, e.g.*, Francis J. Beckwith, *Public Education, Religious Establishment, And The Challenge of Intelligent Design*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 461, 469 (2003) ("exclud[ing] nonmaterialist . . . accounts of natural phenomena . . . is . . . at worst, intellectual imperialism."); Andrew A. Cheng, *The Inherent Hostility of Secular Public Education Toward Religion: Why Parental Choice Best Serves the Core Values of the Religion Clauses*, 19 U. HAW. L. REV. 697, 716 (1997) (schools teaching religion and other matters are "[n]urturing of a [s]ecular [w]orld [v]iew.").

popularity among creationists of all stripes.[5] Moreover, hopes that creationism, or for that matter Postmodernism, would collapse under their own weight have so far not paid out.[6] Sometimes it behooves us to make clear why balderdash is, indeed, balderdash.

First, we will begin with the obvious. Evolution by natural selection is a fact—a well-established, thoroughly documented, experimentally tested, observationally confirmed, real fact. Some contend that evolution need not conflict with religious belief, but for many others, it presents a real crisis.[7] And, as might be expected of a person against whose position the evidence is so strong, Trask tries instead to question the validity of evidence, fact, and truth itself. Picking up on various Postmodernist themes, he begins with the proposition that science is simply one of many equally valid ways of knowing, and that our society's preference for those theories that have been established by evidence, experiment, and observation is simply a prejudice, reinforced by science's "hegemony," which "legitimize[s] the exclusion of those who do not understand truth exclusively through empirical verification."[8] Science has no superior claim to truth;[9] relying on it instead of faith is simply a matter of subjective preference.

Further, Trask argues, the Establishment Clause requires government to remain neutral, and to treat all "ways of knowing" as equal. Science's focus on natural causes rather than supernatural or magical causes,[10] is itself a type of religion, and for government to endorse science, and particu-

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5 *See, e.g.*, Jana R. McCreary, *This Is The Trap The Courts Built: Dealing with The entanglement of Religion And The Origin of Life in American Public Schools*, 37 SW. U. L. REV. (forthcoming, 2007), *available* at http://ssrn.com/abstract=979529. McCreary's article came to my attention only while this article was in press, and time constraints preclude a thorough response to it. McCreary, however, commits many of the same fallacies as Trask, in many instances more egregiously so. Thus the present article will likely suffice. Like Trask, McCreary defines atheism and science as religions, because she uses the following as a definition of religion: "'something people do together to face urgent problems.'" *Id.* at 5. A vaguer definition could hardly be devised. By this definition, everything from Sufism to membership in a political party to buying an umbrella in a rainstorm would qualify as religion! See *id.* at 59 (defining "dogma" as "some sort of belief held" by either a religious or any kind of organization "that is authoritative and that is to be neither disputed nor doubted," a definition which would apply, e.g., to belief that the earth exists). Such wordplay allows McCreary to categorize science as a religion and then to argue, as Trask does, that the Establishment Clause forbids the teaching of science in public schools. *Id.*

6 One excellent discussion of these matters is Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L. J. 453 (1996).

7 Trask is a creationist. Stephen W. Trask, A Loving Designer, AgapeRevolution.com, http://agaperevolution.com/2006/03/22/bishop-of-canterbury-opposes-evolution-in-science-classes/ (March 22, 2006) ("the theory of evolution is theologically inconsistent with the Christian view of God. One of the most important elements of the Genesis creation account is not just that it records how the world was created, it is that God created the world through very specific means that reveals to us what kind of God he is. . . . Although, God could have brought the world into being through a very slow evolutionary process, it would really have been a wimpy God's method of accomplishing the creation of the world."). He believes that the Supreme Court should overturn *Edwards v. Aguillard*, and allow the teaching of "alternatives to evolution science, such as creation science" in government schools." Trask, *supra* note 2 at 368, 390.

8 Trask, *supra* note 2, at 362–63.

9 *Id.* at 364.

10 I use the terms "supernatural," "magical," and "religious," interchangeably.

larly of evolution—by teaching it in schools—is "forcibly indoctrinating students into the religion of secular humanism"[11] and compelling them to undergo "religious instruction."[12] Government instead ought to remain "neutral" by teaching "alternative theories" to evolution in science classes, including explicitly "supernatural" ones.

This argument is troubling for many reasons. I will begin with the epistemological claim—that science is simply one among many different but equal paths to knowledge and that its ascendancy over other methods is due to conflicts between social power structures rather than any objective superiority. I will also consider the related arguments that science's exclusive reliance on natural causes—so called "methodological naturalism"—is an *a priori* assumption, and that science or secularism is a "religion" which falls under the Establishment and Free Exercise Clauses of the First Amendment. In Part II, I will address whether the First Amendment requires the government to remain "neutral" between supernatural and naturalistic worldviews. I will conclude with some observations on the conflict between science and supernaturalism in general.

I. SCIENCE AS A WAY OF KNOWING

A. Competing Epistemologies

The scientific method is a tool of unmatched efficacy. The practical benefits of science are incalculably vast. While its fruits include such modern horrors as atomic weapons, it has also cured diseases, improved crop yields beyond the wildest dreams of former generations, harnessed energy on an unimaginable scale, and provided us with modern conveniences that have become such a part of our lives that we generally take them for granted. Modern medical devices, automobiles and airplanes, telecommunications and computing, refrigeration and farming methods, weather satellites, nuclear attack submarines, comfortable shoes and plastic bags that keep salads fresh for weeks,[13] all owe their existence to the scientific focus on controlling nature by understanding and obeying her.[14] In 1900, life expectancy in the United States was 47.3 years. Today it is 77.8 years.[15] Since 1900, infant mortality in the United States has decreased 90

11 Trask, *supra* note 2, at 365.

12 *Id.* at 390.

13 Recent years have seen the invention of the ready-to-eat salad pack, a remarkable piece of ingenuity that owes its existence to specially designed polymer bags and a technique called "Modified Atmosphere Packaging." *See* B.P.F. Day, *Perspective of Modified Atmosphere Packaging in Western Europe*, 4 FOOD SCI. & TECH. TODAY 221 (1990).

14 Francis Bacon's statement that "Nature to be commanded must be obeyed; and that which in contemplation is as the cause is in operation as the rule" is among the profound thoughts that make Bacon one of the founding fathers of the scientific revolution. FRANCIS BACON, *Novum Organum in* 8 THE WORKS OF FRANCIS BACON 59, 68 (James Spedding, *et al.*, eds., Taggard and Thompson, 1863).

15 NATIONAL CENTER FOR HEALTH STATISTICS, HEALTH UNITED STATES, 2006 WITH CHARTBOOK ON TRENDS IN THE HEALTH OF AMERICANS 176 tbl.27 (2006) available at http://www.cdc.gov/nchs/data/hus/hus06.pdf#027.

percent, and maternal mortality has decreased 99 percent.[16] In 1900, the average worker labored 56 minutes to earn enough money to buy a half-gallon of milk. Today, it's less than 7 minutes. In 1910, it took the average worker two hours and forty minutes of labor to afford a three-pound chicken; today, it takes the same worker 14 minutes.[17] Expensive food and high infant mortality rates were, until the Scientific and Industrial Revolutions, simply facts of life.[18]

Naming the practical benefits of science fails to get at the heart of the issue because science is not just its practical benefits. Obviously, one of science's great goals is to make such practical improvements; to provide, in Francis Bacon's famous words, for "the relief of man's estate."[19] But science is more than a collection of findings; it is a way of getting at the underlying structure of our world, and while it has proven its effectiveness in practical results, focusing only on its material benefits, and not the process, would lead to the problem made familiar in the old adage that if you give a man a fish he will eat for a day, but if you teach him to fish, he will eat for a lifetime. Humanitarian efforts to bring the fruits of scientific research to the Third World may alleviate the poverty in which too many still live, but it is only by teaching others how to think scientifically, and giving them the intellectual tools they need to make future discoveries on their own, that human suffering and ignorance can be reduced.

The scientific method requires observation of natural phenomena, the formation of hypotheses about their nature, the testing of those hypotheses through experiment, and the evaluation of the hypotheses in light of the experimental results.[20] Science seeks "elegant" explanations which will account for the observed phenomena without unnecessary complications, and it seeks general laws that will explain phenomena in terms of simpler phenomena. In this way, it builds what Richard Feynman called a "hierarchy of ideas," which tries to begin with "the fundamental laws of physics," and lead "up in this hierarchy of complexity" towards "words and concepts like 'man,' and 'history,' or 'political expediency,' and so forth."[21] This step-by-step understanding is built by forming "invisible-hand explanations" which will seek to describe the explanandum in terms other than that which

16 Center for Disease Control, *Ten Great Public Health Achievements—United States 1900–1999*, 48 MORBIDITY AND MORTALITY WEEKLY REPORT (MMWR) 242 (1999) available at http://www.cdc.gov/mmwr/PDF/wk/mm4812.pdf.

17 W. MICHAEL COX AND RICHARD ALM, MYTHS OF RICH AND POOR: WHY WE'RE BETTER OFF THAN WE THINK 43 tbl.2.2 (1999).

18 Scientific and technological advancement are only among the more important of many factors that have improved the standard of living. *See generally* NATHAN ROSENBERG AND L.E. BIRDZELL JR., HOW THE WEST GREW RICH: THE ECONOMIC TRANSFORMATION OF THE INDUSTRIAL WORLD (Basic Books 1985).

19 FRANCIS BACON, *The Advancement of Learning*, *in* 3 THE WORKS OF FRANCIS BACON 255, 294 (James Spedding, et. al. eds., Longman & Co. 1857).

20 *See* NATIONAL ACADEMY OF SCIENCES, TEACHING ABOUT EVOLUTION AND THE NATURE OF SCIENCE ch. 3, *available at* http://books.nap.edu/html/evolution98/evol3.html (last visited Oct. 3, 2007).

21 RICHARD FEYNMAN, THE CHARACTER OF PHYSICAL LAW 118–19 (Random House 1994).

is being explained—just as a dictionary will avoid using a word in its own definition.[22] The ultimate goal is a unified and empirically sound understanding of the world.

This understanding of the scientific enterprise flies in the face of the Postmodernist theories underlying Trask's thesis. According to Postmodernism, there is no reality to be understood, or, if there is, it cannot be understood in an objective sense. Instead, what we think of as understanding is really the construction of "narratives"—socially created worldviews which we adopt as "true," but whose truth value runs no deeper than the language in which they are expressed. Man cannot really connect to nature; he is separated from reality by a kind of invisible and impenetrable bubble of language. And these narratives, or paradigms, are tools or weapons that are manipulated in a struggle for power between populations. The "truth" these narratives allegedly describe is really a trick for controlling people and obtaining resources for the privileged elites who are most responsible for constructing and maintaining our social structures.

If nothing else,[23] Postmodernism represents a direct attack on the Enlightenment legacy, and particularly on science.[24] The entire idea of formulating a unified, reliable, objectively true description of the nature of the universe clashes with the postmodern vision that there are different "ways of knowing" that are equally valid—women's ways of knowing, Eastern ways of knowing, and so forth.[25] Science's dream of discovering laws that can be understood by all humanity regardless of their various cultures is therefore doomed. "If, as postmodernists would have it, meaning and truth are inexorably bound to context and historical setting, then the whole point of scientific theorizing would vanish, and science itself would have to be abandoned."[26]

Postmodernist theories appear to be growing in popularity among creationists, and particularly those of the Intelligent Design variety.[27] Phillip

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22 *See* ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 18–19 (1974) (describing "invisible hand" and "fundamental" explanations.).

23 There is good reason to believe there is nothing else. *See generally* Dennis W. Arrow, *Spaceball (Or, Not Everything That's Left is Postmodern)*, 54 VAND. L. REV. 2381 (2001); Dennis W. Arrow, *"Rich," "Textured," and "Nuanced": Constitutional "Scholarship" and Constitutional Messianism at the Millennium*, 78 TEX. L. REV. 149 (1999); Dennis W. Arrow, *Pomobabble: Postmodern Newspeak and Constitutional "Meaning" for the Uninitiated*, 96 MICH. L. REV. 461 (1997).

24 *See* ALAN D. SOKAL AND JEAN BRICMONT, FASHIONABLE NONSENSE: POSTMODERN INTELLECTUALS' ABUSE OF SCIENCE (Picador USA 1998).

25 There is an eerie similarity here to the Nazi claim that "Jewish science" was somehow distinct from *Deutsche physic*. WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH 250 (New York: Touchstone, 1981) (1960).

26 Loren Fishman, *Feelings And Beliefs*, *in* THE FLIGHT FROM SCIENCE AND REASON 87, 95 (Paul. R. Gross *et al.* eds., 1996).

27 *See* Noam Scheiber, *Science Fiction*, NEW REPUBLIC, Sept. 5, 2005 at 6 ("postmodernist ideas have become a staple of the ID movement."); Stanley Fish, *Academic Cross Dressing: How Intelligent Design gets its arguments from the left*, HARPER'S, Dec. 2005 at 70–72; Posting of Nick Matzke to Panda's Thumb, *ID = Postmodern Creationism*, http://www.pandasthumb.org/archives/2005/08/id_postmodern_c.html (Aug. 4, 2005, 11:26 PM).

Johnson, whose books attacking evolution are a cornerstone of the ID movement, has declared his allegiance to Postmodern notions such as deconstructivism.[28] Francis Beckwith, probably the most prominent defender of creationism in the legal academy, argues in many of his articles that science's methodological naturalism is no more or less valid than the embrace of supernaturalism among religious believers and that granting science any greater prestige is "intellectual imperialism."[29] David DeWolf and other writers affiliated with the pro-ID Discovery Institute contend that scientists have "wielded demarcation arguments as a way of protecting the Darwinist hegemony in public education," and portray the scientific community's opposition to the teaching of creationism as based in power, rather than in evidence.[30]

But Postmodernism is ultimately an empty philosophy[31]—if it is a

28 *See* ROBERT T. PENNOCK, TOWER OF BABEL: THE EVIDENCE AGAINST THE NEW CREATIONISM 210 (1999) (quoting Johnson: "After a morning of writing I met Political Science professor Patricia Boling who hosted a noon colloquium for the department faculty and grad students. I told them I was postmodernist and deconstructionist just like them, but aiming at a slightly different target."). Johnson, however, has elsewhere claimed that he is not a Postmodernist. Scheiber, *supra* note 27 at 71 (quoting Johnson: "I'm no postmodernist."). *See also* MICHAEL RUSE, MYSTERY OF MYSTERIES: IS EVOLUTION A SOCIAL CONSTRUCTION? (1999).

29 Beckwith, *supra* note 4, at 469.

30 David K. DeWolf, *et al.*, *Teaching The Origins Controversy: Science, Or Religion, Or Speech?* 2000 UTAH L. REV. 39, 73–74 (2000).

31 The factual, not to say ethical, weakness of Postmodernist relativism has long led Christians to distance themselves from it. After all, Christianity, like other religions, is based on the notion that there is, indeed, one God at least—or at most, *see Exodus* 20:2–3 (King James) ("I am the LORD thy God . . . Thou shalt have no other gods before me")—that both He and the world around us are real and that God placed people in it and has manipulated it as an objective fact. Those who deny these truth-claims are not simply people with different narratives; according to Christianity as to many other faiths, those who deny the objective, factual nature of God's existence, the story of Jesus, and other truth-claims are alleged to be *wrong*. *See, e.g.*, *John* 14:6 (King James) ("Jesus saith unto him, I am the way, the truth, and the life: no man cometh unto the Father, but by me."); 2 *Timothy* 2:12–13 (King James) ("If we suffer, we shall also reign with him: if we deny him, he also will deny us: If we believe not, yet he abideth faithful: he cannot deny himself."); 2 *Peter* 2:1 (King James) ("But there were false prophets also among the people, even as there shall be false teachers among you, who privily shall bring in damnable heresies, even denying the Lord that bought them, and bring upon themselves swift destruction."). *See also Sura* 6:5 (THE KORAN) (N.J. Dawood, trans., London: Penguin Classics 1999 at 93) ("He is God in the heavens on earth. . . . Yet every time a revelation comes to them from their Lord, they pay no heed to it. Thus do they deny the truth when it is declared to them: but they shall learn the consequences of their scorn.").

It is ironic indeed to find Trask defending creationism on Postmodern grounds, given that Christians (and members of other religious groups) have long been concerned about the extreme moral and cultural relativism that lies at the heart of Postmodernism. Indeed, some Christian philosophers have argued that the Intelligent Design version of creationism is an effective way to avoid the relativistic doctrines of Postmodernism. *See, e.g.*, J.P. Moreland, *Postmodernism And The Intelligent Design Movement*, 1 PHILOSOPHIA CHRISTI 97, 101 (1999) (arguing that Intelligent Design creationism will provide Christians with "the rudder necessary to media [sic] between the Scylla of scientific naturalism and the Charybdis of post modernism.") Postmodernism—largely sponsored by thinkers who seek to avoid the often violent clashes between cultures and societies that differ on fundamentals—seeks to defuse conflicts by denying their reality. But this is as contrary to Christian teaching as it is to secular ones. Simply put, Christianity is incompatible with Postmodernism. *See, e.g.*, *Matthew* 10:33–34 (King James) ("whosoever shall deny me before men, him will I also deny before my Father which is in heaven. Think not that I am come to send peace on earth: I came not to send peace, but a sword."); *Revelation* 3:16 (King James) ("So then because thou art lukewarm, and neither cold nor hot, I will spue thee out of my mouth."). *See also* THE DEATH OF TRUTH: RESPONDING TO MULTICULTURALISM, THE

philosophy at all. For all its fashionable jargon, Postmodernism cannot undo the fact that reality is reality, and that in understanding the world around us, we run up against objectively true facts that simply cannot be denied.[32] Postmodernism is a kind of solipsism, impossible for any but the suicidal to take seriously. As Richard Dawkins has eloquently put it, there are no postmodernists at 30,000 feet: "Airplanes built according to scientific principles work. They stay aloft, and they get you to a chosen destination. Airplanes built to tribal or mythological specifications, such as the dummy planes of the cargo cults in jungle clearings, or the beeswaxed wings of Icarus, don't."[33] No amount of linguistic disputation will change this basic, empirically verifiable fact.

What makes science such a special enterprise is that its commitment to objectivity allows it to be universal. People of widely different backgrounds can run the same experiments and see the same results. Whether they are of different races, different political views, or even if they disagree strongly on scientific matters, science enables them to communicate their ideas and to put their disagreements to the test. The history of science is rich with stories of those whose severe disagreements were put to the test, and in which those proven wrong have peacefully and even cheerfully admitted their errors and moved on to learn more.[34] This is because the scientific method allows for the testing of theories before an objective standard—precisely what Postmodernism claims is impossible. Where the Postmodernist envisions minds as locked within their cultural bubbles, unable to touch nature, and unable to communicate entirely with one another, science envisions minds as basically free, able to learn, and to share with and convince others. As Thomas Huxley famously put it, science is simply

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REJECTION OF REASON AND THE NEW POSTMODERN DIVERSITY (Dennis McCallum ed., 1996).

32 Daniel C. Dennett, Postmodernism And Truth, (Aug. 13, 1998) (unpublished paper delivered at the World Congress of Philosophy), *available at* http://ase.tufts.edu/cogstud/papers/postmod.tru.htm. ("[There] are truths about events that really happened. Their denials are falsehoods. No sane philosopher has ever thought otherwise, though in the heat of battle, they have sometimes made claims that could be so interpreted. . . . In short, the goal of truth goes without saying in every human culture."). *See also*, THE SOKAL HOAX: THE SHAM THAT SHOOK THE ACADEMY (Lingua Franca eds., 2000) (dramatizing Postmodernism's failings through publication of a hoax paper claiming on Postmodernist methods to prove that gravity is a myth).

33 RICHARD DAWKINS, RIVER OUT OF EDEN: A DARWINIAN VIEW OF LIFE 31–32 (1995). *But see* Matt Egan, *Nepal Airline Sacrifices Two Goats to Sky God in Face of Aircraft Problems*, FOX NEWS, Sept. 5, 2007, http://www.foxnews.com/story/0,2933,295857,00.html (airline ground crew having technical trouble with a Boeing 757 sacrificed goats to appease the Hindu sky god Akash Bhairab).

34 KARL POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 293 (Routledge Classics, 2006) (1963) ("The history of science, like the history of all human ideas, is a history of irresponsible dreams, of obstinacy, and of error. But science is one of the very few human activities—perhaps the only one—in which the errors are systematically criticized and fairly often, in time, corrected.") But religion, like taste, is amenable to no test in reality and no objective verification. Religious differences cannot be brought to a standard tribunal and settled through experiment. Science requires that differences be settled through persuasion. Religion does not. The history of religious violence attests to the consequences of that difference. *See, e.g.*, JON KRAKAUER, UNDER THE BANNER OF HEAVEN: A STORY OF VIOLENT FAITH (2003); Sherry, *supra* note 6 at 477–82 (explaining that the use of power is the only alternative when reasoned discourse is abandoned, whether by Postmodernism, religion, or other doctrines).

organized common sense:

> Common sense is science exactly in so far as it fulfils [sic] the ideal of common sense; that is, sees facts as they are, or, at any rate, without the distortion of prejudice, and reasons from them in accordance with the dictates of sound judgment. And science is simply common sense at its best; that is, rigidly accurate in observation, and merciless to fallacy in logic.
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> Whoso will question the validity of the conclusions of sound science, must be prepared to carry his scepticism [sic] a long way; for it may be safely affirmed, that there is hardly any of those decisions of common sense on which men stake their all in their practical life, which can justify itself so thoroughly on common sense principles, as the broad truths of science can be justified.[35]

Postmodernism, it is clear, takes skepticism a very long way—much too far for humanity. To subscribe to it one must concede that the everyday facts of reality are merely "language games,"[36] and that there is no objectively verifiable reality about the facts which every living person in actual practice does take as real. One is reminded of the famous story of Dr. Johnson, who, asked his opinion about Berkeley's radical subjectivism, kicked his foot against a stone and cried, "I refute it thus!"[37]

"Naturalistic" science is more than simply another "possible approach[]" to understanding.[38] Contrary to the claims of its Postmodernist critics, science is a robust and universal system with a code of values which we would all do well to emulate. The society of scientists is a diverse, lively, dynamic and peaceful one, united by a search for objectively ascertainable fact.[39]

B. Avoiding Supernaturalism

One increasingly common critique is that science's exclusive focus on natural forces—its so-called "methodological naturalism"—is *a priori*: that is, an assumption made at the beginning of the process; an assumption which cannot be justified and which unfairly stacks the deck against the supernatural.[40] The resolution only to look for natural—not supernatural—

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35 THOMAS HENRY HUXLEY, THE CRAYFISH: AN INTRODUCTION TO THE STUDY OF ZOOLOGY 2 (1880). Obviously science has come to some conclusions that diverge *wildly* from common sense—quantum physics, for example—but these conclusions are just the result of *very*, *very*, organized common sense!

36 Trask, *supra* note 2, at 362.

37 JOHN HOSPERS, AN INTRODUCTION TO PHILOSOPHICAL ANALYSIS 80 (4th ed. 1997).

38 Trask, *supra* note 2, at 364.

39 *See generally* BRONOWSKI, SCIENCE AND HUMAN VALUES, *supra* note 1, at 49–76.

40 *See, e.g.*, Francis J. Beckwith, *Science And Religion Twenty Years after* McLean v. Arkansas*: Evolution, Public Education, And The New Challenge of Intelligent Design*, 26 HARV. J.L. & PUB. POL'Y 455, 457 (2003) (referring to "an *a priori* philosophical commitment to methodological naturalism" allegedly shared by scientists.); Book Note, *Not your Daddy's Fundamentalism: Intelligent Design in the Classroom*, 117 HARV. L. REV. 964, 966 (2004) (reviewing FRANCIS J. BECKWITH, LAW, DARWINISM, AND PUBLIC EDUCATION: THE ESTABLISHMENT CLAUSE AND THE CHALLENGE OF INTELLIGENT DESIGN (2003)) (referring to "an a priori philosophical commitment to [methodological naturalism]" within "evolutionary theory.") *But see* Posting of Brian Leiter to Leiter Reports: A Philosophy Blog, http://leiterreports.typepad.com/blog/2005/10/a_priori_in_the.html (Oct. 3, 2005 08:54

causes is simply the prejudice of resolutely closed minds. This argument is helpful to Trask and others who share his view,[41] because it helps portray science and religion as simply alternative viewpoints which deserve equal treatment under the Constitution's religion clauses.[42] But this is false. Scientists have at least three very good reasons for avoiding supernatural causation in their research.

First, and most obviously, science focuses on natural causes instead of supernatural ones because by now, experience has demonstrated that this is an extremely effective way of doing things. Generations of scientists have made enormous progress on some of humanity's greatest mysteries, and they have done so by seeking out natural causes and putting aside speculations about the supernatural. This, it must be noted, means that methodological naturalism is *not a priori*, but *a posteriori*. Science relies on natural causation because we have discovered that doing so works very well.[43]

Second, science seeks natural causes instead of supernatural ones because supernatural agencies are, by definition, not amenable to scientific inquiry. A supernatural entity—one that operates outside of the course of nature, and is not measurable, predictable, or manipulable—cannot be studied by science anyway. It is reasonable for scientists to confine their efforts to subjects that they can study. There is no sense in reaching for something that is outside of our reach, and a realm of the supernatural is simply not something that can be understood in the terms that science uses. For scientists to focus their attention on natural causes is therefore perfectly legitimate.[44]

Finally, forming a "hierarchy of knowledge" requires scientists to avoid dropping some inexplicable trick into the chain of knowledge—some

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EST) (explaining why methodological naturalism is not *a priori*.).

41 *See, e.g.*, Francis J. Beckwith, *Rawls's Dangerous Idea?: Liberalism, Evolution And The Legal Requirement of Religious Neutrality in Public Schools*, 20 J.L. & RELIGION 423 (2004–2005).

42 Brauer, *et al.*, *supra* note 3 at 46 ("accus[ing] evolutionary scientists of an a priori commitment to [methodological naturalism is an attempt] . . . . [T]o convince supporters and potential recruits that science's naturalism is arbitrary, lacking foundation in the pragmatic necessities of scientific explanation. This makes scientists appear dogmatic and conspiratorial, concerned only to keep creationists' putatively competitive explanation of 'origins' from assuming its rightful scientific status. This approach appeals to Americans' desire that each side of an issue be heard.").

43 *Id.* at 48–49 (science "requires no a priori *metaphysical* commitments. The only commitment is to an empirical methodology, which scientists use with good reason: it works. Natural explanations are scientifically successful; supernatural ones are not.").

44 *See* Barbara Forrest, *Methodological Naturalism and Philosophical Naturalism: Clarifying the Connection*, 3 PHILO 7 (2000). Obviously, if another "reality" did exist, which *could* be measured, predicted, and evaluated, and which had effects on this world, it would then be a legitimate subject of study by scientists. But then, it would cease to be supernatural or otherworldly! For example, scientists have studied the alleged healing effects of prayer, but their study has been confined only to the (purported) natural effects, not to the prayer itself or the Godhead. *See, e.g.*, Jennifer M. Aviles, *et al.*, *Intercessory Prayer And Cardiovascular Disease Progression in A Coronary Care Unit Population: A Randomized Controlled Trial*, 76 MAYO CLINIC PROC. 1192 (2001) (finding no significant effect). Even if such studies demonstrated a significant effect, it would prove only the existence of an interesting *natural* phenomenon, which would then be subsumed under science—but it would prove nothing about a supernatural cause of such a phenomenon.

special "X"-factor which will pretend to connect two halves of a theory together but which ultimately leaves the mystery unsolved. Daniel Dennett refers to such tricks as "skyhooks," because they hang from nothing, holding up a theory without having to touch the ground, as it were.[45] A skyhook aims to provide an exception to the mechanistic, natural processes that connect real phenomena to one another. It provides a magical spark, or *deus ex machina*, in a system that otherwise would be the simple working of mindless forces on mindless entities. Science avoids skyhooks because skyhooks do no explanatory work, and they tend to swallow up the explanatory power of those theories that *are* well established.

For example, if a person wants to know how genes control the development of an animal, a scientist would explain how the molecules of DNA and RNA work—how a gene is transcribed by the ribosome into a protein, which then sets in order cellular processes, which in turn control the metabolism and make up the structures of tissues . . . . Eventually, such an invisible hand explanation can connect the most sophisticated processes to the most fundamental ideas that science now understands. But tell a person "it's magic," and nothing is accomplished: no explanation is provided at all. Magic is an intellectual dead-end, a wall against which questions simply bounce back. If a person asks, "How does magic work?" or "Why does magic have this result instead of a different result?" the answer is simply, because that's just what magic does. There just *is* no deeper answer.[46] But if magic is an end to the inquiry, why not also use it to "explain" everything else? The formation and functions of the body work because of the (awesomely complicated) mechanical functions of the proteins and amino acids—or it's just magic, and trying to understand magic is, of course, pointless. After all, it's magic, not boring old comprehensible science! Magical "explanations" do just as much work for every phenomenon to which they are applied, no matter how complicated—that is to say, none at all. They merely substitute words in place of an explanation. Like "because I said so," the statement "it's just magic" is fundamentally *arbitrary* because it can with equal plausibility apply to any possible state of affairs.

This point is especially relevant to the evolution controversy. The philosopher of science Jacob Bronowski put the point well when asked whether evolution didn't just implausibly suppose that everything came

45 DANIEL C. DENNETT, DARWIN'S DANGEROUS IDEA: EVOLUTION AND THE MEANINGS OF LIFE 74–77 (1995).

46 This seems to me to be the lesson of the Book of Job, wherein the abused Job finally asks for some explanation for his sufferings and is rebuked for daring to question. Job then repents. *Job* 38:2–42:6. *Cf.* Sherry, *supra* note 6 at 476 ("Because God's commands need not be rational, logical, or consistent, . . . [reference to] God's will is essentially a conversation stopper . . . . If one does not share the underlying faith, one is reduced to arguing about whether the believer has properly interpreted God's commands. That is a sterile argument indeed—focusing on authority rather than morality—and one which is particularly unlikely to succeed in the context of any religion that denies individual believers the right to dissent from authorized interpretations.") There is obviously a big difference between saying that there is no answer and saying that one does not (yet) *know* the answer, but that it is out there for the finding. Science does the latter all the time.

about by mere accident:

> On the contrary, it is those who appeal to God and special creation who reduce everything to an accident. They assign to man a unique status on the ground that there was some act of special creation which made the world the way it is. But that explains nothing, because it would explain anything: it is an explanation for *any* conceivable world. If we had the color vision of the bee combined with the neck of the giraffe and the feet of the elephant, that would equally be explained by the "theory" of special creation.[47]

Magical "explanations" therefore teach nothing—yet consider Trask's statement that "exclusion of supernatural theories from science classes marginalizes religious belief."[48] If the implication here is that supernatural "theories" ought to be included in science lessons, one can only imagine what science classes would be like. In addition to thoroughly documented, well-substantiated scientific propositions, teachers would be compelled to list—non-judgmentally—the many varieties of (often conflicting) supernatural propositions from every religion, major and minor, each of which lacks evidentiary support or even the potential for such support. If the teacher explains that earthquakes are caused by the motions of the Earth's tectonic plates, he would then be required to explain that there are equally legitimate notions that they are caused by Poseidon becoming angry at the moral transgressions of sailors,[49] or the laughter of the Egyptian god Geb,[50] and that no mere empirical evidence for or against these propositions is available or possible, because these are just different ways of knowing, and it's up to the children to decide what to believe. In the end, science avoids these "supernatural explanations" [51] because there simply are no such things: appeals to the supernatural are not explanations at all.

C. Is Science A Religion?

Another essential point for Trask is the argument that science is part of a "religion" of "secular humanism" which has gained unfair advantages with the public, and particularly in classrooms. This "religion," Trask claims, "emerge[s] logically and necessarily from the materialist scientific method."[52] Teaching science, therefore, and particularly evolution, is a form of "forcibl[e] indoctrinat[ion]" in the religion of secular humanism.[53]

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47 George Derfer, *Science, Poetry and "Human Specificity": An Interview with J. Bronowski*, 43 AM. SCHOLAR 386, 399–400 (1974). *See also* CARL ZIMMER, EVOLUTION: THE TRIUMPH OF AN IDEA 332 (2002) (quoting Richard Dawkins: "If you're allowed just to postulate something complicated enough to design a universe intelligently. . . . [y]ou've simply allowed yourself to assume the existence of exactly the thing which we're trying to explain . . . You're simply not providing any kind of explanation at all.").

48 Trask, *supra* note 2, at 382.

49 HOMER, ODYSSEY *reprinted in* CLASSICAL MYTHOLOGY: IMAGES & INSIGHTS 469, 470–71 (Stephen L. Harris & Gloria Platzner eds., Stanley Lombardo trans., McGraw-Hill, 4th ed. 1995).

50 GEORGE HART, THE ROUTLEDGE DICTIONARY OF EGYPTIAN GODS AND GODDESSES 59 (2d ed. 2005).

51 Trask, *supra* note 2, at 364.

52 *Id.* at 365–66.

53 *Id.* at 365.

To begin with, this claim commits the fallacy of affirming the consequent. Assuming it is true that secular humanism is a religion, and that evolution or other scientific theories are a part of that religion, it still would not follow that teaching these scientific theories would constitute forbidden indoctrination. Many true claims—*e.g.*, that Augustus was once Emperor of Rome[54]—are subsumed under religious doctrines, but they are not therefore religious claims.

More to the point, Trask contends that science "requires as much faith as belief in the supernatural."[55] He bases this claim on the assertions that for science to legitimize itself would be circular reasoning, because the precepts to which such a justification would appeal are themselves the constructs of secular, scientific society,[56] and also that "science cannot prove through the senses alone that all true knowledge must be directly accessible to the senses," since trying to do so would beg the question.[57]

The latter charge can be dealt with quickly: scientists do not claim that all true knowledge must be accessible through the senses, but merely that *scientific* knowledge must be accessible through the senses. Nor does science claim that all true knowledge can be understood through the scientific method; it claims merely that all *scientific understanding* must be based on empirical evidence and processed by reason. Realist philosophers do hold that all valid knowledge must be in some way reducible to sense experience, but they do not hold that *all* knowledge must *directly* accessible to the senses. Mathematics, for example, is not directly accessible to the senses. But for such knowledge to be of any use to humans, it must be demonstrable in a way that can be confirmed by some sort of sensory experience, if for no other reason than that it can then be taught to others.

A more complicated issue is the oft-heard claim that all knowledge has a foundation in faith because, although we may establish thorough, logically sound constructs, our basic assumptions must always be mere assumptions: for example, sophisticated chains of reasoning still make the "leap of faith" that sensory data are reliable. This argument is wrong, since it confuses assumptions with axioms. Axiomatic knowledge is *not* taken on faith, or merely assumed; rather, axioms are propositions that contain their own proof and cannot be denied without being simultaneously relied upon.[58] Science establishes its propositions by experimental confirmation

54 But not at the time when Cyrenus ruled Syria and Herod I ruled Judea. *Compare Luke* 1:5, 2:1–2 (asserting that Augustus, Cyrenius, and Herod I ruled at the same time) *with* ROBIN LANE FOX, THE UNAUTHORIZED VERSION: TRUTH AND FICTION IN THE BIBLE 28 (1991) (noting that Cyrenius (Quirinus) was not governor of Syria until a decade or so after the death of Herod.).

55 Trask, *supra* note 2, at 363.

56 *Id.* In other words, scientists defending their work on the grounds that their discoveries are supported by the evidence are just begging the question because the value of evidence is merely one of science's assumptions! "Tantum religio potuit suadere malorum." LUCRETIUS, DE RERUM NATURA 1:101 (W. H. D. Rouse trans., 3d ed. rev. 1966).

57 Trask, *supra* note 2, at 363.

58 *See generally* ARISTOTLE, *Metaphysics* bk IV ch. 3–4, *in*, THE BASIC WORKS OF ARISTOTLE 735–43 (Richard McKeon, ed., Random House, 1941); Tibor Machan, *Evidence of Necessary Exis-*

using perceptual data[59] which are themselves the irreducible, non-arbitrary foundation of cognition.[60] A similarly common contention is that science must assume—with apparent arbitrariness—the validity of induction: a scientist is merely guessing that because the sun has risen countless times, it will rise again in the morning. This is really just an assumption, not a logical necessity, so the chain of reason is said to collapse here. This too, is incorrect. Induction is a process of grasping the similarities and differences in causal relationships and forming a complete conceptual understanding.[61] Moreover, the whole point of the experimental method, as opposed to mere contemplation, is that it has a healthy relationship with inductive reasoning, since experimentation alone allows us to test the veracity of our inferences. Since inference is typical in human thinking, science provides us with a uniquely effective way to weed out bad induction from good: formulation of hypotheses, testing with empirically verifiable results, and then refinement or rejection of invalid inferences. This is the exact opposite of faith or guesswork.

As to Trask's claim that science cannot legitimize itself except through circular reasoning, it is difficult to refute on the Postmodernist premise that science is just a "language game."[62] But it is not—it is a pursuit that proposes and accomplishes actual results in the real world. This alone legitimizes science as an epistemological matter. Contrary to Trask's claim that science has no "superior claim to proof"[63] over supernaturalism, the predictive power of the modern world's rigorous scientific theories do indeed establish their superiority over supernaturalism. In 1967, a crowd of Vietnam War protestors led by Abbie Hoffman tried to use chanting and meditation to cause the Pentagon to levitate off the ground. Needless to say, this attempt failed. Two years later, NASA scientists put two men on the surface of the moon, using equations and experimentally tested theories tracing back to Sir Isaac Newton.[64] Science has a superior claim to legiti-

tence, 1 OBJECTIVITY 31 (1992).

59 Of course, we can err in interpreting our perceptions, and some people's perceptual apparatus might not function properly. This is why science requires *intersubjectively accessible* data. In this connection, what Coke said of the common law is true also of science, that it is "nothing else but reason, which is to be understood of an artificial perfection of reason, gotten by long study, observation, and experience, and not of every man's naturall [sic] reason." EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND *97b (William S. Hein Co. 1986) (1600–1615). This fact does not mean, however, that sensory data are taken on faith, however; just that they are corrected against observations by others.

60 This is a complicated subject, far beyond the scope of this paper, and one on which scientists themselves differ. For in-depth discussions of the view (that I share) that the chain of reason need not be hooked to an arbitrarily assumed base, *see* AYN RAND, INTRODUCTION TO OBJECTIVIST EPISTEMOLOGY (Harry Binswanger & Leonard Peikoff eds., rev. 2d. ed., Meridian 1966); TIBOR R. MACHAN, OBJECTIVITY: RECOVERING DETERMINATE REALITY IN PHILOSOPHY, SCIENCE, AND EVERYDAY LIFE (2004); DAVID KELLEY, THE EVIDENCE OF THE SENSES: A REALIST THEORY OF PERCEPTION (1986).

61 *See* David Harriman, *Induction And Experimental Method*, 2 THE OBJECTIVE STANDARD 73, 100–07 (2007).

62 Trask, *supra* note 2 at 362.

63 *Id.* at 364.

64 *See* AYN RAND, *Apollo And Dionysus*, *in* THE RETURN OF THE PRIMITIVE: THE ANTI-

macy if for no other reason than that its techniques enable us to predict results and accomplish our ends on such a spectacular scale.

For a similar reason, science is "good." There is a sense in which it is true that science—understood in the modern sense as a specific kind of research—cannot vouch for its own worth. If science is a worthy undertaking for human beings, it must fit into a hierarchy of values—of "goods" for human beings. That is, it must be justified in terms of its service of certain ends. The ends which science serves—the "relief of man's estate"—are good ends because for human beings there simply cannot be any other definition of goodness than the flourishing of human beings.[65] There is no circularity in justifying science on these grounds: it is validated by its service of man's needs. And once again, naturalistic science passes this test spectacularly. Trask approvingly quotes the Postmodernist Jean-François Lyotard, who writes that "there is no other proof that the rules [of science] are good than the consensus extended to them by the experts,"[66] but this is absurd: the proof that the rules of science are good are the smallpox vaccine, heart bypass surgery, jet aircraft, Apollo 11, and golden rice.[67] And these things, in turn, are good because they are good for man.

Science is not a religion. Although the word "religion" is notoriously difficult to define,[68] it is at least clear that it includes some reference to supernatural or transcendental forces that possess volition. In *United States v. Meyers*,[69] the court rejected the argument of a litigant who claimed to be a member of the "church of marijuana," and provided a remarkably good definition of religion. Among other things, religions generally include reference to "fundamental questions about life, purpose, and death," "address a reality which transcends the physical and immediately apparent world," are usually "founded or significantly influenced by a deity, teacher, seer, or prophet who is considered to be divine, enlightened, gifted, or blessed," "designate particular structures or places as sacred, holy, or significant," include a "clergy . . . [who] are keepers and purveyors of religious know-

INDUSTRIAL REVOLUTION 99 (Peter Schwartz ed., Meridian 1999).

65 TARA SMITH, VIABLE VALUES 125–45 (2000). Smith states that "[f]lourishing refers to a life that is prospering or in good condition" and that "what makes a life good is its being led in a life-furthering fashion." *Id.* at 126–27.

66 Trask, *supra* note 2, at 368 (quoting JEAN-FRANÇOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE 29 (Geoff Bennington & Brian Massumi trans., Univ. of Minnesota Press 1984) (1979).

67 Of course, science has also brought us fearful things such as nuclear weapons. Nevertheless, science has alleviated far more human suffering than it has caused. J. BRONOWSKI, THE COMMON SENSE OF SCIENCE 146–47 (Harv. Univ. Press, 1978) (1951).

68 *See, e.g.*, Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233 (1989); Ben Clements, Note, *Defining "Religion" in The First Amendment: A Functional Approach*, 74 CORNELL L. REV. 532 (1989); Andrew W. Austin, *Faith And The Constitutional Definition of Religion*, 22 CUMB. L. REV. 1 (1991–1992); Recent Case*: Massachusetts Supreme Judicial Court Invalidates Religious Holiday Statute Protecting Only Established Religions*, 110 HARV. L. REV. 541 (1996).

69 906 F.Supp. 1494 (D.Wyo. 1995), *aff'd* 95 F.3d 1475 (10th Cir. 1996).

ledge," and "include some form of ceremony, ritual, liturgy, sacrament, or protocol . . . imbued with transcendent significance."[70] These things are not true of science. To define science as a religion would require one to stretch the definition of "religion" too far, so that every form of belief, from the Boy Scout Oath to the platform of the Democratic Party to the beliefs of the most rigorous atheist, would also be a religion.[71] Such a definition is unworkable, and, as the Ninth Circuit Court of Appeals has noted, "patently frivolous."[72] Indeed, such a definition of religion "cannot be found in the dictionary, in the Supreme Court cases, or anywhere in the common understanding of the words."[73]

D. All Epistemologies Are Not Created Equal

As Matthew J. Brauer, Barbara Forrest, and Steven G. Gey conclude in *Is It Science Yet?* (the definitive law review article on contemporary creationism[74]), science's focus on natural causation rather than supernatural

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70 *Id.* at 1502–03.

71 It is true that the Supreme Court, in a footnote in *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961), identified "secular humanism" as one of the "religions" to which the First Amendment applies. But this footnote—dictum in that case—is not as conclusive as some writers contend. It, and the cases it cited on this point—*Washington Ethical Society v. District of Columbia*, 249 F.2d 127 (D.C. Cir. 1957) and *Fellowship of Humanity v. County of Alameda*, 153 Cal.App.2d 673 (1957)—did not address Establishment Clause issues, and did not hold that "humanism" (whatever that term might designate) is a religion for Establishment Clause purposes. *See* Kalka v. Hawk, 215 F.3d 90, 99 (D.C. Cir. 2000) ("The Court's statement in *Torcaso* does not stand for the proposition that humanism, no matter in what form and no matter how practiced, amounts to a religion under the First Amendment."). *See also* Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517, 521 (9th Cir. 1994) ("neither the Supreme Court, nor this circuit, has ever held that evolutionism or secular humanism are 'religions' for Establishment Clause purposes."). This difference is important because the Establishment and Free Exercise Clauses cover different issues. *See generally* Zelman v. Simmons-Harris, 536 U.S. 639, 679 n.4 (2002) (Thomas, J., concurring); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 246–57 (1998). What might be a protected individual right under the Free Exercise Clause—the right to subscribe to and practice a particular philosophical position—may not be barred to the government under the Establishment Clause. Take, for example, the faith of the World Church of the Creator, a white supremacist group that believes God created white people superior to black people. While the government is barred from obstructing the free exercise of such beliefs by the church's members, it is not barred from declaring officially that whites and blacks are created equal, even though its doing so may offend members of the church. *See generally* Hein v. Freedom From Religion Foundation, Inc., 127 S.Ct. 2553, 2582 (2007) (plurality) ("Is a taxpayer's purely psychological displeasure that his funds are being spent in an allegedly unlawful manner ever sufficiently concrete and particularized to support Article III standing? The answer is plainly no.").
In addition, the two cases cited by *Torcaso* involved humanist groups which sought tax exemptions that had been provided for religious organizations. Those two cases only addressed the question of whether belief in a "supreme being" was the *sine qua non* of "religion." The groups in question engaged in many ceremonial and ritualistic practices that echoed traditional religious observances, which cannot be said of scientists or of most secular humanists. It appears that the religious group involved in *Washington Ethical Society*, in particular, were mystical or semi-mystical, and therefore that its characterization as "secular" is open to doubt. *See* 249 F.2d at 128 ("The services of the organization held at regular hours each Sunday have the forms of worship service with Bible readings, sermons, singing and meditation familiar in services of many formal or traditional church organizations. Its program bears the words 'Where Men Meet to Seek the Highest is Holy Ground.'").

72 *Peloza*, 37 F.3d at 520.

73 *Id.* at 521.

74 Brauer *et al.*, *supra* note 3. It is inexplicable that Trask fails to cite this article, (or any other work which responds to the arguments he makes). No discussion of the evolution controversy is com-

causation "has nothing to do with a crass desire for explanatory (or political) hegemony. Scientists exclude the supernatural because they are unable to construct explanations that require access to a reality beyond the cognitive faculties and sources of knowledge humans are known to have."[75] The argument by Trask, Philip Johnson[76], and others, that science excludes the possibility of supernaturalism in order to bar religion at the door is a misrepresentation. And, contrary to Trask's contention that science's success unfairly excludes religious belief from the marketplace of ideas, there is good reason that science has prevailed: it works. It was scientific research and experiment that cured smallpox, and not the fruitless efforts of countless millions who pursued other "narratives" through prayer and folk medicine.

Trask's Postmodern notion that all epistemologies are created equal is belied by the common experience of mankind and by the very nature of knowledge. We can see the point clearly by simply rewriting a paragraph of Trask's article to refer to a specific supernatural belief. The ancient Greeks thought that the winter cold was caused by Persephone's visit to her husband Hades, the god of the underworld.[77] Modern astronomy has revealed that the seasons are caused by the tilt of Earth's axis. But the demand for equal treatment of secular and supernatural beliefs might run along these lines:

> The exclusive teaching of [the idea that the seasons are caused by the tilt of Earth's axis] in public schools is an advancement of the religion of secular humanism. There is an inherent connection between [scientific astronomy] and the secular humanist worldview. Secular humanists generally reject knowledge that science cannot test [such as that Persephone's visit to the underworld causes the seasons]. Since one cannot directly test the supernatural, secular humanists inevitably adopt a naturalistic worldview, which is the belief that there is only a natural realm and no supernatural. Any secular humanist theory about the [cause of the seasons] cannot rely on the supernatural because that would be inconsistent with naturalism. Therefore, there is an inherent link between secular humanism and [astronomy] because [astronomy] is an exclusively materialistic theory about the origin of [the seasons]. . . . [T]he exclusion of supernatural theories from science classes marginalizes religious belief. It creates the impression that secular humanism is a practical device that allows people to understand the world today, and religion is only an object of historical study concerning some deranged people of the past.[78]

The absurdity makes the point clear: the reason supernatural "theories" are not a serious part of scientific discourse is that they have not fit the facts and have not yielded useful conclusions. Does Trask really be-

plete without reference to this paper.

75 *Id.* at 50.

76 Phillip E. Johnson, *Evolution as Dogma: The Establishment of Naturalism*, FIRST THINGS, Oct. 1990, *available at* http://www.arn.org/docs/johnson/pjdogma1.htm.

77 *See* HOMERIC HYMN TO DEMETER, *reprinted in*, CLASSICAL MYTHOLOGY, *supra* note 49, at 164–74.

78 Trask, *supra* note 2, at 381–83.

lieve such "theories" as Greek mythology ought to be accorded the same respect as our modern understanding of the causes of the seasons? After all, to call the Persephone myth a "myth" would denigrate it and make it seem deranged—because, of course, it *is*, by our standards. The Persephone myth is simply *not true*. For those who believe that "truth" is something more than a cultural prejudice, this is a convincing reason to exclude the Persephone myth from laboratories and science classes. Taken to its logical conclusion, Trask's argument would require science teachers to include in their lessons a potentially infinite number of unsubstantiated dogmas,[79] as well as astrology, phrenology, heliocentrism, the flatness of the earth, and the immortality of the Count of St. Germain.

It is precisely because science is *not* a religion—that it focuses on empirically verifiable facts—that it is accessible to people of diverse backgrounds and is capable of getting them to change their minds. A person who insists on the truth of the Persephone myth, a belief amenable to no test in reality, cannot be shaken of that notion. But the person who holds a false belief while accepting empirical verification and experiment as a test of truth, can look at the evidence, do the experiments, and see where she has erred. As Suzanna Sherry notes, rational discourse becomes impossible in the absence of such an agreement on objective testing: "[a]necdotal evidence replaces scientific data, and telling stories becomes the equivalent of making rational arguments. Thus, what people say becomes as important as what they can 'prove,'. . . . Once the commonality of reason is rejected, knowledge is intensely personal . . . ."[80]

Science and supernaturalism are simply not equally valid ways of understanding the world. Science, with its commitment to exclusively natural explanations, has proven itself with practical results, highly reliable predictions, a consistent and robust system of knowledge, an intricately integrated network of theory, and a universal culture of ideas and methods accessible to a widely diverse population. If any culture can lay claim to universal values, it is the culture of science.

II. THE ESTABLISHMENT CLAUSE AND NEUTRALITY

Nothing in the Constitution requires government to remain "neutral" between naturalistic and supernatural worldviews. The only restriction that the Constitution places on government's relationship to supernaturalism

79 I strongly suspect that Trask would *not*—as consistency would require of him—hold that the government should teach *every* religious view equally. Instead, I suspect he shares Justice Scalia's view that the Constitution "permits . . . disregard of polytheists and . . . devout atheists" since "[t]he three most popular religions in the United States, Christianity, Judaism, and Islam—which combined account for 97.7% of all believers—are monotheistic." McCreary County, Ky. v. Am. Civ. Liberties Union of Ky., 125 S. Ct. 2722, 2753, (2005) (Scalia, J., dissenting). This, of course, in the words of James Madison, "is to lift the evil at once and exhibit in its naked deformity the doctrine that religious truth is to be tested by numbers, or that the major sects have a right to govern the minor." JAMES MADISON, *Detatched Memoranda*, *in* JAMES MADISON, WRITINGS 745, 763 (J. Rakove ed. 1999).

80 Sherry, *supra* note 6, at 459.

appears in the First Amendment, which forbids government from "establishing" a religion or from interfering with those who wish to "exercise" their religions. In *Epperson v. Arkansas*,[81] the Supreme Court held that "The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion,"[82] but Trask and other writers have pulled this language out of context to suggest that government may not endorse or base its policies on scientific, natural explanations of the physical world.[83]

This is obviously a misreading of the First Amendment. If government were truly required to remain neutral between "naturalism" and "supernaturalism," it would be impossible for it to accomplish anything without making a potentially infinite number of paralyzing accommodations. For example, it would be unable to teach children that AIDS is caused by a virus, unless it provided equal time for those who believe that it is God's punishment for the sin of sodomy.[84] It would not be allowed to prevent the abuse of women and children among communities that hold women to be second-class citizens and children the "property" of their parents, subject to "honor killings" and genital mutilation. And if a city happens to have any citizens with Aztec roots, it had better take care not to consult scientific research on fire hazards without also appeasing the fire god Huehueteotl, who liked to have newlywed couples sacrificed to Him.[85]

This may sound flippant, but the reality is quite serious indeed. In July, 2007, police in Phoenix, Arizona responded to a domestic disturbance to discover 48-year old Ronald Marquez in the act of choking his three-year-old granddaughter to death. Looking on was the baby's 19-year-old mother, naked and covered in blood. Marquez was performing an exorcism, trying to expel demons from the infant by strangling the life out of her. Police officers saved her life by tasering the man (who died from the shock).[86]

A nation in which the First Amendment prohibits the government from "adopt[ing] a distinctly materialistic belief. . .that directly conflicts with other religious beliefs"[87] is one in which the police officers would be prohibited from saving this little girl's life. After all, their doing so certainly "marginalized" the grandfather's religious beliefs. Who are the police to say that the child was *not* suffering from demonic possession? To suggest that natural, scientific causes can account for whatever illness the child may have had is no answer, according to Trask's argument, because it is based on an epistemology that is unfairly biased against supernaturalism.

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81 393 U.S. 97 (1968).

82 *Id.* at 104.

83 Trask, *supra* note 2 at 371; *Contra* McRoberts & Sandefur, *supra* note 3, at 39–47 (responding to the "neutrality" argument).

84 *Cf.* Sherry, *supra* note 6, at 482–83.

85 MARY MILLER & KARL TAUBE, AN ILLUSTRATED DICTIONARY OF THE GODS AND SYMBOLS OF ANCIENT MEXICO AND THE MAYA 92 (1993).

86 Elias C. Arnold, *Fatal End to Exorcism Attempt*, ARIZ. REPUBLIC, July 29, 2007, at A8.

87 Trask, *supra* note 2 at 386.

Indeed, it would be a cruel form of cultural imperialism.

Trask's argument is clearly nonsense. A society which consistently prohibited its government from preferring secular reasoning over supernaturalism would be paralyzed. Moreover, the Constitution clearly contemplates a government which shall base its actions on secular reasons.

A. Consistent "Neutrality" Between World Views Would Be Unworkable

In *Employment Division v. Smith*,[88] the Supreme Court held that a person's religious beliefs cannot absolve him of obeying laws which are designed for a general, secular purpose. There, a religious group contended that a federal law against the use of hallucinogens violated their Free Exercise rights, since their religious ceremonies included the use of such drugs. The Court explained that that theory would grant religious believers a kind of heckler's veto over legitimate enactments. "Any society" which exempted people from laws whenever such people claimed a supernatural reason for such an exemption "would be courting anarchy," particularly given America's "diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference,' and precisely because we value and protect that religious divergence, we cannot afford [that] luxury."[89] The argument that the First Amendment prohibits the government from any action which restricts a person's obedience to alleged supernatural revelation "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind. . . ."[90]

This conclusion is certainly true. As the Court noted, there are an indefinite number of religious claims purporting to exempt a person from the demands of a modern secular culture. Litigants have demanded religious exemptions for everything from school attendance laws[91] to laws requiring children to be vaccinated.[92] In one case, a group of prisoners claimed to have founded a religion which required them to be fed steak and wine at each meal![93] Because supernatural claims have no test in reality, they can stop rational discourse and rational policies in their tracks. The First Amendment does not go so far. In fact, government is free to base its policies on secular considerations and to choose good science over bad.[94]

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88 494 U.S. 872 (1990).

89 *Id.* at 888 (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961)).

90 *Id.*

91 Wisconsin v. Yoder, 406 U.S. 205 (1972).

92 Cude v. State, 377 S.W.2d 816 (Ark. 1964).

93 Theriault v. Silber, 391 F. Supp. 578, 582 (W.D. Tex. 1975), *vacated*, 547 F.2d 1279 (5th Cir. 1977).

94 *See* Jacobson v. Massachusetts, 197 U.S. 11 (1905) (upholding Massachusetts legislature's decision to require vaccinations despite some scientific skepticism about the efficacy of vaccinations); United States v. Downing, 753 F.2d 1224, 1238 n.18 (3d Cir. 1985) (taking judicial notice "of the invalidity of . . . astrology or phrenology.").

Moreover, government is free to *promote* sound science, by subsidizing its publication by private parties or by teaching it directly. This is unsurprising, since government is free to promote sound history, and other subjects. When one concedes that government may teach people about World War II—whether through government schools, or monuments, or other ways—one must concede that it may also teach them *accurately* that, for instance, it may teach about the Holocaust, despite the fact that there are people who deny that it occurred. When one concedes that government may teach students geography, one must also concede that it may teach them that the world is round, even though there are people who do not believe this.[95] If one concedes that the government has the right to give grants to private organizations that teach science, including science which some people consider controversial for religious reasons, then one must concede that government may choose to give grants to private organizations that make accurate statements about both the science and the religious controversy.[96]

In *Crowley v Smithsonian Institution*,[97] the plaintiffs challenged the Smithsonian's use of government funds to set up an exhibit on evolution, arguing that it violated the Establishment Clause. The exhibit, they claimed, promoted what they called the "religion" of secular humanism.[98] Seeking to "balance [the] appellants' freedom to practice and propagate their religious beliefs in creation without suffering government competition or interferences and [the Smithsonian's] right to disseminate, and the public's right to receive, knowledge from government," the court concluded that the "balance was long ago struck in favor of diffusion of knowledge based on responsible scientific foundations, and against special constitutional protection of religious believers from the competition generated by such knowledge diffusion."[99] It noted that the "solid secular purpose of 'increasing and diffusing knowledge among men'"[100] was sufficient to permit the expenditure of federal funds despite the fact that some people might interpret the display as having religious connotations:

> Nor does it follow that government involvement in a subject which is also important to practitioners of a religion becomes, therefore, activity in support of religion. For example, birth control and abortion are topics that involve both religious beliefs and general health and welfare concerns. Many religious leaders have vigorously opposed government support of the teaching and practice of birth control and government support, or even toleration, of abortion. Controver-

95 Robert P.J. Day, Documenting the existence of the "International Flat Earth Society," http://www.talkorigins.org/faqs/flatearth.html (visited Sept. 29, 2007).

96 *But see* Francis Beckwith, *Government-Sponsored Theology*, THE AMERICAN SPECTATOR, Apr. 7, 2004, http://www.spectator.org/dsp_article.asp?art_id=6395 (last visited Aug. 13, 2007) (arguing that Establishment Clause was violated when government-funded National Science Foundation gave grant to U.C. Berkeley to establish website on evolution.).

97 636 F.2d 738 (D.C. Cir. 1980).

98 *Id.* at 740.

99 *Id.* at 744.

100 *Id.* at 740 (citation omitted).

> sy, including litigation, about these subjects has been prolific and spirited. No court, however, has finally held that government advocacy of or opposition to either birth control or abortion violates the establishment clause of the first amendment.[101]

Trask objects to *Crowley* on the grounds that what he calls "evolutionism,"[102] is "a religion because it takes a position on an issue that has always been at the center of religious belief systems, i.e., the origin of life and the universe."[103] Thus, for the government to endorse it is a violation of constitutionally mandated neutrality. But nothing in the Constitution forbids the government from taking positions on "matters" that are "addressed" by religions. "We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."[104] It may subsidize the pork industry and advertisements for pork even though religious scriptures take positions on the consumption of pork.[105] The government may urge people to practice safe sex even though doing so conflicts with certain religious views,[106] just as it may urge people not to obtain abortions.[107] In fact, the government may express "its" opinions in virtually any matter, regardless of the fact that there are some who would have religious objections to the messages in question. This is because "the antidisparagement principle [can] effectively silence the government on a great many matters to which the citizenry has some form of deep attachment."[108] The *only* limitation on the messages which government may convey is that it may not "establish" a religious dogma in an official sense. While the exact meaning of "establishment" is a matter of constant dispute, it simply *cannot* be so broadly defined as to include the adoption of policies based on secular criteria, if the government is to have the capacity to act on any matter.

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101 *Id.* at 742 (citations omitted). *See also* Brown v. Hot, Sexy and Safer Prod., Inc., 68 F.3d 525 (1st Cir. 1995); Cornwell v. State Bd. of Educ., 314 F.Supp. 340 (D.C. Md. 1969), *aff'd*, 428 F.2d 471 (4th Cir. 1970); Civic Awareness of Am., Ltd. v. Richardson, 343 F.Supp. 1358 (E.D. Wis. 1972); Smith v. Ricci, 446 A.2d 501 (N.J. 1982); Gregory G. Sarno and Alan Stephens, Annotation, *Constitutionality of Teaching or Otherwise Promoting Secular Humanism in Public Schools*, 103 A.L.R. FED. 538 (2005).

102 "Evolutionism" is commonly used as a value-laden term to imply that the scientific fact of evolution is an ideology. In fact, schools do not teach "evolutionism" any more than they teach "economicsism" or "historyism." *See* Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517, 520–21 (9th Cir. 1994).

103 Trask, *supra* note 2, at 386. Some scientists have contended that evolution takes no position on the origin of life, merely the development of life after it originated. *See, e.g.*, McLean v. Ark. Bd. of Ed., 529 F.Supp. 1255, 1266 (E.D. Ark. 1982) ("Although the subject of origins of life is within the province of biology, the scientific community does not consider origins of life a part of evolutionary theory."). I disagree. Evolution is as useful in the search for the origin of what we call life as it is in describing the origin of species. *See* DENNETT, DARWIN'S DANGEROUS IDEA, *supra* note 45, at 149–85.

104 Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

105 *Cf.* Johanns v. Livestock Mktg. Ass'n, 125 S. Ct. 2055 (2005).

106 *Cf.* Smith v. Bd. of Sch. Comm'rs of Mobile County, 827 F.2d 684, 691 (11th Cir. 1987).

107 *Cf.* Rust v. Sullivan, 500 U.S. 173, 194 (1991).

108 Ira C. Lupu & Robert W. Tuttle, *The Limits of Equal Liberty as a Theory of Religious Freedom*, 85 TEX. L. REV. 1247, 1253 (2007).

B. Nothing In The Constitution Forbids A Commitment To Methodological Naturalism

The text of the Constitution clearly anticipates government acting on secular criteria. For example, Congress is given power to grant copyrights and patents in order to promote the progress of science and the useful arts—secular criteria.[109] Defendants may not be convicted of treason except on the testimony of two witnesses to the same overt act—not only secular criteria, but *empirical*, secular criteria.[110] Juries are generally expected to convict on the basis of evidence, rather than on appeals to non-evidentiary matters such as faith.[111] Moreover, a government given the power to do X must be able to do X *effectively*.[112] If, as is the case, the most effective method of accomplishing its purposes is to rely on the scientific method and the data of naturalistic science, this alone is a sufficient, religiously-neutral justification for basing policy on science and not on supernaturalism. The framers of the Constitution and the Bill of Rights clearly anticipated that government would act on the basis of secular considerations, empirical data, and reason.

There is nothing in the Constitution's text or history that suggests that the founders considered "materialistic science" to be a "religion" covered by the First Amendment. Indeed, a great many of America's founders were themselves scientists who believed strongly in empiricism and the search for the material causes of phenomena.[113] After hundreds of generations of humans had clung to a "supernatural theory" of lightning—that it was the weapon of Zeus, the spear of Odin, the weapon of Vajra—Constitution-signer Benjamin Franklin accounted for it through a natural, empirical explanation that allowed people to protect their buildings from lightning via the lightning rod. His contemporaries generally agreed that a true understanding of the world not only was possible through empirical research, but that such an understanding was to be applauded and encouraged, often by government subsidies.[114] There is no evidence that Franklin or his con-

109 U.S. CONST. art. I, § 8, cl. 8.

110 U.S. CONST. art. III, § 3.

111 PENNOCK, *supra* note 28, at 295 ("Imagine the problems that would result if the courts had to accept legal theories of this sort. How would the court rule on whether to commit a purportedly insane person to a mental hospital for self-mutilation who claims that the Lord told her to pluck out her eye because it offended her? How would a judge deal with a defendant, Abe, accused of attempted murder of his son, Ike, who claims that he was only following God's command that he kill Ike to prove his faith?").

112 *Cf.* M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 324–25 (1819) ("the grant of powers itself necessarily implies the grant of all usual and suitable means for the execution of the powers granted . . . [including] such powers as are suitable and fitted to the object; such as are *best* and *most useful* in relation to the end proposed.").

113 *See, e.g.*, I. BERNARD COHEN, SCIENCE AND THE FOUNDING FATHERS: SCIENCE IN THE POLITICAL THOUGHT OF JEFFERSON, FRANKLIN, ADAMS, AND MADISON (1997).

114 Thomas Jefferson, a skeptic and freethinker, was behind such government-subsidized scientific undertakings as the Lewis and Clark expedition. *See generally* EDWIN T. MARTIN, THOMAS JEFFERSON: SCIENTIST (1952). James Madison, author of the First Amendment, advocated establishing a federally-funded university "in which no preferences or distinctions should be allowed on account of religion," 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 at 616 (Max Farrand ed., Plimpton Press

temporaries understood the word "religion" to include scientific empiricism:[115] instead, the Establishment and Free Exercise Clauses were understood as barring the state from compelling attendance to or support of an institution demanding spiritual allegiance to a dogmatic creed, and prohibiting the state from interfering with an individual's obedience to the demands of the creed that he had freely accepted.[116]

There are certainly instances where government's secular policies overlap the zone of religious freedom that is guaranteed by the Constitution, and where the enactment of such policies can intrude on the deeply held beliefs of religious practitioners. These are the hard cases in First Amendment law. But the closest the Supreme Court has ever come to holding that "neutrality" between religious sects bars the government from pursuing legitimate, secular policies, is *United States v. Ballard*.[117] There, a 5–4 Supreme Court overturned the conviction of a defendant in a mail-fraud case who had been brought up on charges due to a faith-healing scheme. Justice Douglas declared for the majority that "the truth or verity of respondents' religious doctrines or beliefs" should not have been considered by the trial court.[118] For a court to convict a person of fraud on the basis that his religious doctrines were false would threaten the safety of religious dissenters. People "may not be put to the proof of their religious doctrines or beliefs."[119] The fact that religious dogmas are

> [B]eyond the ken of mortals does not mean that they can be made suspect before the law. . . . The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom.[120]

1923) (1911), as did Benjamin Rush, devout Christian, signer of the Declaration of Independence, and pioneering physician and science enthusiast. ALYN BRODSKY, BENJAMIN RUSH: PATRIOT AND PHYSICIAN 295 (2004).

115 One indication of the distinction between religion and science in the minds of thinkers in the founding era appears in the first edition of the Encyclopedia Britannica:

> We know but little of the nature of bodies; we discover some of their properties, as motion, figure, colours, &c. but of their essence we are ignorant: we know still much less of the soul, but of the essence or nature of God, we know nothing. . . . [W]e may discover his attributes by our reason, almost as clearly as we distinguish the properties of matter, and many other objects: and this knowledge is sufficient for us. The end of every other science is some temporal happiness; theology alone proposes an eternal felicity; its object therefore differs from all other sciences, as the age of threescore and ten differs from eternity.

3 ENCYCLOPEDIA BRITANNICA 533 (1771).

116 *See, e.g.*, JAMES MADISON, *Memorial And Remonstrance Against Religious Assessments* (1785), *reprinted in* MADISON: WRITINGS 29, 30 (Jack N. Rakove, ed. 1999) (defining religion as "the duty which we owe to our Creator and the manner of discharging it"); THOMAS JEFFERSON, *A Bill for Establishing Religious Freedom*, *in* JEFFERSON: WRITINGS 346, 346–47 (Merril D. Peterson, ed., 1984) (distinguishing between "religious opinions" from "our opinions in physics or geometry.").

117 322 U.S. 78 (1944).

118 *Id*. at 86.

119 *Id.*

120 *Id.* at 87.

Ballard is a hard case, especially after *Smith*,[121] but it is at least clear that *Ballard* does *not* apply to government policies based on secular considerations unless those policies would *punish* a person for *professing* a religious faith.[122] As the Supreme Court has noted, "The crucial word in the constitutional text is 'prohibit': 'For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'"[123] Government policies based on secular considerations generally do not mean the persecution of dissenters for their beliefs, and certainly not where appropriate accommodations are included for those whose faiths are extremely opposed to the policies.[124] Courts have tried to deal with these hard cases pragmatically, as in the blood-transfusion cases, where courts have held that while parents whose religious beliefs prohibit blood transfusions cannot be compelled to obtain transfusions for their children, courts can still order such transfusions by appointing guardians *ad litem*.[125] But courts have never—and can never—hold that government is required to accord equal respect to magical thinking as to scientifically established and empirically sound facts. To do so would simply be disastrous.[126] Certainly it is not warranted by the Constitution, which anticipates a government not only free to base its decisions on a preference for scientific understandings, but which is *expected* to do so.

C. To Teach Means To Teach Well

In *Heart of Darkness*, Joseph Conrad has given us a fitting image of

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121 David E. Steinberg, *Rejecting The Case Against The Free Exercise Exemption: A Critical Assessment*, 75 B.U. L. REV. 241, 276–96 (1995).

122 *Smith*, 494 U.S. at 877 (describing *Ballard* as involving the "punish[ment of] expression of religious doctrines [the government] believes to be false").

123 Lyng v. Northwest Indian Cemetery Protective Ass'n 485 U.S. 439, 451 (1988) (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)).

124 First Amendment law is so complicated that it is impossible to make general statements without exceptions. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), rightly stands as a monument of religious freedom in this country even though it struck down a policy adopted for secular reasons, on the grounds that such policies violated the Free Exercise Clause. Still, in that case, children were subject to discipline by the state for refusing to swear the oath. Children are not subject to discipline for refusing to *believe* in evolution—although they must, of course, learn what evolution *means*.

125 *See, e.g.*, In re Cabrera, 552 A.2d 1114 (Pa. Super. Ct., 1989); Jehovah's Witnesses v. King's County Hosp., 278 F. Supp. 488, 504 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968).

126 Where should courts draw the line? I contend that the line should be drawn at the level of the right to consent. Adults should be freely able to practice their religions and, of course, believe what they want, but should not be free to compel others:

> The State arguably should not assign any *right*—that is, any legal *entitlement*—to protect choices and actions that are not a matter of self-determination. Such a right finds no support in general liberal political principles. To view religiously-motivated child medical neglect as a First Amendment issue is as much a conceptual mistake as it would be to view religiously-motivated wife-beating as a First Amendment issue. Additionally, this right directly conflicts with a principle that is basic to our legal and moral culture—namely, that no one is *entitled* to control the life of another person in accordance with their own preferences.

James G. Dwyer, *Spiritual Treatment Exemptions to Child Medical Neglect Laws: What We Outsiders Should Think*, 76 NOTRE DAME L. REV. 147, 163 (2000).

the person who is made to memorize the factual conclusions of science, without being taught the critical thinking and analytical skills at the heart of the scientific method. He describes a cannibal who has been trained to operate a steam-boat on the Congo:

> He was useful because he had been instructed; and what he knew was this—that should the water in that transparent thing disappear, the evil spirit inside the boiler would get angry through the greatness of his thirst, and take a terrible vengeance. So he sweated and fired up and watched the glass fearfully. . . .[127]

Such a person, knowing only the conclusions but not the method, may pull the right levers. But without understanding the techniques, he remains unable to master the physical world around him or to harness its energies for new advances. And he remains vulnerable to quacks and con-men who can mimic a scientist's language while making convincing-sounding assertions. This is the whole reason for teaching science in schools.[128] As Carl Sagan put it, "[i]f we teach only the findings and products of science—no matter how useful and even inspiring they may be—without communicating its critical method, how can the average person possibly distinguish science from pseudoscience? Both then are presented as unsupported assertion."[129]

Evolution and other scientific discoveries are included in science curricula for an important reason: not so that students will memorize the facts, but so that they will become equipped with the intellectual tools that they need to be critical and independent thinkers who are not satisfied with shoddy evidence, appeals to authority, dogma, tradition, or magical thinking. Nothing is more important in a democratic society than that citizens be capable of innovative and discerning thought—that they be able to tell the genius from the crank, the idealist from the ideologue, the innocent from the guilty, and that they be able to figure out what is true and what is false.

Moreover, science is an essential part of the training for a free citizen because the values of scientific discourse—respect, freedom to dissent, and a demand for logical, reasoned arguments supported by evidence—create a common ground for people of diverse ethnicities and cultures. In a nation made up of people as different as we are, a commitment to tolerance and the search for empirically verifiable, logically established, objective truth suggests a path to peace and freedom. Our founding fathers understood this. Professor Sherry has said it well: "it is difficult to envision a civic republican polity—at least a polity with any diversity of viewpoints—without

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127 JOSEPH CONRAD, HEART OF DARKNESS 57 (New York: Pocket Books 1972) (1902).

128 Of course, there is also the personal satisfaction to be gained by an accurate understanding of the world. *See* Epicurus, *Principal Doctrines* ¶12, *in* THE STOIC AND EPICUREAN PHILOSOPHERS 35, 36 (Witney J. Oates ed. 1940) ("A man cannot dispel his fear about the most important matters if he does not know what is the nature of the universe but suspects the truth of some mythical story. So that without natural science it is not possible to attain our pleasures unalloyed.").

129 CARL SAGAN, THE DEMON-HAUNTED WORLD: SCIENCE AS A CANDLE IN THE DARK 21 (1995).

an emphasis on reason. . . . In a diverse society, no [definition of 'the common good'] can develop without reasoned discourse."[130]

Science's focus on empirical evidence and demonstrable theories is part of an Enlightenment legacy that made possible a peaceful and free society among diverse equals. Teaching that habit of mind is of the essence for keeping our civilization alive. To reject the existence of objective truth is to deny the possibility of common ground, to undermine the very purpose of scholarly, intellectual discourse, and to strike at the root of all that makes our values valuable and our society worthwhile. It goes Plato one better—it is the ignoble lie.[131] At a time when Americans are threatened by an enemy that rejects science and reason, and demands respect for dogmas entailing violence, persecution, and tyranny, nothing more deserves our attention than nourishing respect for reason.

III. CONCLUSION

The debate over evolution and creationism has raged for a long time, and will continue to do so. The science behind evolution is overwhelming and only continues to grow,[132] but those who insist that evolution is false will continue to resist its promulgation in schools. The appeal to Postmodernism represents the most recent—and so far, the most desperate—attempt on the part of creationists to support their claim that the teaching of valid, empirically-tested, experimentally-confirmed science in government schools is somehow a violation of the Constitution. When shorn of its sophisticated-sounding language, however, this argument is beneath serious consideration. It essentially holds that truth is meaningless; that all ways of knowing—whether it be the scientist's empirically tested, experimentally confirmed, well-documented theory, or the mumbo-jumbo of mystics, psychics, and shamans—are equally valid myths; and that government has no right to base its policies on solid evidence rather than supernatural conjurations. This argument has no support in epistemology, history, law, or common sense. It should simply not be heard again.

130 Sherry, *supra* note 6, at 471.

131 For a discussion of Plato's "noble lie," see PLATO, *Republic*, *in* THE COLLECTED DIALOGUES OF PLATO 575, 629–30 (Edith Hamilton & Huntington Cairns eds., Paul Shorey trans., Princeton Univ. Press 1961) (1938).

132 *See* JONATHAN WEINER, THE BEAK OF THE FINCH: A STORY OF EVOLUTION IN OUR TIME (1994).

The Application of the Religious Freedom Restoration Act to Appearance Regulations That Presumptively Prohibit Observant Sikh Lawyers From Joining the U.S. Army Judge Advocate General Corps

Rajdeep Singh Jolly[*]

PURPOSE

Observant Sikh lawyers are presumptively prohibited from joining the U.S. Army Judge Advocate General (JAG) Corps because they cannot satisfy the Army's appearance regulations. This essay argues that this presumptive prohibition violates the Religious Freedom Restoration Act (RFRA). Under RFRA, the federal government may substantially burden an individual's exercise of religion only if it demonstrates that its application of the burden furthers a compelling governmental interest by the least restrictive means.[1] The Army's appearance regulations are designed to promote two interests—uniformity and safety. In the course of furthering these interests, the Army's appearance regulations effectively preclude observant Sikhs from joining the U.S. Army JAG Corps. The Sikh religion requires its male followers to wear turbans and forbids all of its followers from cutting their hair. Both requirements purportedly interfere with the Army's asserted interests in uniformity and safety. This purported interference forms the basis for a conclusion that observant Sikhs are appropriately excluded from joining the U.S. Army JAG Corps. This essay argues against the necessity of such a conclusion by demonstrating that under RFRA (1) the Army does not have a compelling interest in disallowing exceptions to its appearance regulations, and (2) the Army's appearance regulations do not constitute the least restrictive means of promoting safety. Because the Army's appearance regulations violate RFRA, they must be amended to allow for the accommodation of observant Sikhs in the U.S. Army JAG Corps.

OBSERVANT SIKHS IN CONTEXT

As of 2006, there were approximately 25 million Sikhs in the world.[2]

[*] I wish to thank Professor Davison Douglas of the Marshall-Wythe School of Law at the College of William & Mary for his support and several others who helped me shape this project, including Christopher Jones, Christopher Byrne, Manbir Singh Chowdhary, Col. G.B. Singh, Maj. Glenn Harwood, Prof. Stephen Sapp, Prof. Ken Goodman, William Durbin, and Donald Judy.

1 Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (2000).

2 *Worldwide Adherents of All Religions, Mid-2005*, ENCYCLOPEDIA BRITANNICA ONLINE, http://www.britannica.com/eb/article-9432620/Worldwide-Adherents-of-All-Religions-Mid-2005 (last

The overwhelming majority of them live on the Indian subcontinent.[3] In contrast, only an estimated 251,000 live in the United States.[4] The formative phase of Sikh history began with Guru Nanak (1469–1539),[5] the founder of Sikhism, and continued for two centuries under the leadership of nine successive Gurus.[6] The last of these Gurus, Guru Gobind Singh (1666–1708),[7] presided over a transformative phase of Sikh history; Guru Gobind Singh not only vested permanent spiritual authority in the Sikh scripture—the Adi Granth—but also inaugurated a fellowship of orthodox Sikhs—the Khalsa—which "provided a visible insignia and an explicit discipline which members of the community could renounce only at the cost of virtual excommunication."[8] One of the most conspicuous components of the Khalsa code of discipline is a prohibition on hair-cutting.[9] In practice, even among Sikhs who do not live in complete accordance with Khalsa traditions, a turban and unshorn hair are important marks of a Sikh male's personality.[10] These identifiers link the Sikh community and also serve as "a declaration of privilege [and] also of the intent to be prepared steadfastly to uphold the ideals [that Guru Gobind Singh] had demarcated."[11] Those who decline to accept these aspects of the Sikh identity are

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visited Sept. 14, 2007).

3 *Id.*

4 *Religious Adherents in the United States of America*, *1999–2005*, ENCYCLOPEDIA BRITANNICA ONLINE, http://www.britannica.com/eb/article-9432619/Religious-Adherents-in-the-United-States-of America-1900-2005 (last visited Sept. 14, 2007).

5 *See* W.H. MCLEOD, *Guru Nanak and the Sikh Religion*, *in* SIKHS AND SIKHISM 1, 1–5 (Oxford Univ. Press 1999) [hereinafter *Guru Nanak*].

6 *Id.* at 1. The basis of Sikh theology, according to Professor McLeod, is:

> a belief in a personal God, the omnipotent Creator of the universe, a Being beyond time and human comprehending yet seeking by His grace the salvation of man and for this purpose revealing Himself in His own creation. To the offer of salvation man is called to respond by a life of meditation on the divine self-revelation and of conformity to it. If man responds he progressively grows into the likeness of God and ultimately into an ineffable union with [Him]. If he refuses he follows the path of spiritual death and remains firmly bound to the wheel of transmigration.

Id. at 5–6.

7 AMANDEEP SINGH MADRA & PARMJIT SINGH, WARRIOR SAINTS: THREE CENTURIES OF THE SIKH MILITARY TRADITION 7 (1999).

8 *Guru Nanak*, *supra* note 5, at 1, 2. Professor McLeod suggests that these two features—the immutable scripture and the recognizable insignia—have preserved Sikhism from irrevocable dissolution. *Id*. at 3. According to Professor McLeod:

> The Khalsa is best described as an order, as a society possessing a religious foundation and a military discipline. The religious base was already in existence and a military tradition had been developed, but something much stronger was required. The military aspect had to be fused with the religious, and this Guru Gobind Singh achieved by promulgating the Order of the Khalsa . . . .

W.H. MCLEOD, *The Evolution of the Sikh Community*, *in* SIKHS AND SIKHISM, *supra* note 5, at 1, 4.

9 W.H. MCLEOD, *Who is a Sikh?*, *in* SIKHS AND SIKHISM, *supra* note 5, at 1, 121 [hereinafter *Who is a Sikh?*] According to one author, observant Sikhs refrain from cutting their hair to "affirm that the body, as divinely created, is sacrosanct in its completeness." ELEANOR NESBITT, SIKHISM: A VERY SHORT INTRODUCTION 54 (2005).

10 Sardarni Premka Kaur, *Rahit Maryada, in* 3 THE ENCYCLOPAEDIA OF SIKHISM 424 (Harbans Singh ed.,1997).

11 *Id*. *See also* MAX ARTHUR MACAULIFFE, 5 THE SIKH RELIGION: ITS GURUS, SACRED WRITINGS AND AUTHORS 89 (S. Chand & Co. 1963) (noting that Guru Gobind Singh "always held the

still regarded as Sikhs, "but only on the understanding that they are failing to discharge customary duties."[12] In other words, to the extent that Sikhs decline to wear a turban and decline to keep their hair unshorn, they are not regarded as observant Sikhs.

Sikhs have earned recognition for martial prowess in the course of their history.[13] An estimated 100,000 Sikhs served in the British armed forces during World War I, disproportionately forming around twenty percent of the total number of volunteers from India.[14] Over 83,000 observant Sikh soldiers died and more than 109,000 were wounded in the cause of the Allies during both World Wars,[15] and five observant Sikhs were awarded the Victoria Cross for gallantry in these conflicts.[16] Observant Sikhs still serve in the armed forces of India[17] and are presumptively permitted to serve in the armed forces of Canada[18] and the United Kingdom.[19]

Unlike their coreligionists elsewhere in the world, and as explained in greater detail below, observant American Sikhs who wish to wear the uniform of their country do not presumptively enjoy this privilege.[20]

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belief that it would be proper and advantageous to his Sikhs to wear long hair . . . .").

12 *Who is a Sikh*, *supra* note 9, at 121.

13 *See* MADRA & SINGH, *supra* note 7, at vii. Writer Pico Iyer partially summarized the military evolution of Sikhs as follows:

> With his people being persecuted by Mogul warlords, [Guru] Gobind [Singh] formed a fierce fraternity of "warriors of God" known as the *Khalsa* (Pure). As the Sikhs cleaved to [Guru] Gobind [Singh's] martial principles, the tales of their valor and ferocity became legion. They routed the Afghans at the Battle of Attock in 1813, and in 1849 they delivered a stinging defeat to the British at the Battle of Chillianwala. After they were forced to succumb to superior British firepower six weeks later, the Sikhs became among the sturdiest and trustiest men of the British army: during the great Indian Mutiny of 1857, the raj was kept alive by their support. After the British slaughtered nearly 400 civilians, many of them Sikhs, at Amritsar in 1919, the warriors changed allegiances and joined the crusade to bring down the raj. Sikh soldiers and policemen have, to this day, loyally protected their Hindu compatriots all over India.

Pico Iyer, *The Lions of Punjab*, TIME, Nov. 12 1984, at 53.

14 MADRA & SINGH, *supra* note 7, at 110.

15 *Id.* at 41 (quoting General Sir Frank Messervy, *Foreword* to F.T. BIRDWOOD, THE SIKH REGIMENT IN THE SECOND WORLD WAR. (1953)).

16 MADRA & SINGH, *supra* note 7, at 158.

17 *See* D.S. Sandhu, *The Sikh Regiment: Indian Army's Most Decorated Regiment*, 3 BHARAT RAKSHAK MONITOR, May–June 2001, http://www.bharat-rakshak.com/MONITOR/ISSUE3-6/sandhu.html (last visited Sept. 14, 2007).

18 *See* CANADIAN FORCES GRIEVANCE BOARD, ANNUAL REPORT 2004, at 27 (2004), *available at* http://www.cfgb-cgfc.gc.ca/pdf/ar2004_revised-e.pdf.

19 *See* UNITED KINGDOM MINISTRY OF DEFENCE, GUIDE ON RELIGION AND BELIEF IN THE MOD AND ARMED FORCES 13 (2005). As detailed in subsequent portions of this essay, the right of English Sikhs to wear the uniform of their country is conditioned on the satisfaction of technical requirements, which might preclude observant Sikhs from serving in certain capacities in limited circumstances. *See id.* Even still, what English Sikhs enjoy—and what American Sikhs do not—is the right to be presumptively accommodated in the armed forces of their country.

20 *See* U.S. DEP'T. OF DEF., ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES, DIRECTIVE NO. 1300.17, at 3 (1988) *available at* http://www.dtic.mil/whs/directives/corres/pdf/130017p.pdf [hereinafter DIRECTIVE NO. 1300.17] (effectively excluding Sikhs from the scope of religious apparel accommodations in the U.S. Armed Forces by excluding hair and grooming practices required or observed by religious groups from the class of exempt religious apparel.).

NOTES ON THE SCOPE OF THIS ESSAY

This essay argues for the accommodation of observant Sikh lawyers in the U.S. Army JAG Corps. This narrow focus is premised on two assumptions, the second of which qualifies the first. In the first place, there is institutional precedent and, accordingly, a greater practical possibility of accommodating observant Sikhs in the Army. Between 1958 and 1981, the Army specifically permitted observant Sikhs to enlist through a special exemption from its appearance regulations.[21] After this exemption ended in 1981, prior grantees of the exemption were permitted to remain in uniform, provided that they were "otherwise eligible for continued service."[22] In addition, prior grantees are subject to assignment restrictions.[23] Even still, the significance is that the Army is familiar with the religious commitments of observant Sikhs. Secondly, notwithstanding this history of accommodation, it is arguably the case that institutional change in the Army and other armed forces will face less opposition if such change is implemented in a piecemeal fashion. As discussed in greater detail below, opposition to the accommodation of Sikhs in the Army stems from concerns about operational requirements in the military.[24] Allaying these concerns may be easier if the question of accommodating observant Sikh lawyers is successfully addressed *before* the knottier issue of accommodating observant Sikhs who seek to serve primarily as combatants.

REASONS FOR APPEARANCE REGULATIONS IN THE MILITARY

The presumptive preclusion of observant Sikhs from the U.S. Army JAG Corps is based on the inability of observant Sikhs to satisfy the Army's current appearance regulations.[25] These regulations are based on the military's interests in uniformity[26] and safety.[27] In 1984, pursuant to a congressional amendment to that year's Department of Defense Authorization Bill,[28] the Department of Defense established a Joint Service Study Group on Religious Practice (Joint Study Group),[29] which was tasked with

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21 Captain Thomas R. Folk, *Military Appearance Requirements and Free Exercise of Religion*, 98 MIL. L. REV. 53, 62 (1982). The exemption for observant Sikhs was codified in the Army's appearance regulations between 1972 until its rescission on August 20, 1981. *Id.* at 62 n.65.

22 *Religious Exceptions in Army Uniform End*, N.Y. TIMES, Aug. 22, 1981, at 13. In effect, the accommodation of observant Sikhs in the U.S. Army was downgraded from rule to exception.

23 U.S. DEP'T. OF ARMY, ARMY COMMAND POLICY, ARMY REG. 600-20, at 34 (2002) *available at* http://www.first.army.mil/eo/pdf/r600_20.pdf [hereinafter ARMY REG. 600-20] ("[S]oldiers previously granted authority to wear unshorn hair, unshorn beard, or permanent religious jewelry will not be assigned permanent change of station or temporary duty out of [the Continental United States] due to health and safety considerations.").

24 *Religious Exceptions in Army Uniforms End*, *supra* note 22.

25 *See* DIRECTIVE NUMBER 1300.17, *supra* note 20.

26 JOINT SERVICE STUDY GROUP ON RELIGIOUS PRACTICE, JOINT SERVICE STUDY ON RELIGIOUS MATTERS MARCH 1985, at III-4 (1985) [hereinafter RELIGIOUS PRACTICE].

27 *Id*. at III-7.

28 Memorandum from Deputy Secretary Taft to Secretaries of the Military Departments (Oct. 12, 1984) [hereinafter Taft Memorandum], *reprinted in* RELIGIOUS PRACTICE, *supra* note 26, at A-4.

29 Dwight H. Sullivan, *The Congressional Response to* Goldman v. Weinberger, 121 MIL. L. REV. 125, 137 (1988).

studying the possibility of modifying appearance regulations to accommodate religious practices in the armed forces.[30] The Joint Study Group issued its report in March 1985,[31] and its examination of the military's interests in uniformity and safety forms the basis for the following discussion.

A. The Army's Interest in Uniformity

According to the Joint Study Group, uniforms "act as a cohesive bond within the services by instilling a common identity, by providing visual evidence of shared experience, and by reinforcing a sense of tradition."[32] These factors are said to play "an essential role in the development of unit cohesion and institutional esprit de corps, which in turn contribute to military effectiveness."[33] As well, "[u]niformity not only directly imposes the discipline of the group, but, more subtly, instills the self-discipline necessary for the military member to perform effectively."[34] Non-uniformity, on the other hand, may result in polarization, which "fractures the [military] unit along lines that are irrelevant to and destructive of military considerations."[35] In other words, because uniformity "induces the wearers to view themselves as part of a group larger than themselves,"[36] and because "the extent to which individuals retain old dress and appearance habits reduces their identity with and commitment to the new group,"[37] it is possible that non-uniformity can "create an impression that [an] individual is unwilling to subordinate personal desires to traditional military values and raise questions of ultimate dependability in a crisis."[38] Put another way, exceptions to appearance regulations may create "perceptions of favored treatment for some military members, or the feeling that some individuals were 'getting over' on the system, [and] would almost certainly be disruptive."[39] The foregoing arguments can be condensed into the proposition that uniformity has a psychological and behavioral impact on operational effectiveness.[40]

In the course of suggesting a connection between uniformity and operational effectiveness, the Joint Study Group offered several additional reasons for preserving uniformity. First "[w]hen perceived favored treatment is linked to a potentially emotional issue such as religion, the possibil-

30 Taft Memorandum, *supra* note 28, at A-4.

31 Sullivan, *supra* note 29, at 137.

32 RELIGIOUS PRACTICE, *supra* note 26, at III-5.

33 *Id*.

34 *Id*. at III-4.

35 *Id*. at III-10.

36 *Id*. at III-4.

37 *Id.* at III-9.

38 *Id*. at III-11. The Joint Study Group acknowledged, however, that "[s]uch impressions are most likely when the individual is not well-known to the other members of the group." *Id*. By implication, if observant Sikhs were presumptively permitted to join the U.S. military, these impressions might not be so strong.

39 *Id*.

40 *See id*. at III-4. ("In the course of this outward display of group membership, the individual servicemember develops a willingness to submit his or her individuality to the larger organization and thus thinks and acts differently.").

ity of prejudice exists."[41] One might argue that prejudice would disrupt esprit de corps and consequently have an adverse impact on operational effectiveness. Second, uniformity reinforces "the idea that military members are different from civilians,"[42] and "remind[s] the men and women who wear them that they put aside certain personal freedoms when they joined the armed forces and that they have assumed special obligations inherent in the military's responsibility for the nation's defense."[43] It is possible that non-uniformity undermines esprit de corps to the extent that it simultaneously accentuates civilian distinctions and undermines professional equality among military members.[44] Third, "permitting certain faith groups openly to display their religious preference and to identify with a particular religion (and in some cases ethnic group) might cause other groups to assert more vocally and visibly their commitment to their particular faith."[45] In other words, it is feared that departures from uniformity will lead to a slippery slope situation and generate unwieldiness of a sort that would not only create "chao[s] in combat"[46] but also "discourage others from entering what they perceive as no longer a 'sharp' military organization."[47] The Joint Study Group ultimately concluded that, as a matter of policy, "it would be unwise to permit visible exceptions to uniform dress and appearance standards . . . ."[48]

B. The Army's Interest in Safety

According to the Joint Study Group, safety standards not only "directly affect the individual's health and well-being,"[49] but also "affect the ability of the individual to perform a task. This, in turn, influences the accomplishment of the unit's mission in both peace and war."[50] Of particular relevance to observant Sikhs is their ability (or inability, as the case may be) to wear protective equipment. For example, within the military, there is hesitation about permitting dress and grooming standards that would prevent the formation of "an effective seal on a protective mask or which would otherwise fail to ensure complete protection in a toxic environ-

41 *Id*. at III-12.
42 *Id*. at III-4.
43 *Id*. at III-4–5.
44 *Id*. at III-7.
45 *Id*. at III-12.
46 *See id*. at III-13.
47 *See id*. at III-14.
48 *Id*. at III-19. The Joint Study Group justified its conclusion as follows:

> While uniformity will not, in itself, establish cohesion and military spirit in the absence of other factors, both sociological studies and historical experience clearly indicate it does play a very important role in creating and maintaining the spirit of a military force. The potential negative impacts on identification and discipline, on cohesion and esprit de corps, and on the public image of the military services would outweigh the possible benefits to the individuals involved or to the service of permitting visible religious expression within the military context.

Id.
49 *Id*. at III-7–8.
50 *Id*. at III-8.

ment."[51] As of 1985—the year in which the Joint Study Group released its report—"test results and testimony from experts in chemical protection . . . overwhelmingly concluded that an effective seal is not possible with a beard."[52]

To the extent that protective equipment cannot function on a bearded individual, one might argue that the individual should be free to subject himself to the risks that ordinarily compel the use of protective equipment.[53] Anticipating this argument, the Joint Study Group determined that it would not be feasible "to permit the individual to determine the risk to which he is willing to put himself,"[54] because, "[g]iven the interdependency of all activities within the military, what would be at stake would not be merely one individual, but the lives of others as well as the accomplishment of the mission."[55] To the extent that protective equipment cannot function on a bearded individual, one might argue that the individual should be assigned roles not likely to require the use of protective equipment.[56] Anticipating this argument, the Joint Study Group suggested that assignment restrictions could harm military esprit de corps.[57] Finally, to the extent that protective equipment cannot function on a bearded individual, one might argue that the individual should be allowed to maintain a beard until its modification or removal is compelled by extenuating circumstances.[58] Anticipating this argument, the Joint Study Group rejected it on two grounds: (1) "it opens the possibility of individuals questioning . . . their commander's judgment of what constitutes an emergency situation"[59] and (2) "there would be no way to ensure [that] the individual would live up to his commitment when circumstances did so dictate."[60]

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51 *Id*.

52 *Id*. at III-15.

53 *Id*. at III-16.

54 *Id*.

55 RELIGIOUS PRACTICE, *supra* note 26, at III-16.

56 *Id*.

57 *Id*. at III-17. The Joint Study Group explained the problem as follows:

> [A]doption of assignment restrictions . . . would, in essence, create two classes within the military: the majority, subject to all the demands the military makes on its members (including worldwide assignment and the possibility of serving in a combat environment), and a visible minority, exempt from certain of the more onerous demands of the institution but eligible for all of its benefits. The impact of such an arrangement on the attitude of both groups can only be speculated, but it seems likely the overall effect would harm military esprit de corps.

Id. at 16–17. In practice, observant Sikhs in the U.S. Army are subject to assignment restrictions. ARMY REG. 600-20, *supra* note 23, at 34 ("[S]oldiers previously granted authority to wear unshorn hair, unshorn beard, or permanent religious jewelry will not be assigned permanent change of station or temporary duty out of [the Continental United States] due to health and safety considerations.").

58 RELIGIOUS PRACTICE, *supra* note 26, at III-17. This is the approach taken by the British armed forces. UNITED KINGDOM MINISTRY OF DEFENCE, *supra* note 19, at 13.

59 RELIGIOUS PRACTICE, *supra* note 26 at III-17.

60 *Id.* Against this, one could argue that it is never possible to ensure that *any* individual will live up to his or her commitments. In a military context, there is always a danger that a soldier will fail to live up to his or her commitments to the detriment of operational effectiveness; accordingly, it is not clear why the military should recruit or train anyone at all.

A. *Goldman v. Weinberger*

The *Goldman* case concerned Dr. Simcha Goldman, an Orthodox Jew and ordained rabbi who actively served in the U.S. Air Force as a clinical psychologist between 1977 and 1981.[61] Until 1981, Dr. Goldman was not prohibited from wearing his yarmulke on the base where he worked.[62] Throughout his service, Dr. Goldman consistently received outstanding evaluations from his superiors, who even recognized him for professionalism in dress.[63] In April 1981, Dr. Goldman testified as a defense witness at a court-martial while wearing his yarmulke.[64] Opposing counsel subsequently complained about the yarmulke to the commander of the hospital where Dr. Goldman worked, noting that wearing it on duty constituted a violation of Air Force appearance regulations.[65] In response, the hospital commander ordered Dr. Goldman to refrain from wearing a yarmulke off base while on duty; when Dr. Goldman refused and protested through an attorney, the hospital commander enjoined Dr. Goldman from wearing a yarmulke at any time while on duty.[66] After receiving a reprimand and a threat of a court-martial, Dr. Goldman filed suit, claiming that the Air Force regulations at issue infringed upon his First Amendment right to practice his religion.[67] The case made its way to the U.S. Supreme Court, where a five-to-four majority of the Court upheld the preclusive appearance regulations.[68]

The result in *Goldman* stemmed from a principle of judicial deference to military judgment.[69] Writing for the majority, Justice Rehnquist articu-

61 Goldman v. Sec'y of Def., 734 F.2d 1531, 1532–33 (D.C. Cir. 1984), *aff'd*, 475 U.S. 503 (1986).

62 Goldman v. Weinberger, 475 U.S. 503, 505 (1986). According to the D.C. Court of Appeals, "[n]either before [Goldman's] joining the Air Force nor during his first three and one-half years in the service was he informed that wearing a head covering in addition to his uniform was problematic, although he did explain its religious significance to several co-workers and patients who inquired." *Sec'y of Def.*, 734 F.2d at 1533.

63 *Id.*

64 *Goldman*, 475 U.S. at 505. Until 1981, Goldman "avoided controversy by remaining close to his duty station in the health clinic and by wearing his service cap over the yarmulke when out of doors." *Id.*

65 *Id*. In a concurring opinion, Justice Stevens suggested that opposing counsel's complaint may have had a retaliatory motive. *Id*. at 511 (Stevens, J., concurring).

66 *Id*. at 505 (majority opinion).

67 *Id*. at 505–506.

68 *Id*. at 509–10.

69 *Id.* at 507. This principle found expression in the Supreme Court's 1974 decision in *Parker v. Levy*, which "[upheld] a service member's conviction for making disloyal statements . . . ." Major John P. Jurden, *Spit and Polish: A Critique of Military Off-Duty Personal Appearance Standards*, 184 MIL. L. REV. 1, 21 (2005). Writing for the majority in *Parker*, Justice Rehnquist observed that "the military is, by necessity, a specialized society separate from civilian society" and that it has, "by necessity, developed laws and traditions of its own during its long history." *Parker v. Levy*, 417 U.S. 733, 743 (1974). The legal upshot of this observation is that "fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." *Id.* at 758. In other words, "[w]hile members of

lated this principle as follows: "[W]hen evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."[70] In other words, "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."[71] This deference was motivated at least in part by the *Goldman* majority's concern about being "ill-equipped" to determine the extent to which a religious accommodation would impact discipline in the military.[72] According to Justice Rehnquist, "[t]he considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission."[73] In other words, because "[u]niforms encourage a sense of hierarchical unity,"[74] and because "the necessary habits of discipline and unity must be developed in advance of trouble,"[75] the "Air Force considers them as vital during peacetime as during war. . . ."[76] Notwithstanding the preclusive impact of the appearance regulations at issue in *Goldman*, the majority in *Goldman* ultimately concluded that the regulations "reasonably and evenhandedly regulate[d] dress in the interest of the military's perceived need for uniformity."[77]

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the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community, within the military community there is simply not the same autonomy as there is in the larger civilian community." *Id.* at 751.

70 *Goldman*, 475 U.S. at 507.

71 *Id*. As noted by Justice Blackmun in his dissent in *Goldman*, the then-prevailing "civilian" standard of constitutional review in free exercise cases required the state to justify an impairment of religious liberty by showing that the impairment was the least restrictive means of achieving a compelling state interest. *Id*. at 525 (Blackmun J., dissenting).

72 *Id*. at 507 (majority opinion).

73 *Id*. at 508.

74 *Id*.

75 *Id*.

76 *Id*.

77 *Id*. at 510. The majority decision in *Goldman* drew strong dissents. Justices Brennan and Marshall lamented what they regarded as the majority's adoption of "a sub-rational-basis standard—absolute, uncritical 'deference to the professional judgment of military authorities.'" *Id*. at 515 (Brennan J., dissenting). According to Brennan and Marshall, "[w]hen a military service burdens the free exercise rights of its members in the name of necessity, it must provide, as an initial matter and at a minimum, a *credible* explanation of how the contested practice is likely to interfere with the proffered military interest." *Id*. at 516. Justice Blackmun applied this principle to the case at hand in a separate dissent, opining that "the Air Force . . . failed to produce even a minimally credible explanation for its refusal to allow Goldman to keep his head covered indoors." *Id*. at 526 (Blackmun J., dissenting). Dissenting separately, Justice O'Connor criticized the majority for rejecting Goldman's claim "without even the slightest attempt to weigh his asserted right to the free exercise of his religion against the interest of the Air Force in uniformity of dress within the military hospital." *Id*. at 528 (O'Connor J., dissenting). In general, Justices Brennan, Marshall, and O'Connor agreed that a military service can justify a contested regulation only by showing that it furthers a compelling state interest by the least restrictive means. *Id*. at 516 (Brennan J., dissenting); *Id.* at 530 (O'Connor J., dissenting).

B. The Congressional Response to *Goldman v. Weinberger*

The *Goldman* majority pointed out that "[j]udicial deference. . .is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."[78] Pursuant to this constitutionally-delegated authority,[79] several members of Congress responded to the *Goldman* decision by proposing legislation designed to permit members of the armed forces to wear "neat and conservative" religious apparel if such apparel does not interfere with military duties.[80] Rooted in efforts that began in response to Dr. Simcha Goldman's 1984 loss in the U.S. Court of Appeals for the District of Columbia,[81] the proposal was eventually approved in 1987 by Congress and signed into law by President Reagan[82] before its codification as 10 U.S.C. § 774.[83] Under this statute, the general rule is that "a member of the armed forces may wear an item of religious apparel while wearing the uniform of the member's armed force."[84] The general rule does not apply, however, in two circumstances: (1) if it is determined "that the wearing of the item would interfere with the performance of the member's military duties,"[85] or (2) if it is determined "that the item of apparel is not neat and conservative."[86] The statute directs the armed forces to "prescribe regulations concerning the wearing of religious apparel by members of the armed forces. . . ."[87] Pursuant to this delegation of authority, the armed forces must not only determine whether religious apparel significantly interferes with military duties[88] but also develop criteria for determining whether religious apparel is neat and conservative.[89] These details found expression

78 *Id*. at 508 (quoting Rostker v. Goldberg, 453 U.S. 57, 70 (1981)).

79 *See* U.S. CONST. art. I, § 8, cl. 14 ("The Congress shall have Power . . . to make Rules for the Government and Regulation of the land and naval Forces . . . .").

80 132 CONG. REC. 14, 19801 (1986) (statement of Sen. Lautenberg). For a comprehensive overview of the congressional response to *Goldman v. Weinberger*, see Sullivan, *supra* note 29, at 147.

81 *Id*. at 135.

82 *Id*. at 147. The proposal was tabled in 1986 by a 51–49 vote. *Id*. at 142.

83 *Id*. at 147 n.144.

84 10 U.S.C. § 774(a) (2000).

85 § 774(b)(1).

86 § 774(b)(2).

87 § 774(c). One commentator explained the significance of 10 U.S.C. § 774 as follows:

> In adopting the religious apparel accommodation legislation, Congress indicated that it is more disposed to protect servicemembers' religious apparel interests than is the Department of Defense. Yet both the legislative process and the statute which it produced demonstrate congressional caution when dealing with the military's internal regulations. Congress took three years to adopt the accommodation statute. Before legislating its own solution, Congress called for the Department of Defense to study the issue, a clear but almost unheeded signal for the Department of Defense to adopt religious apparel accommodation regulations. When Congress did finally act, it chose not to legislate specific regulations. Instead, Congress relied on the Department of Defense to carry out a loosely defined policy of accommodation. Congress has thus shown itself to be sensitive to both servicemembers' liberty interests and the military's needs.

Sullivan, *supra* note 29, at 147.

88 § 774(b)(1).

89 § 774(b)(2).

in 1988 when the Department of Defense issued Directive Number 1300.17.[90]

The Directive applies to all branches of the armed forces and governs the accommodation of religious practices within the military.[91] In pertinent part, the Directive permits members of the armed forces to "wear visible items of religious apparel while in uniform, except under circumstances in which an item is not neat and conservative or its wearing shall interfere with the performance of the member's military duties."[92] The Directive defines "religious apparel" as "articles of clothing worn as part of the doctrinal or traditional observance of the religious faith practiced by the member."[93] To emphasize that "religious apparel" only includes "articles of clothing," the Directive excludes "[h]air and grooming practices required or observed by religious groups" from its definition of "religious apparel."[94] In doing so, the Directive prevents observant Sikhs from satisfying its requirements. Notwithstanding this, the Directive grants military commanders discretion to approve requests for religious accommodation in individual cases;[95] however, the Army almost categorically forbids religious accommodations for uncut hair.[96]

It has been suggested that 10 U.S.C. § 774 "was specifically designed to allow Jewish servicemembers to wear yarmulkes and Sikh servicemembers to wear turbans."[97] This proposition is based on statements in that statute's legislative history that address the accommodation of Sikhs in

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90 DIRECTIVE NO. 1300.17, *supra* note 20, at 1.

91 *Id.*

92 *Id*. at 2.

93 *Id*. at 3.

94 *Id.*

95 *Id*. at 3–4. According to the Directive,

> [M]ilitary commanders should consider the following factors along with any other factors deemed appropriate in determining whether to grant a request for accommodation of religious practices . . .
>
> [1] The importance of military requirements in terms of individual and unit readiness, health and safety, discipline, morale, and cohesion.
>
> [2] The religious importance of the accommodation to the requester.
>
> [3] The cumulative impact of repeated accommodations of a similar nature.
>
> [4] Alternative means available to meet the requested accommodation.
>
> [5] Previous treatment of the same or similar requests, including treatment of similar requests made for other than religious reasons.

Id. at 4.

96 U.S. DEP'T. OF ARMY, UNIFORM AND INSIGNIA: WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA, ARMY REG. 670-1 at 2-3 (2005) [hereinafter ARMY REG. 670.1]. The Army created an exception to this categorical rule as follows: "As an exception, policy exceptions based on religious practice given to soldiers in accordance with AR 600-20 on or prior to 1 January 1986 remain in effect as long as the soldier remains otherwise qualified for retention." *Id.* Army Regulation 600-20, in turn, reads in pertinent part as follows: "[S]oldiers previously granted authority to wear unshorn hair, unshorn beard, or permanent religious jewelry will not be assigned permanent change of station or temporary duty out of [the continental United States] due to health and safety considerations." ARMY REG. 600-20 *supra* note 23, at 34.

97 Sullivan, *supra* note 29, at 148–49.

the Army.[98] If the proposition is correct, then the Department of Defense and U.S. Army effected a significant departure from congressional intent by promulgating appearance regulations that effectively disqualify observant Sikhs from military service. Upon closer examination, however, the legislative history that eventuated in 10 U.S.C. § 774 reflects tentativeness about accommodating observant Sikhs in the military.[99] That Congress did not wholeheartedly intend to pursue the accommodation of observant Sikhs is evinced further by an unsuccessful attempt by Representative Dennis Hastert in 1990 to amend 10 U.S.C. § 774 to expressly allow for the accommodation of observant Sikhs in the U.S. Armed Forces.[100]

THE RELIGIOUS FREEDOM RESTORATION ACT'S APPLICABILITY TO THE MILITARY

The Religious Freedom Restoration Act of 1993 (RFRA) sought to invalidate any state or federal law that substantially burdens a person's exercise of religion unless such a law furthers a compelling governmental interest by the least restrictive means.[101] RFRA was enacted in response to the U.S. Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, according to which "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest. . . ."[102] Prior to *Smith*, the compelling interest test was an established means of resolving federal cases involving religious liberty and competing government interests.[103] RFRA effectively overturned *Smith* by codifying the compelling interest test and by expressly applying it to laws of general

98 *Id*.

99 For example, while addressing arguments that greater religious accommodation in the military would impair esprit de corps, Senator Frank Lautenberg—a leading proponent of the religious apparel amendment—observed that "[i]n the United Kingdom, Sikh members of the services are permitted to wear turbans, and to keep their hair long, if they choose" but then immediately clarified that "*we are not advocating that*." 132 CONG. REC. 14, 19802 (1986) (statement of Sen. Lautenberg) (emphasis added). Senator Lautenberg made the same argument the following year but dropped the italicized language. 133 CONG. REC. 18, 25250 (1987) (statement of Sen. Lautenberg). Senator Arlen Specter expressed his views as follows: "If there were to be a head dress, if there were to be a turban, *that might not be so bad*. Certainly, when you consider what is meant by the yarmulke, a very small skullcap, that does not interfere with the ability of some of the military to perform their service." 132 CONG. REC. 14, 19803 (1986) (statement of Sen. Specter) (emphasis added).

100 H.R. 5672, 101st Cong. (1990). In 1990, the bill was referred to the Subcommittee on Military Personnel and Compensation, a subsidiary of the House Committee on Armed Services, from which it never emerged. *See id.* If successful, the bill would have added the following provision to 10 U.S.C. § 774:

> (d) HAIR, BEARDS, AND TURBANS OF SIKHS- The Secretary concerned may not regulate the length of hair, or the appearance of facial hair, of a member of the armed forces who is a Sikh if that regulation would abridge the exercise of the religious faith of that member under the tenets of the Sikh religion. The Secretary concerned may not determine under subsection (b)(2) that a turban worn as an item of religious apparel by a member who is a Sikh is not neat and conservative.

Id.

101 Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (2000).

102 Employment Div. v. Smith, 494 U.S. 872, 886 n.3 (1990).

103 42 U.S.C. § 2000bb (2000).

applicability.[104] In 1997, the U.S. Supreme Court in *City of Boerne v. Flores* concluded that RFRA cannot constitutionally apply to state law.[105] Notwithstanding this, in 2006, the U.S. Supreme Court in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal* ratified the settled judgments of numerous appellate courts[106] that RFRA still applies to federal law.[107] RFRA applies sweepingly to all federal law and implementations of federal law, "whether statutory or otherwise, and whether adopted before or after [RFRA]."[108]

On its face, RFRA does not exempt the U.S. military from the compelling interest test.[109] In general, RFRA imposes limitations on the federal "government," which encompasses any "branch, *department*, agency, instrumentality, and official (or other person acting under color of law) of the United States. . . ."[110] This definition facially applies to the Department of Defense and, by implication, to the military branches—including the Army. Although RFRA's legislative history expressly declares that RFRA applies to the military,[111] a closer examination is required to ascertain the scope of RFRA's applicability to the military.

A. Ascertaining the Scope of RFRA's Applicability to the Military

The Senate Judiciary Committee's report on RFRA noted that "the [federal] courts have always extended to military authorities significant deference in effectuating . . . [military] interests."[112] The Committee then declared its intention and expectation that "such deference" continue under RFRA.[113] The House Judiciary Committee's report on RFRA was not as categorical. After noting the importance of respecting the "expertise and authority" of military officials,[114] the House report declared that, under RFRA, "[s]eemingly reasonable [military] regulations based upon speculation, exaggerated fears . . . [or] thoughtless policies cannot stand."[115] Sig-

104 §§ 2000bb, 2000bb-1.

105 City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

106 O'Bryan v. Bureau of Prisons, 349 F.3d 399, 401 (7th Cir. 2003); *In re* Young, 141 F.3d 854, 856 (8th Cir. 1998); Guam v. Guerrero, 290 F.3d 1210, 1221 (9th Cir. 2002); Kikumara v. Hurley, 242 F.3d 950, 959 (10th Cir. 2001).

107 Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 126 S. Ct 1211, 1216 (2006).

108 42 U.S.C. § 2000bb-3 (2000).

109 *See* §§ 2000bb-1, 2000bb-2 (2000).

110 § 2000bb-2 (emphasis added).

111 H.R. REP. NO. 103-88, at 8 (1993) ("Pursuant to the Religious Freedom Restoration Act, the courts must review the claims of . . . military personnel under the compelling governmental interest test."); S. REP. NO. 103-111, at 12 (1993) ("Under the unitary standard set forth in the act, courts will review the free exercise claims of military personnel under the compelling governmental interest test.").

112 S. REP. NO. 103-111, at 12.

113 *Id.*

114 H.R. REP. NO. 103-88, at 8 (1993). According to the House report, applying the compelling interest test to military regulations "does not mean the expertise and authority of military . . . officials will be necessarily undermined." *Id*. This is so, according to the House report, because "maintaining discipline in [the] armed forces, [has] been recognized as governmental interests of the highest order." *Id*.

115 *Id*.

nificantly, the Senate Judiciary Committee's report on RFRA adopted a similar stance with respect to regulations based on "speculation, exaggerated fears, or post-hoc rationalizations," but only with respect to prison regulations.[116] The notion that military regulations must be justified on the basis of something other than speculation, exaggerated fears, or thoughtless policies is not significant because, the Senate Judiciary Committee applied this justificatory standard only to prison regulations—it declined or neglected to apply the standard to military regulations. The consequent failure of the Senate and House reports to comport with each other with respect to the standard detracts from its significance.

Notwithstanding this divergence, both reports expressed an expectation that courts applying RFRA will construe the compelling interest test neither "more stringently [n]or more leniently than it was prior to *Smith*."[117] The next section of this essay examines two pre-*Smith* cases that applied the compelling interest test to military appearance regulations.

B. Two Pre-*Smith* Applications of the Compelling Interest Test to Military Appearance Regulations

In *Bitterman v. Secretary of Defense*, the U.S. District Court for the District of Columbia addressed the constitutionality of Air Force regulations that prohibited an active duty air traffic controller from wearing a yarmulke in uniform.[118] Sergeant Murray Bitterman—the complainant—filed suit after being denied permission to wear a yarmulke.[119] Although the Air Force conceded that a yarmulke would not interfere with Bitterman's air traffic control duties,[120] and notwithstanding the testimony of a former Air Force physician, who wore a yarmulke during active duty,[121] the District Court upheld the Air Force regulations after applying a compelling interest test.[122] According to the District Court, the Air Force asserted two compelling interests: (1) a compelling interest in "the effective functioning and maintenance of the Air Force,"[123] and (2) a compelling interest in preserving "motivation, image, morale, discipline and esprit de corps,"

116 *See* S. REP. NO. 103-111, at 10 (1993).

117 H.R. REP. NO. 103-88, at 7 (1993); S. REP. NO. 103-111, at 9 (1993).

118 Bitterman v. Sec'y of Def., 553 F. Supp. 719, 720 (D.D.C. 1982).

119 *Id*.

120 *Id*.

121 *Id*. at 721.

122 *Id*. at 724–26. The District Court articulated the test as follows:

> [I]n order to withstand judicial review, the regulation in question, although presumptively valid, must protect a substantial governmental interest overshadowing the First Amendment right that is being circumscribed. Further, the regulation must regulate no more conduct than is reasonably necessary to protect the substantial governmental interest asserted; yet this strict standard of review is to be tempered by the substantial deference to be accorded military judgments as to the appropriate ways in which to further a compelling interest . . . .

Id. at 723–24. In its opinion, the District Court inconsistently characterized the governmental interest at issue as "a substantial governmental interest," a "substantial compelling governmental interest," a "compelling governmental interest," *id*. at 724, and "an important governmental interest." *Id*. at 726.

123 *Id.* at 724.

which are "essential to the efficient functioning and operation of the Air Force."[124] According to the District Court, permitting departures from Air Force appearance regulations would "adversely affect the promotion of teamwork, counteract pride and motivation, and undermine discipline and morale, all to the detriment of the substantial compelling governmental interest of maintaining an efficient Air Force."[125]

The District Court also concluded that the appearance regulations at issue were the least intrusive means of furthering the Air Force's asserted interests.[126] This conclusion was motivated in part by the District Court's assumption of the following analytic stance: in determining the intrusiveness of the challenged regulation, "[i]ts effect upon the religious practices of all Air Force personnel must be considered, not just its effect upon the wearing of a yarmulke" by a single individual.[127] After assuming this analytic stance, the District Court posed an extreme hypothetical, in which the Air Force promotes uniformity by requiring all personnel to adhere to the same religion or to no religion.[128] Because the actual regulations at issue sought to promote uniformity while permitting personnel to adhere to at least some form of religion, they were less restrictive than they hypothetically could have been.[129] The District Court went further than this, however, by concluding on the basis of its hypothetical that the actual regulations were the *least* restrictive means of promoting uniformity[130] and, derivatively, operational effectiveness in the Air Force.[131]

The District Court went even further in the course of upholding the contested regulations. Drawing on an interpretation of Jewish religious law,[132] the District Court opined that Bitterman's desire to wear a yarmulke was a "religious preference" instead of a religious requirement.[133] This, according to the District Court, supported the notion that the contested regulations constituted the least restrictive means of promoting uniformity and operational effectiveness in the Air Force.[134]

In *Sherwood v. Brown*, the U.S. Court of Appeals for the Ninth Circuit addressed the constitutionality of Navy regulations that prohibited an enlistee from remaining in uniform after his adoption of Sikhism.[135] Ronald

124 *Id.*
125 *Id.* at 724–25.
126 *Id.* at 725.
127 *Id.*
128 *Id.*
129 *See id.*
130 *Id.*
131 *Id.* at 724.
132 *Id*. at 725. In support of the notion that wearing a yarmulke constitutes a religious preference instead of a religious requirement, the District Court cited a footnote from *The Concise Code of Jewish Law*, according to which a Jew is permitted to go bareheaded, "especially where one's livelihood is involved . . . *inasmuch as covering the head is prescribed by custom but not demanded by law*." *Id.* (quoting 1 GERSION, APPEL, THE CONCISE CODE OF JEWISH LAW 34 n.3 (1977)) (emphasis added).
133 *Id.* at, 726.
134 *Id.*
135 Sherwood v. Brown, 619 F.2d 47, 48 (9th Cir. 1980).

Sherwood—the complainant—filed suit after being court-martialed and discharged from the Navy for refusing to remove his turban and wear a helmet in compliance with Navy appearance regulations.[136] In a short opinion, the court upheld the Navy regulations by affirming the lower court's application of a compelling interest test.[137] Both courts concluded that the Navy's interest in safety was a compelling interest.[138] Addressing the observant Sikh practice of wearing a turban, and drawing on an affidavit by a senior naval officer, both courts concluded that the "[a]bsence of a helmet poses serious safety problems both for the unprotected sailor and for the crew that depends on him" and that "[a] turban does not meet [the] safety requirement necessitated by both the ordinary and extraordinary activities of the modern, mechanized Navy."[139] Both courts also concluded that "because all naval personnel are subject to military duties which implicate the safety rationale, no less restrictive alternative [to naval appearance regulations] exists."[140]

C. The Significance of *Bitterman* and *Sherwood* in the Context of RFRA's Legislative History

RFRA's legislative history uniformly contemplated that RFRA would reinstate the compelling interest test, as applied prior to *Smith,* in free exercise cases.[141] RFRA's legislative history also contemplated deference to military judgment in RFRA challenges to military regulations.[142] *Bitterman* and *Sherwood* were pre-*Smith* applications of the compelling interest test, and both courts upheld military appearance regulations against constitutional challenge.[143] The court in *Bitterman* expressly stated that its application of the compelling interest test was "tempered by the substantial deference to be accorded military judgments as to the appropriate ways in which to further a compelling interest."[144] All of this, without more, might support a conclusion that RFRA does not compel the accommodation of observant Sikh lawyers in the U.S. Army JAG Corps. The balance of this essay argues against the necessity of such a conclusion by applying RFRA to appearance regulations that presumptively prohibit observant Sikh lawyers from joining the U.S. Army JAG Corps.

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136 *Id.*

137 *Id.* The Court of Appeals articulated the test as follows: "Government regulations which infringe protected religious practice are proscribed by the free exercise clause of the First Amendment unless the Government can demonstrate that the regulation is the least restrictive alternative to meet a compelling state need." *Id.*

138 *Id.*

139 *Id.*

140 *Id.*

141 H.R. REP. NO. 103-88, at 6 (1993); S. REP. NO. 103-111, at 8-9 (1993).

142 S. REP. NO. 103-111, at 12.

143 Bitterman v. Sec'y. of Def., 553 F. Supp. 719, 726 (D.D.C. 1982); Sherwood v. Brown, 619 F.2d 47, 48 (9th Cir. 1980).

144 *Bitterman*, 553 F. Supp. at 724.

THE APPLICABILITY OF THE RELIGIOUS FREEDOM RESTORATION ACT TO APPEARANCE REGULATIONS THAT PRESUMPTIVELY PROHIBIT OBSERVANT SIKH LAWYERS FROM JOINING THE U.S. ARMY JUDGE ADVOCATE GENERAL CORPS

The Religious Freedom Restoration Act of 1993 reads in pertinent part as follows: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . ."[145] Notwithstanding this, "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[146] The following discussion is organized around RFRA's statutory language.

A. Do Army Appearance Regulations Substantially Burden an Observant Sikh's Exercise of Religion?

Under RFRA, as under the First Amendment, "[r]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit . . . protection."[147] RFRA protects the "sincere exercise of religion."[148] An observant Sikh who initiates a RFRA challenge of Army appearance regulations would accordingly have to demonstrate that *his* practice of Sikhism is sincere. As mentioned earlier in this essay, observant Sikhs wear turbans and refrain from cutting their hair in accordance with their religion.[149]

Federal courts have offered multiple expressions of the requirement that contested regulations "substantially burden" a person's exercise of religion; even still, several recurring principles emerge from these expressions.[150] As a threshold matter, "plaintiffs have the initial burden under RFRA to demonstrate that the policy in question substantially burdens the free exercise of their religion."[151] This initial evidentiary burden is a prerequisite to the government's demonstration that its contested regulations further a compelling governmental interest by the least restrictive means.[152] A "substantial burden" under RFRA "must be more than an inconve-

145 42 U.S.C. § 2000bb-1 (2000).

146 *Id.*

147 United States v. DeWitt, 95 F.3d 1374, 1374–75 (8th Cir. 1996) (quoting Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 714 (1981)).

148 Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 126 S. Ct 1211, 1220 (2006); *see also DeWitt*, 95 F.3d at 1375 (noting that RFRA "only protects sincerely held beliefs that are 'rooted in religion.'"(quoting *Thomas*, 450 U.S. at 713)).

149 *See* Sardarni Premka Kaur, *Rahit Maryada*, *in* 3 THE ENCYCLOPAEDIA OF SIKHISM 424 (Harbans Singh ed., 1997).

150 Mary Topliff, Annotation, *Validity, Construction, and Application of Religious Freedom Restoration Act (42 USCS §§ 2000bb et seq)*, 135 A.L.R. FED. 121, 144–48 (1996).

151 Potter v. District of Columbia, 382 F. Supp. 2d 35, 39 (D.D.C. 2005).

152 Henderson v. Stanton, 76 F. Supp. 2d 10, 14 (D.D.C. 1999).

nience."[153] A RFRA plaintiff must show that a government regulation "pressur[es] him or her to commit an act forbidden by the religion or . . . [prevents] him or her from engaging in conduct or having a religious experience which the faith mandates."[154] Although at least one court interpreted the substantial burden test as applying only to religious practices that are mandated rather than to those which are merely encouraged,[155] at least one other court has concluded that "a restriction on practices subjectively important to plaintiff's sincerely held religious understanding is a substantial burden within the meaning of RFRA."[156]

Two aspects of the Army's appearance regulations fail to comport with Sikh religious requirements: (1) rules regarding headgear, and (2) rules regarding hair. In pertinent part, the regulations permit religious headdress to be worn if it is "of a style and size which can be completely covered by standard military headgear" but categorically forbid personnel from wearing religious headgear in "circumstances when the wear of military headgear is required (for example, when the soldier is outside or required to wear headgear indoors for a special purpose)."[157] Religious headdress cannot be worn at all if it "interfere[s] with the wear or proper functioning of protective clothing or equipment."[158] Although it is possible that an observant Sikh would consent to wearing a small head-covering[159] underneath a protective helmet as required by operational necessity, it is equally possible that an observant Sikh would categorically object to wearing a helmet if this required him to remove any form of traditional headgear; this is so because observant Sikhs regard their turbans as being inseparable parts of their religious identity.[160] With respect to such a Sikh—faced with a choice between removing his turban and being precluded from the U.S. Army JAG Corps—some courts might find a substantial burden on religious exercise in virtue of his subjective but sincere belief that a turban

153 Worldwide Church of God v. Philadelphia Church of God, Inc., 227 F.3d 1110, 1121 (9th Cir. 2000) (citations omitted).

154 *Id.*; Guam v. Guerrero, 290 F.3d 1210, 1222 (9th Cir. 2002) ("A statute burdens the free exercise of religion if it 'puts substantial pressure on an adherent to modify his behavior and to violate his beliefs. . . . '").

155 Goodall v. Stafford County Sch. Bd., 60 F.3d 168, 172–73 (4th Cir. 1995) *See also* Turner-Bey v. Lee, 935 F. Supp. 702, 703 (D. Md. 1996) (noting the distinction between conduct mandated by a religion and conduct merely encouraged but declining to decide the issue on that basis). This approach accords with the approach taken in *Bitterman*, where a district court drew a distinction between religious preferences and religious requirements in the course of deciding whether contested appearance regulations unconstitutionally infringed upon an Air Force member's right to wear a yarmulke. Bitterman v. Sec'y. of Def., 553 F. Supp. 719, 726 (D.D.C. 1982).

156 Rouser v. White, 944 F. Supp. 1447, 1455 (D.Cal. 1996).

157 ARMY REG. 600-20, *supra* note 23, at 33.

158 *Id.*

159 One example of an alternative head-covering among Sikhs is a *patka*—a square cloth with four strings attached to each corner. The cloth is tightly wrapped around the head and tends to be more secure and compact than a traditional turban. Some Sikh athletes wear *patkas* underneath their helmets. About.com, http://altreligion.about.com/library/glossary/bldefpatka.htm?terms=patka (last visited Sept. 12, 2007).

160 Kaur, *supra* note 149, at 424.

is an inseparable part of his religious identity.[161] Even if a court requires that such an individual demonstrate that turbans are mandated rather than encouraged in Sikhism,[162] there is ecclesiastical support for the proposition that turbans are required for Sikh males.[163] This would likely lead a court to conclude that an observant Sikh's exercise of religion is substantially burdened by a rule that requires him to remove his turban and replace it with a helmet.

Observant Sikhs do not cut their hair.[164] Emphasizing cleanliness, observant Sikhs keep their uncut hair combed and tied in a knot underneath their turbans.[165] Although many observant Sikhs maintain flowing beards, others keep their uncut beards secured with hair gel, an elastic band, or a combination of both. As with turbans, although an individual Sikh may have subjective religious reasons for wanting to preserve his hair in the face of opposition from military authorities, there is ecclesiastical support for the proposition that hair-cutting is prohibited in Sikhism.[166] Several courts have, in the context of particular cases, concluded that forcing individuals to cut their hair in violation of religious requirements constitutes a substantial burden on the exercise of religion.[167] For the foregoing reasons, it is likely that a court would conclude that giving a Sikh a choice between preserving his hair and being able to join the U.S. Army JAG Corps constitutes a substantial burden on his exercise of religion.

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161 *Rouser*, 944 F. Supp. at 1455.

162 Goodall v. Stafford County Sch. Bd., 60 F.3d 168, 172–73 (4th Cir. 1995).

163 SHIROMANI GURDWARA PARBANDHAK COMMITTEE SIKH REHT MARYADA (CODE OF SIKH CONDUCT AND CONVENTIONS) § 4, ch. 10, art. XVI, cl. t http://www.sgpc.net/rehat_maryada/section_four.html (last visited Sept. 12, 2007) [hereinafter SIKH REHT MARYADA] ("For a Sikh, there is no restriction or requirement as to dress except that he must wear Kachhehra . . . [a] drawer type garment fastened by a fitted string round the waist, very often worn as an underwear. . . . *and turban*.") (emphasis added). The *Sikh Reht Maryada* was first approved in 1945 by the Advisory Committee on Religious Matters, a constituent of the Shiromani Gurdwara Parbandhak Committee (SGPC). *Preface to* SIKH REHT MARYADA, CODE OF SIKH CONDUCT AND CONVENTIONS, http://www.sgpc.net/sikhism/code_of_conduct.html (last visited Sept. 12, 2007). The SGPC was organized in 1925 after orthodox Sikh reformers secured the legal right to manage historic Sikh shrines. NESBITT, *supra* note 9, at 78–79. Described as "the mini parliament of Sikhs," the SGPC promotes religious and educational activities for Sikhs throughout India. *SGPC Budget for 2006–07 Presented*, PRESS TRUST OF INDIA, Mar. 30, 2006, *available at* http://www.accessmylibrary.com/com2/summary_0286-14293491_ITM. The *Rehat Maryada* was not the first codification of Sikh discipline; the earliest versions appeared in the 18th century following the death of Guru Gobind Singh. NESBITT, *supra* note 9, at 62–63.

164 *Who is a Sikh?*, *supra* note 9, at 121.

165 NESBITT, *supra* note 9, at 51–54.

166 SIKH REHT MARYADA *supra* note 163, at § 4, ch. 10, art. XVI, cl. i ("A Sikh should, in no way, harbour any antipathy to the hair of the head with which his child is born. He should not temper [sic] with the hair with which the child is born. . . . A Sikh should keep the hair of his sons and daughters intact.").

167 *See, e.g*, Estep v. Dent, 914 F. Supp. 1462, 1467 (W.D. Ky. 1996) ("The court will assume for the purpose of this opinion that [a Hasidic Jewish inmate's] religious convictions are authentic and [that] cutting his earlocks substantially burdens his faith."); Luckette v. Lewis, 883 F. Supp. 471, 479 (D. Ariz. 1995) ("Prison policies do substantially burden Plaintiff's attempts to maintain a Kosher diet, *keep his hair at a certain length*, and wear a headcovering of a particular color.") (emphasis added).

B. Do Army Appearance Regulations Further Compelling Governmental Interests by the Least Restrictive Means?

The foregoing section of this essay argued that, with respect to an observant Sikh aspirant to military service in the U.S. Army JAG Corps, certain preclusive provisions of the Army's appearance regulations constitute a substantial burden on said individual's exercise of religion. Under RFRA, the Army can justify such a burden only by demonstrating that its appearance regulations (1) further a compelling governmental interest, and (2) are the least restrictive means of furthering that interest.[168] As suggested by the Supreme Court in *Gonzales,*[169] the plain language of RFRA indicates that passing the compelling interest test is a prerequisite to reaching the least restrictive means test.[170] The Army's appearance regulations are designed to promote two governmental interests: uniformity[171] and safety[172] among Army personnel. The following subsections treat each interest in turn.

1. Does the Army Have a Compelling Interest in Uniformity?

As noted earlier, RFRA's legislative history uniformly contemplated that the compelling interest test would be applied neither "more stringently [n]or more leniently than it was prior to *Smith*."[173] Before *Smith,* the U.S. District Court for the District of Columbia in *Bitterman* applied a compelling interest test to appearance regulations that precluded an observant Jewish member of the Air Force from wearing a yarmulke.[174] In the course of upholding the contested regulations, the District Court presaged RFRA's legislative history[175] by observing that its own application of the compelling interest test was "tempered by the substantial deference to be accorded military judgments as to the appropriate ways in which to further a compelling interest."[176] According to the District Court, creating exceptions to uniformity in the Air Force would adversely impact the efficiency of the Air Force,[177] a compelling interest which depends on the preservation of other similarly compelling interests, such as discipline and esprit de corps.[178] This reasoning tracked that of the Joint Service Study Group on Religious Practice, which ultimately counseled against visible departures from un-

168 42 U.S.C § 2000bb-1 (2000).

169 Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 126 S. Ct. 1211, 1219 (2006) ("[H]ere, the government failed on the first prong of the compelling interest test, *and did not reach the least restrictive means prong* . . . .") (emphasis added).

170 § 2000bb-1.

171 RELIGIOUS PRACTICE, *supra* note 26, at III-4.

172 *Id.* at III-7.

173 H.R. REP. NO. 103-88, at 7 (1993); S. REP. NO. 103-111, at 9 (1993).

174 Bitterman v. Sec'y of Def., 553 F. Supp. 719, 720, 723–724 (D.D.C. 1982).

175 S. REP. NO. 103-111 ("[T]he courts have always extended to military authorities significant deference in effectuating [military] interests. The [Senate Judiciary] [C]ommittee intends and expects that such deference will continue under this bill.").

176 *Bitterman*, 553 F. Supp. at 724.

177 *Id.* at 724–25.

178 *Id.* at 724.

iformity in the military.[179] Without more, one might conclude that the Army could overcome a RFRA challenge to its appearance regulations by heeding the instruction of RFRA's legislative history and adopting the reasoning of *Bitterman*; however, as argued below, there is reason to doubt the Army's claim that its interest in uniformity is compelling under RFRA.

In the face of a RFRA challenge to Army appearance regulations, the Army must begin by asserting not merely an interest but a compelling interest in preserving uniformity within its ranks. In other words, the Army must assert a compelling interest in the uniform application of its appearance standards—in disallowing appearance exceptions to appearance regulations within its ranks. Although the U.S. Supreme Court has acknowledged "that there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA,"[180] the Army must affirmatively "demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program."[181] As discussed above, the Joint Study Group concluded on the basis of extensive research that uniformity has a psychological and behavioral impact on operational effectiveness within the military.[182] This research formed the basis for the Joint Study Group's ultimate conclusion that "it would be unwise to permit visible exceptions to uniform dress and appearance standards."[183] By implication, this research forms the basis for an argument against the accommodation of observant Sikhs in the Army JAG Corps. Without more, and to the extent that the Army adopts the reasoning of the Joint Study Group, it is conceivable that the Army would carry its burden of demonstrating a compelling interest in preserving uniformity in the face of a challenge by an observant Sikh aspirant to JAG Corps service. Notwithstanding this, *Gonzales* offers a roadmap for demonstrating that the Army's asserted interest in preserving uniformity is not compelling.

In *Gonzales*, the U.S. Supreme Court applied RFRA to the federal government's application of the Controlled Substances Act to a religious sect whose beliefs require the consumption of a regulated hallucinogen.[184] The government asserted "a compelling interest in the *uniform* application of the Controlled Substances Act, such that no exception to the ban on use of the hallucinogen [could] be made to accommodate the sect's sincere religious practice."[185] In response, the Court noted that the government itself had previously recognized an exception to the Controlled Substances Act

179 RELIGIOUS PRACTICE, *supra* note 26, at III-19.
180 Gonzales v. O'Centro Espirita Beneficente Uniao Do Vegetal, 126 S. Ct. 1211, 1224 (2006).
181 *Id.* at 1223.
182 RELIGIOUS PRACTICE, *supra* note 26, at III-4.
183 *Id.* at III-19.
184 *Gonzales*, 126 S. Ct at 1216.
185 *Id.*

for religion-based peyote use among Native Americans.[186] The peyote exception, according to the Court, "fatally undermine[d] the government's broader contention that the Controlled Substances Act establishes a closed regulatory system that admits of no exceptions under RFRA."[187] Furthermore, according to the Court, "the [g]overnment's argument for uniformity . . . rest[ed] not so much on the particular statutory program at issue as on slippery-slope concerns that could be invoked in response to any RFRA claim for an exception to a generally applicable law."[188] On these grounds, the Court ultimately concluded that the government failed to demonstrate a compelling interest in barring the sect's religious use of the hallucinogen at issue.[189]

With respect to the issue of uniformity, what *Gonzales* teaches is that an asserted interest in uniformity is not compelling to the extent that exceptions are made to the asserted interest. In other words, if the Army asserts a compelling interest in preserving uniformity through uniform application of its appearance standards, its assertion is undercut to the extent it can be shown that exceptions are being made to the uniform application of its appearance standards. There are, in fact, several such exceptions. Most pertinently, the U.S. Army has accommodated observant Sikhs, even after the implementation of preclusive appearance regulations.[190] This directly undermines the Army's argument that it has a compelling interest in disallowing exceptions to its appearance standards. Military authorities have suggested that uniformity has a psychological and behavioral impact on operational effectiveness within the military.[191] If the presence of observant Sikhs in the Army has not already undermined its operational effectiveness, it is not obvious why admitting additional Sikhs would do so in the future; an argument to the contrary would be in the nature of a slippery-slope, which was rejected by the U.S. Supreme Court in *Gonzales* as a legitimate foundation for demonstrating a compelling governmental interest.[192] The Army's dress regulations aim to "maintain uniformity" within the Army and ensure that personnel "avoid an extreme or unmilitary appear-

186 *Id.* at 1222.

187 *Id.*

188 *Id.* at 1223. Put another way, "[t]he [g]overnment's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *Id.*

189 *Id.* at 1225.

190 Manbir Singh Chowdhary, *Interview with Colonel G.B. Singh*, 17 SIKHSPECTRUM.COM Q. (2004), http://www.sikhspectrum.com/082004/gbsingh_int.htm. The author communicated with Col. G.B. Singh (retired), an observant Sikh who served in the U.S. Army after the implementation of preclusive appearance regulations, and learned that he retired on August 1, 2007. Email from Colonel G.B. Singh to Rajdeep Singh Jolly (Oct. 3, 2007, 08:46:08 PST) (on file with author). Although the Army has generally ruled out religion-based exceptions to its appearance regulations for uncut hair, Army Regulations provide that "policy exceptions based on religious practice given to soldiers . . . on or prior to 1 January 1986 remain in effect as long as the soldier remains otherwise qualified for retention." ARMY REG. 670.1, *supra* note 96, at 2–3.

191 RELIGIOUS PRACTICE, *supra* note 26, at 4.

192 *See Gonzales*, 126 S. Ct. at 1223.

ance."[193] The presence of observant Sikhs in the Army suggests that they have successfully avoided "an extreme or unmilitary appearance," and it is not clear why additional Sikh could not do the same.

Apart from the presence of at least some observant Sikhs in the U.S. Army, the Army's own appearance standards admit of additional exceptions with respect to facial hair, which is an integral part of an observant Sikh's religious identity. Although Army regulations require males to "keep their face[s] clean-shaven when in uniform or in civilian clothes on duty," an exception is provided when "appropriate medical authority prescribes beard growth."[194] As well, males are allowed to keep mustaches.[195] If non-Sikh Army personnel can maintain facial hair without undermining uniformity to the detriment of operational effectiveness, it is not clear why Sikh personnel would do so by maintaining facial hair in accordance with their religious beliefs.

For the foregoing reasons, the Army does not have a compelling interest in preserving uniformity by excluding observant Sikhs from its ranks. If, as this essay suggests, the Army cannot demonstrate that its appearance regulations further a *compelling* governmental interest in preserving uniformity, it is neither necessary nor even possible to determine whether those regulations satisfy RFRA's least restrictive means test. According to RFRA, "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering *that compelling governmental interest*."[196] The plain language of RFRA implies that passing the compelling interest test is a prerequisite to reaching the least restrictive means test,[197] and it is demonstrably the case that the Army has not asserted a compelling interest in disallowing appearance exceptions to its appearance regulations.

2. Does the Army Have a Compelling Interest in Safety?

As noted earlier, RFRA's legislative history uniformly contemplated that the compelling interest test would be applied neither "more stringently [n]or more leniently than it was prior to *Smith*."[198] Before *Smith,* the U.S. Court of Appeals for the Ninth Circuit in *Sherwood* applied the compelling interest test to Navy appearance regulations that formed the basis for the discharge of an observant Sikh who refused to wear a safety helmet in compliance with said regulations.[199] The court in *Sherwood* noted that safety helmets are designed to protect sailors from violent impacts and that

193 ARMY REG. 670.1, *supra* note 96, at 5.
194 *Id.* at 3.
195 *Id*. at 3.
196 42 U.S.C. § 2000bb-1 (2000) (emphasis added).
197 *Id.*
198 H.R. REP. NO. 103-88 (1993); S. REP. NO. 103-111(1993).
199 Sherwood v. Brown, 619 F.2d 47, 48 (9th Cir. 1980).

turbans do not afford such protection.[200] On this ground, the court in *Sherwood* concluded that the Navy's interest in promoting safety within its ranks was compelling.[201] This essay does not argue against this conclusion. Neither does this essay argue against the importance of requiring the use of other protective equipment, particularly gas masks. As noted by the Joint Service Study Group on Religious Practice, safety standards not only "directly affect the individual's health and well-being,"[202] but also "affect the ability of the individual to perform a task. This, in turn, influences the accomplishment of the unit's mission in both peace and war."[203] What this essay argues against, however, is the proposition that the Army's appearance regulations constitute the least restrictive means of promoting the Army's concededly compelling interest in promoting safety.

3. Do Army Appearance Regulations Constitute the Least Restrictive Means of Promoting Safety?

One court explained the least restrictive means inquiry as follows: "[i]f the compelling state [interest] can be accomplished despite the exemption of a particular individual, then a regulation which denies an exemption is not the least restrictive means of furthering the state interest."[204] The court in *Sherwood* concluded that the helmet requirement at issue in that case was the least restrictive means of promoting safety among Navy personnel because allowing an observant Sikh to wear a turban in place of a protective helmet "poses serious safety problems both for the unprotected sailor and for the crew that depends on him."[205] In other words, in the view of the court in *Sherwood,* it would have been impossible for the Navy to assure the safety of an observant Sikh sailor—or even the safety of his colleagues—if he were allowed to wear a turban in place of a protective helmet while on duty.[206] This essay agrees that the Army has a compelling interest in promoting safety among its personnel, including JAG Corps officers, who have been deployed in such dangerous settings as Vietnam and Iraq.[207] This essay also agrees with the result in *Sherwood*; however, as explained below, the result in *Sherwood* need not be replicated in every case in which an observant Sikh insists on wearing a turban in uniform. The complainant in *Sherwood* refused to wear any helmet, but it is conceivable that observant Sikhs will wear helmets as safety requires, as long as they can also wear some form of turban.

As indicated earlier, at least some observant Sikh officers have served

200 *Id.*
201 *Id.*
202 RELIGIOUS PRACTICE, *supra* note 26, at III-7–8.
203 *Id*. at III-8.
204 Callahan v. Woods, 736 F.2d 1269, 1272–73 (9th Cir. 1984).
205 *Sherwood*, 619 F.2d at 48.
206 *Id*.
207 *See* Christopher W. Behan, Book Note, 174 MIL. L. REV. 180 (2002) (reviewing FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI (2001)).

in the U.S. Army after the implementation of preclusive appearance regulations.[208] Their presence in the Army is evidence that religious requirements are compatible with safety requirements. By law, members of the U.S. military are allowed to wear religious apparel if wearing it does not "interfere with the performance of the member's military duties. . . ."[209] For example, according to the Department of Defense, "[a] yarmulke may be worn with the uniform whenever a military cap, hat, or other headgear is not prescribed."[210] Even when other headgear is prescribed, "[a] yarmulke may also be worn underneath military headgear as long as it does not interfere with the proper wearing . . . [or] functioning . . . of the prescribed headgear."[211] As mentioned earlier, observant Sikhs keep their uncut hair combed and tied underneath a turban, which can range in style, size, and fit. In situations where safety helmets are required, it is possible for an observant Sikh to wear a helmet over a smaller and tighter headdress; this practice can be observed among Sikh athletes and would be analogous to that of an observant Jew who wears a yarmulke underneath a helmet.[212] If turbans can be worn underneath helmets without subjecting their wearers to more danger than normal, then the Army cannot justifiably argue that disallowing any form of turban constitutes the least restrictive means of promoting its interest in safety.

Although the Department of Defense allows military members to wear religious apparel in certain circumstances, it officially excludes hair from its definition of "religious apparel."[213] This exclusion may have been motivated by concerns about the ability of bearded individuals to properly wear protective gas masks. According to the Joint Service Study Group on Religious Practice, it is not possible for a bearded individual to properly wear a gas mask.[214] Accordingly, even if an observant Sikh demonstrates that he can properly wear a safety helmet over a turban, it is not obvious that he can properly wear a gas mask over his uncut beard.[215] In order to succeed

208 *See supra* note 190.

209 10 U.S.C. § 774(b)(1) (2000).

210 DIRECTIVE NO. 1300.17, *supra* note 20, at 3.

211 *Id.* at 3.

212 Many Sikh men can be observed wearing *patkas*. A *patka* is a square cloth with four strings attached to each corner. The cloth is tightly wrapped around the head and tends to be more secure and compact than a traditional turban. Some Sikh athletes wear *patkas* underneath their helmets. *See supra* note 159.

213 DIRECTIVE NO. 1300.17, *supra* note 20, at 3.

214 RELIGIOUS PRACTICE, *supra* note 26, at 15. This observation might explain the following provision of the Army's appearance regulations: "[S]oldiers previously granted authority to wear unshorn hair, unshorn beard, or permanent religious jewelry will not be assigned permanent change of station or temporary duty out of [the continental United States] *due to health and safety considerations*." ARMY REG. 600-20, *supra* note 23, at 34 (emphasis added). This provision appears to assume that military personnel deployed outside the Continental United States are in greater danger of being subjected to attacks that imperil their health and safety. This assumption might appropriately be questioned in the aftermath of the terrorist attacks of September 11, 2001.

215 Potter v. District of Columbia, No. 01-1189, 2007 WL 2892685 (D.D.C. Sept. 28, 2007). In Potter, the U.S. District Court for the District of Columbia concluded that local fire department regulations requiring religiously bearded individuals to shave violated RFRA. *Id.* at *1. In the course of doing so, the court noted that some religiously bearded plaintiffs repeatedly passed safety tests for gas

under RFRA, the U.S. Army would have to demonstrate that an observant Sikh cannot wear a gas mask without imperiling himself or those around him; if such a demonstration fails, this failure could prove that the Army can promote safety without impairing the exercise of Sikhism.

As indicated earlier, many observant Sikhs secure their uncut beards with hair gel, elastic cords, or a combination of both; the effect is to fix a beard closely to the contours of the face. It is accordingly possible that an observant Sikh could modify his beard in such a way as to enable the formation of a protective seal for the purpose of properly wearing a gas mask. Additionally, as mentioned earlier, the Army allows personnel to maintain beards when "appropriate medical authority prescribes beard growth."[216] If Army personnel are permitted to maintain beards for medical reasons, and if such personnel can properly wear gas masks, then it might be possible for observant Sikhs to do so. That there already are observant Sikhs in the U.S. Army might constitute additional evidence that Sikh religious requirements are compatible with safety requirements. Significantly, however, these Sikhs are "not [to] be assigned permanent change of station or temporary duty out of . . . [the continental United States] *due to health and safety considerations*."[217] This assignment restriction may have been motivated by concerns about exposing observant Sikhs to environments in which the use of gas masks would be more than a remote possibility. Because JAG Corps officers are deployed around the world,[218] observant Sikh members of the JAG Corps could find themselves in environments of the sort that military officials determined would be unsafe for observant Sikhs. This determination argues against the accommodation of observant Sikhs in the U.S. Army JAG Corps; however, as explained below, the foregoing argument need not be regarded as fatal to a case for accommodation.

The United Kingdom's Ministry of Defense has adopted a more inclusive approach to religious accommodation than the United States, and this approach provides useful guidance in regard to facial hair and gas masks.[219] This approach also poses potential obstacles to observant Sikh aspirants to military service in the United States. According to the Ministry of Defense's *Guide on Religion and Belief in the MOD and Armed Forces*, Sikhs in the United Kingdom are permitted to serve in their nation's armed forces and are permitted to maintain uncut hair.[220] Notwithstanding this, Sikhs must maintain "short neatly trimmed beards" that must be modified or removed "to such an extent as to enable the correct wearing of a respira-

masks, *id.* at *10, and that clean shaven individuals fail such tests with regularity, *id.* at *7. The court also observed that certain gas masks can safely be worn by bearded individuals. *Id.* at *9.

216 ARMY REG. 670-1, *supra* note 96, at 3.

217 ARMY REG. 600-20, *supra* note 23, at 34 (emphasis added).

218 Behan, *supra* note 207.

219 This essay assumes that the British military is fairly comparable to the U.S. military in terms of operational sophistication.

220 UNITED KINGDOM MINISTRY OF DEFENCE, *supra* note 19.

tor or breathing apparatus."[221] According to the Ministry of Defense, "[a]n effective seal on a respirator can only be achieved when the skin is clean shaven. In an operational environment (including training in preparation for operational deployment) where there is a [nuclear, biological, or chemical] threat Muslims, Sikhs and indeed all personnel with beards, would need to shave."[222]

The *Guide* requires Sikhs to trim their beards and also asserts that an effective respiratory seal can only be achieved on clean-shaven skin; however, the requirement appears to be motivated by the assertion.[223] The *Guide* might plausibly be read to suggest that an effective respiratory seal can only be achieved when facial hair does not "come[ ] between the sealing surface of the facepiece and the face. . . ."[224] If an observant Sikh can modify his beard—and do so without trimming it—to such an extent as to prevent facial hair from interrupting the formation of a respiratory seal, then the *Guide* itself might have gone too far in prescribing that observant Sikhs trim their beards. In other words, Sikh aspirants to military service should not be presumed to be incapable of safely wearing gas masks without being given an opportunity to demonstrate such capability.

If the *Guide* does not go too far—if it is plainly impossible for a bearded individual to properly wear a gas mask *without* shaving his beard to some extent—then, at best, the *Guide* embodies an approach to safety that enables observant Sikhs to undertake military service without sacrificing all of their visible religious commitments, as they presumptively must in order to join the U.S. Army JAG Corps. If the U.S. Army adopted the British approach to religious accommodation, then observant Sikh personnel would likely be able to wear turbans, maintain uncut hair, and maintain at least some facial hair. Whether this concession would be acceptable to an observant Sikh is a matter for his own conscience; however, to the extent that the British approach enables a Sikh to observe his religious traditions *and* safely wear a gas mask, it appears to demonstrate that existing Army regulations regarding facial hair and gas masks are not the least restrictive means of promoting safety among Army personnel.

CONCLUSION

Observant Sikh lawyers do not presumptively enjoy the right to join the U.S. Army Judge Advocate General (JAG) Corps because Sikh religious requirements do not comport with the Army's appearance regulations. This essay argued that the Army's appearance regulations violate the Religious Freedom Restoration Act (RFRA). Under RFRA, government

221 *Id.*

222 *Id.*

223 *Id.*

224 Potter v. District of Columbia, 382 F. Supp. 2d 35, 38 (D.D.C 2005) (quoting Occupational Health and Safety Administration, Occupational Health and Safety Standards, Personal Protective Equipment, 29 CFR 1910.134).

may substantially burden an individual's exercise of religion only if it demonstrates that its application of the burden furthers a compelling governmental interest by the least restrictive means.[225] The Army's appearance regulations aim to promote two interests—uniformity and safety. In the course of furthering those interests, the Army's appearance regulations also prevent observant Sikhs from joining the U.S. Army JAG Corps. Observant Sikh males wear turbans and refrain from cutting their hair. Both requirements purportedly interfere with the Army's interests in uniformity and safety. This essay argued to the contrary by demonstrating (1) that, under RFRA, the Army does not have a compelling interest in disallowing appearance exceptions to its appearance regulations, and (2) that, under RFRA, the Army's appearance regulations do not constitute the least restrictive means of promoting safety. With respect to uniformity, the presence of observant Sikhs in the Army and the Army's own flexible approach to its appearance regulations undercut the notion that the Army has a compelling interest in disallowing exceptions to its appearance regulations. With respect to safety, observant Sikhs should be permitted to demonstrate that they can safely wear smaller turbans underneath their helmets when helmets must be worn and should be permitted to demonstrate that they can safely wear gas masks when gas masks must be worn. Because the Army's appearance regulations violate RFRA, they must be amended to allow for the accommodation of observant Sikhs in the U.S. Army JAG Corps.

225 42 U.S.C. § 2000bb-1 (2000).

Gulliver's Trials: A Modest Proposal to Excuse and Justify Satire

Daniel Austin Green

ABSTRACT

Satire and parody are both examples of what copyright law denominates "derivative works." And the two are, philologically, rather interrelated, while nevertheless remaining distinct categories. But, following ambiguous Supreme Court guidance, the status of the two genres in fair use defenses to allegations of copyright infringement is somewhat uncertain, and varies significantly amongst the circuit courts. Satire is the unequivocally underprivileged, when not categorically disallowed, genre in fair use evaluations. But refining, without changing, current judicial method in this area could serve to protect arguably more "Useful Art," while leaving the current treatment of parody untouched.

This article serves three distinct, but related, purposes: (1) to disambiguate, for copyright law purposes, the terms "parody" and "satire"; (2) to prove that protection, as fair use, for satire is constitutionally consistent—and, indeed, compelled—by both copyright and First Amendment jurisprudence; and (3) to recommend a judicial method by which to incorporate this view while leaving wholly intact all current precedent.

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Gulliver's Trials: A Modest Proposal to Excuse and Justify Satire

Daniel Austin Green[*]

INTRODUCTION

This article explores the viability of satire as a genre appropriate for the affirmative defense of fair use in copyright infringement actions. More specifically, this article contends that satire can constitute potential "excuse" and "justification" defenses in such actions. The focus on satire finds its nascence in Justice Souter's dictum distinguishing parody from satire in the majority opinion of *Campbell v. Acuff-Rose*,[1] leaving unsettled issues—and circuit splits—as to the viability of the fair use defense for these two genres, particularly satire.

Starting first with Professor Wendy Gordon's theory advocating excuse and justification demarcation for fair use copyright law, the present article builds on the basic distinction and fervently asserts that copyright appropriation should be allowed for satirical works, under limited circumstances set out herein, as part of fair use and First Amendment jurisprudence. More specifically, satire should be thought of not simply as a type of excuse (that is, behavior that society does not want to occur, as a normative matter, yet deems acceptable under the specific facts of the case—for instance, insanity in criminal law),[2] but also as a potential justification (that is, behavior that is deemed acceptable as a normative matter).[3] This proposal culminates with both a theoretical formulation of a "spectrum of fair use" analysis[4] and a five-part test for the judicial administration of the proposed analysis of satire,[5] incorporating the fair use provisions of the Copyright Act of 1976,[6] and the common law doctrines of fair use, and excuse and justification.

I. PRIMER ON FAIR USE

Cognizant of the fact that many uses of copyrighted material are still valid and deserve protection, Congress has chosen to include an explicit

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1 Campbell v. Acuff-Rose Music, 510 U.S. 569, 580–81 (1994).

2 *See infra* text accompanying notes 45–46.

3 *See infra* text accompanying notes 46, 50.

4 *See infra* Part III.

5 *See infra* Part IV.

6 Copyright Act of 1976, 17 U.S.C. § 107 (2000).

provision in the Copyright Act to allow for "fair use" of copyrighted materials.[7] Copyright gives an exclusive monopoly to the owner, for a fixed term, which was recently extended to the life of the author plus seventy years.[8] Fair use can be asserted at any time during this term and is exercised affirmatively by defendants in response to allegations of copyright infringement.[9] The last time the U.S. Supreme Court spoke extensively on the issue of fair use was in 1994.[10] While respecting a parodic song as an acceptable form of a fair use, the Court's views on the treatment of satire were unclear and somewhat conflicting between the majority and concurring opinions.[11]

II. DISTINGUISHING BETWEEN PARODY AND SATIRE

Colloquially, the terms "parody" and "satire" are often used interchangeably, sometimes in error and sometimes merely as tropes of a vague classification of "critical" works.[12] But the Supreme Court seems rather disinterested in such trivialities and appears, at least in dicta, to have adopted a fairly rigid distinction between the two genres.[13] This distinction leaves the two genres with seemingly very different treatment under the law—a distinction that has been taken quite seriously in a number of lower court decisions. In fact, in light of the variation among the circuits,[14] the

7 *Id.* The full text of the provision is:

> § 107. Limitations on exclusive rights: Fair use
>
> Notwithstanding the provisions of sections 106 and 106A [the copyright owner's exclusive rights], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. *Id.*

8 Formerly, protection was life plus fifty years. The recent addition of twenty years was upheld in Eldred v. Ashcroft, 537 U.S. 186, 193–94 (2003).

9 *See infra* text accompanying note 156.

10 Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994).

11 *See infra* Part II.

12 Critical: "1. Given to judging; *esp*. given to adverse or unfavourable criticism; fault-finding, censorious." 4 OXFORD ENGLISH DICTIONARY 30 (2d ed. 1989). This meaning is also the manner in which Shakespeare said "That is some Satire keen and critical." *Id.* (quoting WILLIAM SHAKESPEARE, MIDSUMMER NIGHT'S DREAM act 5, sc.1, ln. 55).

13 *See Campbell*, 510 U.S. at 580–81.

14 Unsurprising to most readers, the decisions of note in this inquiry are those emanating from the Second and Ninth Circuits. Historically, and more importantly, as a product of their geographies, these two circuits are where cases of satire—works of art and entertainment—tend to arise most frequently.

distinction might be best described as only *facially* rigid. What lies beneath its face, however, is the very real potential for significant chilling of free speech.

A. *Campbell v. Acuff-Rose Music*, *Inc*. and Subsequent Judicial Treatment

According to Justice Souter, in his opinion for the Court in *Campbell*, "[p]arody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing."[15] In his concurrence, Justice Kennedy makes the distinction between parody and satire even more pronounced, stating, "[t]he parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole (although if it targets the original, it may target those features as well)."[16] But this distinction, as will be discussed at length in this article, does not comport with literary theories of satire and parody, which view the two as deeply intertwined and sometimes make no distinction.[17]

Different courts have treated the distinction between satire and parody in various ways since *Campbell*. The Ninth Circuit has generally followed Justice Souter's opinion and even the more onerous guidelines of Justice Kennedy's concurrence very formalistically.[18] The Ninth Circuit makes a strict classification based on whether or not a work specifically targets the original, then it considers this determination to the total exclusion of other factors that might be considered.[19] Thus the classification as parody or satire is the touchstone of whether or not fair use protection is to be afforded in the Ninth Circuit.[20]

Second Circuit courts, on the other hand, have ostensibly respected the parody-satire distinction. Second Circuit opinions frequently hold instances of satire to be within the technical definition of parody, and thereby entitled to fair use protection, based on a particular element of the satire be-

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In the next section, we will see exactly how much and in what ways these two courts vary. *See infra* Part II.A.

15 *Campbell*, 510 U.S. at 580–81. A footnote to this quote further elaborates on the meaning of satire: "Satire has been defined as a work 'in which prevalent follies or vices are assailed with ridicule,' 14 Oxford English Dictionary . . . 500 [(2d ed. 1989)], or are 'attacked through irony, derision, or wit,' American Heritage Dictionary . . . 1604 [(3d ed. 1992)]." *Campbell*, 510 U.S. at 581 n.15.

16 *Id*. at 597 (Kennedy, J., concurring).

17 *See infra* Parts II.B–C. Moreover, it is argued here that satirical works are perhaps more a "useful Art[ ]" (to use the Constitution's language, U.S. CONST. art. I, § 8, cl. 8) than the work being satirized, because of the value inhered in the critical nature of satire.

18 *See, e.g.*, Dr. Seuss Enters. v. Penguin Books USA, 109 F.3d 1394 (9th Cir. 1997) (denying protection for a satirical work, even where it was labeled "A Parody"); Columbia Pictures Indus. v. Miramax Films Corp., 11 F. Supp. 2d 1179 (C.D. Cal. 1998) (holding a poster for *The Big One*—a documentary of corporate America—a satire, and thus unprotected because it was substantially similar to the movie poster for the movie *Men in Black*, yet did not parody *Men in Black*).

19 *E.g.*, *Dr. Seuss*, 109 F.3d at 1400; Fisher v. Dees, 794 F.2d 432, 436 (9th Cir. 1986).

20 *See, e.g.*, *Dr. Seuss*, 109 F.3d 1394. This case is discussed in detail *infra* Part III.B.2.b.

ing targeted at the original.[21] Indeed, Justice Kennedy's statement[22]—that works targeting another may also target the "general style," genre, or "society as a whole,"[23]—makes reference to a Second Circuit decision, *Rogers v. Koons*, made almost two years prior to the Supreme Court's decision in *Campbell*.[24] In *Rogers*, the Second Circuit Court of Appeals declared that:

> Parody *or* satire, as we understand it, is when one artist, for comic effect or social commentary, closely imitates the style of another artist and in so doing creates a new art work that makes ridiculous the style and expression of the original. Under our cases parody *and* satire are valued forms of criticism, encouraged because this sort of criticism itself fosters the creativity protected by the copyright law.[25]

Deconstructing this quote, it is first observed that the terms "parody" and "satire" are joined by the disjunctive "or" when describing *what* they are. This must mean that parody and satire are unique genres, but afforded equal *status* in the eyes of the court. The next mention of the two terms addresses the *value* and *protection* of the parody and satire and makes clear that the Second Circuit does view the two as distinct (form*s*, plural), yet respects both as "valued forms of criticism . . . foster[ing] the creativity protected by the copyright law."[26] For the Court to have relied on this opinion without embracing this essential passage is unthinkable.

Of course, even though it cited *Rogers*, the *Campbell* Court—or at least Kennedy's concurrence—may not have intended grandiose conceptions of fair use. But the Second Circuit continues to follow its own doctrine from *Rogers* and subsequent cases, even where such decisions are substantively tantamount to disregarding the parody-versus-satire message of *Campbell*.[27] The Second Circuit carefully holes satire cases into Kennedy's "may target those features as well" set-aside,[28] for pieces that have the requisite parodic element.[29]

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21 *See, e.g.*, Rogers v. Koons, 960 F.2d 301, 309–10 (2d Cir. 1992) (parody and satire occurs "when one artist, for comic effect or social commentary, closely imitates the style of another artist."); Berlin v. E. C. Publ'ns, 329 F.2d 541, 545 (2d Cir. 1964) ("parody and satire *are* deserving of substantial freedom—both as entertainment and as a form of social and literary criticism."); *but see* MCA, Inc. v. Wilson, 425 F.Supp. 443, 453 (S.D.N.Y. 1976) (defendants sought to parody life, sexual mores and taboos, but did not comment ludicrously upon the source material) *aff'd*, 677 F.2d 180 (2d Cir. 1981).

22 And we must not forget that it was Justice Souter that wrote *Campbell*; Justice Kennedy was only concurring. Campbell v. Acuff-Rose Music, 510 U.S. 569, 596 (1994).

23 *Id.* at 597.

24 *Rogers*, 960 F.2d 301.

25 *Id.* at 309–10 (emphasis added).

26 *Id.* at 310.

27 *See, e.g.*, Blanch v. Koons, 467 F.3d 244, 255 (2d Cir. 2006); Yankee Publ'g v. News Am. Publ'g, 809 F.Supp. 267, 278 (S.D.N.Y. 1992).

28 *Campbell*, 510 U.S. at 597. *See also supra* text accompanying note 16.

29 While the Second Circuit's interpretation may be a bit of a stretch jurisprudentially, insofar as it exploits the vagueness of the language, the interpretation is well-grounded philologically. Though the Second Circuit opinions do not rely on (or even mention) literary theory as reasoning for their opinions, it is well-accepted that satire may in fact require the use of parody to be effectuated. It is said that, "[l]iterary satire is a highly sophisticated art-form which thrives on parodying and debunking other lite-

B. Confusion Over the Distinction

What remains uncertain, then, is the status of satirical works, which often do not explicitly target another work. The Supreme Court, in the more than ten years since *Campbell*, has yet to offer up any specific guidance as to the status of satire in copyright fair use. Particularly, there is no consensus as to whether the Court really insists that satire must contain parody, or whether it may be analyzed of its own accord, with or without purely parodic elements.[30]

Although Justice Kennedy would go so far as to require that all satire contain at least some aspect of direct *parody* in order to merit protection, the majority opinion by Justice Souter is not nearly so clear.[31] It would be foolhardy, as a matter of interpretation, to read such a meaning into Justice Souter's opinion. Moreover, it would be exceedingly unwise, as a matter of policy, to do so.[32] And one could expect that had Justice Souter (and the others joining the opinion) truly felt that way, the opinion would have been written to include such a requirement or, alternatively, Kennedy would not have written a separate concurrence in the first place.

Unlike Justice Kennedy, Justice Souter does not appear to endorse the idea of *no* degree of protection for pure satire.[33] Souter simply states that "satire . . . requires justification for the very act of borrowing."[34] The paramount concern the Court need address—the issue contested amongst the circuits and the topic of this article—is exactly what justification is required for satiric borrowing.[35]

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rature . . ." Harriet Deer & Irving Deer, *Satire as Rhetorical Play*, 5 BOUNDARY 2 711, 713 (1977).

30 *See* Elsmere Music v. Nat'l Broad. Co., 482 F.Supp. 741 (S.D.N.Y. 1980), *aff'd*, 623 F.2d 252 (2d Cir. 1980) (holding the *Saturday Night Live* performance of *I Love Sodom* a legitimate parody of the song *I Love New York*). A pre-*Campbell* case, the district court declared: "[T]he issue to be resolved by a court is whether the use in question is a valid satire or parody, and not whether it is a parody of the copied song itself." *Id.* at 746. But this is the very type of inquiry that seems disallowed under *Campbell*.

31 "We thus line up with the courts that have held that parody, *like other comment or criticism*, may claim fair use under § 107." *Campbell*, 510 U.S. at 579 (emphasis added). Surely satire could be called "other comment or criticism."

32 "[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. . . . [T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." *Id.*

33 *Id.* at 581.

34 *Id.*

35 Satire does, however, have a "target," albeit not necessarily as exact as that of a parody:

> Considered from a sufficient remove, the target of satire really never changes, for the satirist always attacks pretense and stupidity, no matter what their source, no matter what their disguise. However, since the nineteenth century, American and, to a lesser degree, European satire has regarded the classic vices with a tolerance, if not sympathy, that has debilitated the satiric energies.

Richard Bridgman, *Satire's Changing Target*, 16 C. COMPOSITION & COMM. 85, 85 (1965). The philosophical inquiry that no member of the Court acknowledges, much less ventures to address, is what effect, if any, the softening of the entire genre of satire has, or should have, on its degree of protection for allegation of copyright infringement.

C. Artistry & Subtlety: Questioning the Merits of the Distinction

Once a definitive word on satire is issued, clients may be advised properly. In the meantime, the best advice is presumably to always directly target all works from which any elements—stylistic or otherwise—are being appropriated for the satire. This response, however, serves to curb the creation of new satirical works,[36] which are often rather subtle in their delivery. Often satire does indeed serve "useful" purposes, independent of the work(s) it draws from.

> Traditionally, satire was, as [John] Dryden described it, for example, "a kind of poetry invented for the purging of minds." It was assumed to be a kind of doctrinaire writing, dedicated to teaching moral lessons, a form of rhetoric, a means of persuasion which, unlike comedy, was not designed merely to entertain.[37]

And satire is almost always "speech" in the sense of trying to convey beliefs of the author: "Satiric indignation is aroused when we discover the incongruity of the comic in a situation which our moral judgment also condemns as unworthy, as indignus. It is this combination of the moral judgment with the comic experience which gives satire its distinctive character."[38]

Unlike parody, satire is often much more believable and more likely to be confused as literal rather than ironic, because of the subtlety in which it is commonly guised. Often the satirist intends not to deride as the parodist, but is merely indignant towards the objects of their satire.[39] To maintain a "legitimate" look and feel, the satirist often employs stylistic allusion and reference to a great many works, usually of a similar topic or style, in order to lure the audience into the illusion of legitimacy. Many satirical works do not offer overt comment or criticism to all, if any, of the works from which they appropriate small aspects. Instead, they frequently rely on subtlety to further entrench the audience.

Once convinced of the "legitimacy" of the satire, the audience will

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36 Some may object to discussing the "creation" of new satirical works, arguing that satire is, at best, an appropriatory art form and is not creative in itself and certainly not a "useful Art[ ]." U.S. CONST. art. I, § 8, cl. 8.

37 Deer & Deer, *supra* note 29, at 712 (footnote omitted).

38 Louis I. Bredvold, *A Note in Defence of Satire*, 7 ELH: J. ENG. LIT. HIST. 253, 260 (1940) (emphasis omitted).

39 While the satirist by all means intends to *comment* on the works of others, the satirist does not necessarily intend an *attack*, as the parodist does:

> "[D]erision," which is assumed to be the precise equivalent of satire[,] . . . has not been a favorite with the satirists themselves; Juvenal did not say *fecit irrisio versum*, nor did Swift write in the epitaph he proposed for himself that he had gone *ubi saeva irrisio cor ulterius lacerare nequit*. The substitution debases them both; had they written so, they would have left us curious, but cold. The word they used was *indignatio*, which is nobler and touches deep sympathies within us. And the profound distinction between derision and indignation, which current theories either ignore or obscure, may be the clue to a more authentic explanation of our enjoyment of satire.

Id. at 258.

then begin to notice slight irregularities or peculiarities, ultimately gleaning the satirist's intended comment. This comment is usually directed towards a whole class of works, or society at large, instead of a specific work. To the satirist, the subtlety of his or her art simply attests to its power and effectiveness, and results in the intended audience looking inward to experience what the satirist intended.[40] To copyright law, however, this subtlety only blurs doctrinal lines and raises many more questions.[41]

D. Coda on the Parody-Satire Distinction: Conjuring Up

The Ninth Circuit originated and "has adopted the 'conjure up' test where the parodist is permitted a fair use of a copyrighted work if it takes no more than is necessary to 'recall' or 'conjure up' the object of his parody."[42] But, given the preceding discussion on the substantial overlap of parody and satire, one might readily conclude that *merely* recalling or conjuring up would seem to be the appliance of satire much more so than of parody.

Conjuring up, however, may or may not actually be part of a satire. And even if a satire does conjure up a particular object, this conjuring may be misleading or in truth conjure up a great many objects. Alternatively, and perhaps more frequently, a reference may be more than what "is necessary to 'recall' or 'conjure up,'"[43] yet the excess can only be recognized when the entirety of the satire is realized. In other words, a satire might use many elements of a work, such that they are not obviously discerned, but nonetheless serve on the whole as an explicit and highly critical reference to the targeted work for an audience that can fully appreciate the satire and properly divine its intended meaning. Critical speech is a cornerstone of free speech jurisprudence.[44] Just because the object of the criticism is not

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40 Jonathan Swift, the author of such satirical classics as *Gulliver's Travels* and *A Modest Proposal* said that "[s]atire is a sort of glass wherein beholders do generally discover everybody's face but their own . . . ." JONATHAN SWIFT, THE BATTLE OF THE BOOKS lxv (A. Guthkelch ed., Chatto & Windus 1908) (1697).

41 Aside from doctrinal legal questions, one also wonders what, if any, reaction will be elicited by a clever satirist, as court decisions frequently animate an affected group in focusing their interests on change. See, for example, Roe v. Wade, 410 U.S. 113 (1973) (announcing the right to have an abortion) and the subsequent revitalization of the movement against abortion. Perhaps more than any other type of person, the satirist is very likely to respond in kind when perceived to be under attack:

> Censorship, like manure, is malodorous, but it encourages growth. Nothing rouses the satiric temper faster than repression. When power seeks to smother expression of opinion, it produces a hatred which in turn produces that murder by indirection we identify as satire. The censored critic must resort to the oblique attacks of insinuation and irony, or of burlesque and parody, to make his point within legal boundaries.

Bridgman, *supra* note 35, at 86. The question of the most interest is precisely where such a legal boundary is to be drawn.

42 Dr. Seuss Enters. v. Penguin Books USA, 109 F.3d 1394, 1400 (9th Cir. 1997).

43 *Id.*

44 Indeed, this is an old common law precept of liberty: "To subject the press to the restrictive power of a licenser . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government."

understood by all in the audience should not disqualify it from protection; it certainly does not nullify its value.

III. EXCUSE AND JUSTIFICATION

In many areas of the law, the terms excuse and justification[45] enter into the lexicon and are used to draw different judicial outcomes for fact patterns that share common acts, but differ in motivation or intention. Perhaps most commonly, the terms appear in the context of criminal law, as with pleas of insanity or self-defense, an excuse and a justification, respectively. More generally, however, the significance of the two terms is aptly summarized by Professor Wendy Gordon, just before she proceeds to apply the concept to copyright law:

> In common lawyer's parlance, an act or omission is said to be "justified" if we would not object to its being emulated. An act or omission is said to be "excused" if we would not want it to be emulated, but we have reasons other than the merits of the act or omission itself to relieve the defendant of liability. Thus, one might say that "justifying" an act or omission goes to the merits of the defendant's choice, while giving the defendant an "excuse" does not go to the merits. Usually, an "excuse" arises because of some kind of institutional lack of fit between the circumstances and what the applicable law seeks to accomplish.[46]

By implementing a framework for the protection of satirical appropriation that is balanced against deference to the original creator's copyrights, the rationale of excuse and justification defenses may be able to remedy the current unsettledness in the fair use doctrine. At best, this mechanism may be cumbersome and fact intensive, but it will also serve to better protect free speech and this "valued form[ ] . . . of criticism [which] itself fosters the creativity protected by the copyright law."[47] After discussing how excuse and justification rationales function in other legal contexts, it will be easier to see how excuse and justification notions may be imported to copyright doctrine. Let us turn now to just such an investigation.

A. Excuse and Justification at Common Law, Generally

In commencing with any discussion of excuse and justification—and particularly in one that hinges on the difference between the two—one must address the inevitable question: what difference does it make? While some may argue that the distinction is one of the foundations of jurispru-

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WILLIAM BLACKSTONE, 4 COMMENTARIES *152.

45 As already discussed, Justice Souter, in *Campbell*, 510 U.S. 569, 581 (1994), references "justification" for satire. Presumably, Souter is using the word in the common sense. This article, however, will henceforth use the word justification only in its sense as a legal term of art, particularly as used in the context of the phrase "excuse and justification."

46 Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Part of the Story*, 50 J. COPYRIGHT SOC'Y U.S.A. 149, 156 (2003) (emphasis omitted).

47 *E.g.*, Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992).

dence,[48] most everyone admits that the two terms are frustratingly confused and are, in some sense, only subtly different.[49] But the effect of this subtle, semantic difference is fully ingrained in our culture.[50] However, since the abolition of forfeiture in 1828, successfully raising either defense resulted in identical "not guilty" verdicts, thus contributing to the rise of synonymous, interchangeable usage of the terms excuse and justification.[51]

Murder, though historically a powerful example of why we make a distinction, is by no means the only instance in which the distinction is useful. A closer look at the merits, circumstances, and conditions of making the distinction, in the context of both criminal and tort actions, will illustrate why the excuse-justification distinction is valuable in copyright as well.

1. Excuse and Justification in Criminal Law

Notwithstanding the fact that excuse and justification became relatively synonymous early in the nineteenth-century,[52] more than a century later, commentators began to again realize that there was, in fact, some value in the distinction, even absent the risk of forfeiture.[53] The merits of the dis-

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48 A very strong statement of this notion recently appeared in the literature:

> Few concepts are as basic to the law—or religion, philosophy, and life, for that matter—as are "justification" and "excuse." They are fundamental guideposts for how we live our lives and interact with others. In the context of the criminal law, justification and excuse are touchstones for prescribing and proscribing conduct generally, and for assigning guilt or innocence in the particular case.

Eugene R. Milhizer, *Justification and Excuse: What they Were, What They Are, and What They Ought to Be*, 78 ST. JOHN'S L. REV. 725, 725 (2004).

49 Indeed, this subtle, somewhat rhetorical difference may blur the commonality of the basic distinction when studying legal systems comparatively:

> One way of addressing this semantic imprecision . . . is to focus on the paradigmatic circumstances that raise issues of justification and excuse—such as self-defense, duress, necessity, insanity, intoxication, etc.—to evaluate how selected legal systems addressed these situations, rather than to be bound by the words themselves. This circumstantially-based approach is especially useful given that many older legal systems never developed a coherent or comprehensive systems of defenses, in which particular and distinct defenses were organized into categories based on justification and excuse.

Id. at 732.

50 And the difference was often assumed to be a matter of justice itself:

> The old common law made such a distinction in the law of homicide. Some homicides, like that done by the public hangman in carrying out the sentence of the court, were justifiable. The law actually required the hangman to kill. He was doing no more than his gruesome duty required. Other homicides, though not amounting to crimes, like killing by misadventure, were merely excusable. Such a killing, far from being required by the law was, no doubt, universally regarded as deplorable; but it was not a crime. Both justification and excuse resulted in acquittal on a charge of homicide but, if the homicide was only excusable, under the common law, the killer's goods were forfeited.

J. C. SMITH, JUSTIFICATION AND EXCUSE IN THE CRIMINAL LAW 7 (1989).

51 *Id.* at 7–8.

52 *See supra* notes 50–51 and accompanying text.

53 *See, e.g.*, Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 245–246 (1982).

tinction include:

> 1. Excusable conduct may be resisted by a person who is threatened by it; but justifiable conduct may not be resisted.
>
> 2. Excusable conduct may not lawfully be assisted by another but justifiable conduct may be.
>
> Some, but not all, of the commentators would add:
>
> 3. Where the facts provide a justification for the defendant's conduct, he is justified even if he is unaware of those facts; and where the facts are capable only of excusing, the defendant is not excused unless he is aware of those facts.[54]

Professor Gordon similarly distinguishes excuse from justification as "if only" factual limitations on applying the law and "inherent limitation" impediments to applying the law, respectively.[55] More specifically, she asserts that excuse should be applied in copyright contexts such as "market malfunction," as when high transaction costs interfere with its consummation.[56] Justification, she proposes, should be applied where even a fully-functional market would not permit use, but other norms would favor use.[57] The example Gordon uses is the case of a true iconoclast, who will rarely, if ever, obtain permission, yet whose work is nevertheless valuable to society as a whole, despite its economic and perhaps reputational harm to the copyright owner of the work appropriated.[58]

Some copyright uses may end up being rather difficult to discretely compartmentalize into excuse or justification, much like many forms of alleged copyright infringement may not be neatly categorized as parody or satire at the exclusion of the other.[59] But confusing areas of overlap should not prevent us from applying an otherwise valuable heuristic for assigning liability, just as it does not do so in the criminal context, though the same problem frequently arises.[60]

The method of analysis proposed in this article fully recognizes the difficulty of rigid classifications of excuse and justification, and therefore proposes instead that a spectrum of protection be embraced—a somewhat amorphous scale of "value" that will include both categories. While the

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54 SMITH, *supra* note 50, at 8.

55 Gordon, *supra* note 46, at 152.

56 *Id.*

57 *Id.* at 152–53.

58 *Id.* at 154.

59 Even the novice author may blend satire and parody. John J. Ruszkiewicz, *Parody and Pedagogy: Explorations in Imitative Literature*, 40 C. ENG. 693, 699–700 (1979). Discussing the work of a student assigned to write a parody in a college English course, his professor said of the piece, "The achievement is fully satiric although [the author] never abandons the peculiar concern of parody with individual form and subject matter." *Id.* at 699.

60 *See* Robinson, *supra* note 53, at 234–36, 239–40 (discussing the classification of the defenses of necessity, self-defense, and mistake as to a justification). *Cf.* Gordon, *supra* note 46, at 174–75 (discussing the Hustler/Jerry Falwell cases as an example of self-defense excuse); *see* discussion *infra* Part III.B.2.a.1.

criminal context may be fodder for the most paradigmatic examples of excuse versus justification, a closer look into how the distinction is handled in civil suits will provide us even more guidance in how to apply the distinction to copyright cases.[61]

2. Excuse and Justification in Tort Law

Common law tort doctrine has generally permitted excuse and justification as a defense.[62] However, the doctrine is more far-reaching than one might first think. For instance, although a violation of the right to exclusive use of one's personal or real property may be remedied solely through tort, the *defense against* such a violation may actually excuse criminal action, so long as the defensive action is *proportionate* to the violation.[63] In this context, this article's proposal to extend the fair use doctrine[64] may not be so radical is it first seems. Instead, it is simply the application of ancient common law principles[65] to modern issues.

B. Excuse and Justification in Copyright

Professor Gordon advocates a "potential role" for the justification of self-defense applied to cases of parody where a work has harmed an individual or group of individuals.[66] But parody is not the only literary method by which harms are brought to task for the damage that they have done—a point that Professor Gordon does not seem to address.[67] However, it is usually only in a very abstract sense that the satirist is defending or self-remedying any harm, impending or actual. It is not here maintained, then, that Gordon's proposed self-defense excuse should simply be extended to satire generally. Rather, the present advocacy is one that reexamines the

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61 Recall that copyright infringement is, after all, a tort, save the few fairly recent modifications to the Copyright Act that criminalize specific means of infringing, such as the Digital Millennium Copyright Act's prohibitions on trafficking in electronic circumvention devices. 17 U.S.C. § 1201 (2000). The emphasis on criminal law thus far in this article has not in any way been to advocate the further criminalization of copyright infringement, but merely to illustrate the rich depths of common law from which the essential distinction advocated here is drawn.

62 W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 108–109 (W. Page Keeton, ed., West Publ'g Co. 5th ed. 1984) (1941).

63 *See* Douglas Ivor Brandon et al., Special Project, *Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845, 860–61 (1984) (footnotes omitted):

> The common law generally recognizes a person's privilege to use reasonable force to defend his lawful present possessory interest in realty or chattels. This privilege excuses any batteries that the defender commits through use of reasonable force to protect his property from another person's tortious or criminal act. The justifications for this self-help remedy exemplify the cardinal concerns that underlie all tort self-help mechanisms.

64 Much more broadly, in fact, than Professor Gordon has advocated thus far. *See* Gordon, *supra* note 46, at 151–56.

65 "It turns out that the Roman system of pleading was most congenial to developing substantive guidelines that defined what excuses and justifications should be allowed to statutory violations." Richard A. Epstein, Lecture, *The Modern Uses of Ancient Law*, 48 S. CAL. L. REV. 243, 259 (1997).

66 Gordon, *supra* note 46, at 174–76.

67 *See id.* at 149–50 (Professor Gordon's focus is on self-defense).

fundamental nature of excuses and justifications, and then applies what is gleaned from the general nature of these defenses to the art of satire.

The satirist follows a long tradition of protesting, through their craft, what they believe has been inured in the masses as subtly as the message they seek to convey. One satirist's description of the craft is that "[w]e participate in the communion of those men—few though they may be—for whom things matter, and with them we share the faith in the validity of universal principles."[68]

The work of a satirist is idealistic,[69] and ideals are the very substance of what the First Amendment seeks to protect.[70] Lockean conceptions of natural rights to undo the effects of harm only further justify encouragement of a self-help remedy.[71]

Indeed, many argue that satire—especially in America—is continually losing the harshness that it once had:

> Satire requires a strong and even arrogant sense of what is normal and right, but the many surface certainties by which the modern social world operates yield swiftly to profound and crippling doubts. With illness regarded as the normal condition in a post-Freudian world, the satirist is faced with the prospect of commanding a person suffering from an incurable disease to cure himself.
>
> As a consequence, we still do not have in modern American satire either the icy, detached observer scornfully raking the idiocies of fools, or the enraged moralist launching headlong attacks against scoundrels. Rather, as observers have repeatedly noted, the American satirist tends to be tolerant, bemused, indulgent about what he exposes. His tone is affectionate, he wants to tease people into sense, although he is prepared to admit that his version of sense may ultimately be as foolish as yours.[72]

Should the satirist really be penalized merely for not being so brazen as the parodist, as current law would have us believe?

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68 Bredvold, *supra* note 38, at 264. He continues, saying:

> The judgment at the core of the feeling of indignation involves a conviction regarding righteousness; indignation is the emotional realization of righteousness and all great satirists, as has always been observed, have been moralists. Though their picture of mankind has been anything but cheerful, they have not yielded to the ultimate cynicism, the derision which is directed against the very concept of the good. For in the true satirist, derision is limited and tempered by moral idealism.

Id.

69 *See* Susan W. Tiefenbrun, *On Civil Disobedience, Jurisprudence, Feminism and the Law in the Antigones of Sophocles and Anouilh*, 11 CARDOZO STUD. L. & LIT. 35, 44 (1999) (contrasting 1940s Vichy France to the idealism of the Free French forces and Charles de Gaulle and describing Jean Anouilh's use of parody and satire to avoid censorship).

70 "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal." Turner Broad. Sys. v. FCC, 512 U.S. 622, 641 (1994).

71 Gordon, *supra* note 46, at 175–76.

72 Bridgman, *supra* note 35, at 88–89.

1. Genres of Discursive Derivative Works and Their Protectability

Many works that communicate a message are restricted even though the United States holds "free speech" to be a fundamental right extended to all of its citizens, regardless of their viewpoint.[73] Even speech that advances little, if any, substantive dialogue—such as commercial speech—may be protected under the law.[74] Communication of non-commercial opinions, though, is held in even higher regard,[75] even when its content is most abominable.[76] This is so true that speech is often protected even notwithstanding real harms that may result from its delivery.[77]

Copyright law, however, is in some sense an aberration from our free speech values. In a content-neutral manner,[78] the government restricts speech that appropriates material, even slightly, from any work properly covered under the current shield of copyright law.[79] Surely there is no real basis for a constitutional challenge to copyright, especially since copyright is itself provided for in the Constitution.[80] Still, one must remember that copyright often pits these two provisions of the Constitution—free speech and copyright's monopoly grant—against one another.[81] This article embraces the idea that the private privilege[82] will yield to the public need[83]—

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73 *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (holding a school district's exclusion of a religious club from using a school building as viewpoint discrimination in violation of the First Amendment's guarantee of free speech).

74 *See* Cent. Hudson Gas & Elec. v. Pub. Serv. Comm., 447 U.S. 557 (1980) (reaffirming the First Amendment's protection of commercial speech).

75 *Id.* at 562–63 (clarifying that the protection for commercial speech is a somewhat "lesser protection" than is afforded other types of speech).

76 *See* Virginia v. Black, 538 U.S. 343 (2003) (holding criminalization of cross-burning *with the intent to intimidate* acceptable, but that such intent cannot be imputed by the act, leaving at least *some* degree of protection possible for even this type of expression).

77 *See* Reno v. ACLU, 521 U.S. 844 (1997) (holding that although the Communications Decency Act of 1996 had a valid interest in preventing harmful speech from reaching minors, its overbreadth rendered it unconstitutional).

78 *See* Eldred v. Ashcroft, 537 U.S. 186, 193–94 (2003) (rejecting *inter alia* the claim "that the [Copyright Term Extension Act] is a content-neutral regulation of speech that fails inspection under the heightened judicial scrutiny appropriate for such regulations.").

79 And this shield has expanded greatly in the last century. *See id.* at 194 (upholding the Copyright Term Extension Act and leaving open the status of future attempts to expand the terms of copyright protection).

80 Indeed, *Eldred v. Ashcroft* expressly held CTEA's extension of existing and future copyrights does not violate the First Amendment. *Id.*

81 The *Eldred* court was very cognizant of this fact:

> The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles. Indeed, copyright's purpose is to *promote* the creation and publication of free expression. As *Harper & Row* observed: "[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."

Id. at 219 (alteration in original) (quoting Harper & Row v. Nation Enters., 471 U.S. 539, 558 (1985)).

82 *See* Tom W. Bell, *Copyright as Intellectual Property Privilege*, 58 SYRACUSE L. REV. (forthcoming 2007) (arguing for an alternative model that classifies copyright as a privilege rather than a property right).

that copyright protection will not trump all expression of commentary on the protected material.

Indeed, this is exactly why the fair use doctrine exists, and is explicitly provided for in the Copyright Act.[84] Fair use is simply the acknowledgement that in certain instances, the value of freedom of speech is of greater moment than the value of copyright protection or promoting the creation of new works. The greatest problem with fair use, however, is that we are given no metric with which to make the requisite balance of interests.[85] This, then, is what this article seeks to do. Although the specific emphasis here is on satire, the proposed method of analysis could easily be extended to at least *some* other types of alleged fair use.

That the very nature of a work, notwithstanding its content, may have some influence on the fair use determination, may well be conceded without resorting to such rigid demarcations as Justices Kennedy and Souter's opinions in *Campbell* would lead us to believe are necessary.[86] To understand how the nature of a work may nonetheless be a crude proxy for its value as speech, we must start by fully understanding the differences between various genres of critical and annotative works.

a) Parody

Parody may be best described by the words of Justice Souter in *Campbell*: "Parody needs to mimic an original to make its point . . . ."[87] Parody does in fact need a target, by its very definition. A parody will directly critique its target, generally mockingly or at least to humorous effect. Further, it is unambiguous that such a use can be classified as at least potentially protectable under current fair use jurisprudence.[88]

b) Satire

As previously discussed, satire has an unclear legal status and may often blur with parody,[89] which is afforded protection from charges of copyright infringement.[90] Unlike Justice Souter's description of parody, his de-

83 "No exercise of [a] private right can be imagined which will not in some respect, however slight, affect the public . . . . But subject only to constitutional restraint the private right must yield to the public need." Nebbia v. New York, 291 U.S. 502, 524–25 (1934).

84 17 U.S.C. § 107 (2000).

85 *Campbell* offers nothing in the way of a test or formal steps of analysis, only glancingly mentioning factors to be considered, with no regard as to their relative importance. Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994).

86 *Compare id.* at 586 *with id.* at 598–600 (Kennedy, J., concurring).

87 *Id.* at 580–81.

88 *See id.* (holding that parody qualifies for protection as fair use under the Copyright Act and leaving questionable the status of satirical works under the law). *See also* Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986); Elsmere Music v. Nat'l Broad. Co., 482 F. Supp. 741 (S.D.N.Y. 1980) *aff'd.*, 623 F.2d 252 (2d Cir. 1980).

89 *See supra* Part II.B.

90 *Campbell*, 510 U.S. 569.

scription of satire as something that "can stand on its own two feet and so requires justification for the very act of borrowing[,]"[91] is not so universally agreed upon.[92] Commonly, in both literary scholarship and judicial holding,[93] satire is recognized as a justified use of the works that fall prey to it. Traditionally, satire does not so directly target the works it draws from as does its cousin, parody. Moreover, many readers or audience members may not even detect (readily, if at all) the appropriation of the style or subject matter at issue in the satire. Of course, such individuals are obviously not the audience for whom the satire was intended to affect.

Oblivious audience members ought not be a Typhoid Mary for the whole of the work, given that a work is substantially appreciated by those in the intended audience. People that fail to grasp the real meaning of a satire may even become outraged at the work as a result of their failure to detect its irony.[94] While outrage may result from parody as well, it is less likely to be a result of failing to discern the intentions of its creator as it is an outright offense to the creator's intention.

c) Camp

Camp is a related but unique method of commenting on matter. It may employ parody, satire, or rest somewhere in between the two, perhaps as an eerie fascination with, or celebration of, its subject. A campy commentary or exhibition may be described as "so bad, it's good;" pretentious bad taste;[95] or the Yiddish word, "kitsch."[96]

2. Existing Instances of Fair Use to Illustrate Application of Proposed Excuse and Justification Doctrine

By looking at how previous, seminal, relatively uncontroversial cases involving parody, satire, and camp have been decided, an examination can ensue as to just how such decisions may reconcile with the more general conception of excuse and justification in tort law. After examining the holdings of prior cases of fair use, we can then reexamine the cases under

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91 *Id.* at 581.

92 *See supra* Part II.B.

93 *Id.*

94 No doubt many a reader of Jonathan Swift's *A Modest Proposal*—both when first published and today—were outraged at the "modesty" of his proposals. *See* Robert Phiddian, *Have you Eaten Yet? The Reader in A Modest Proposal*, 36 STUD. ENG. LITERATURE 603 (1996).

95 Indeed, this is often intentional, even if self-deprecating to some degree, and may be a distinct marketing feature. For instance:

> Roberts [the creator and chairman of Buca restaurants] describes the decor of the Buca restaurants as "kitschy," "campy," "tschochy," and "Italian gaudy." He states that the use of Italian decor elements in an excessive, humorous, irreverent way, so as to create a parody of a 1940's/1950's Southern Italian immigrant restaurant, characterizes Buca restaurants and defines the Buca trade dress.

Buca, Inc. v. Gambucci's Inc., 18 F. Supp. 2d 1193, 1196 (D. Kan. 1998).

96 Kitsch: "Art or *objets d'art* characterized by worthless pretentiousness; the qualities associated with such art or artifacts." 8 OXFORD ENGLISH DICTIONARY 472 (2d ed. 1989).

the excuse and justification framework. Upon reexamination, we will be able to extrapolate a rudimentary fair use heuristic upon which there can be further particularized a more detailed analysis—what in Part IV will be introduced and proposed as "The Spectrum of Satirical Fair Use."

a) Fair Use in Parody

As we know from *Campbell*, parodic works are well within what the Court will recognize as a fair use of copyrighted materials.[97] Parody is undertaken for innumerable reasons, yet the reason for the parody has no apparent effect on a court's analysis under fair use.[98] Instead, it seems from *Campbell* and the circuit court decisions subsequent to and following *Campbell* (doctrinally), that any direct attack brings the issue under the penumbra of fair use,[99] where total freedom of speech overrides interests in protecting copyright owners.

(1) The Hustler & Jerry Falwell Cases

The general animosity between Jerry Falwell (along with his nonprofit group, Moral Majority), and Larry Flynt, publisher of Hustler Magazine, was long-standing and very public.[100] However, a parodic exposé of Falwell, published in Hustler, brought their rivalry into the chambers of the United States Supreme Court.[101] This case is perhaps best known as a First Amendment case as it involved claims by Falwell of intentional infliction of emotional distress and defamation, coupled with Falwell's status as a "public figure."[102]

In addition to traditional First Amendment analysis, the lampoon, given its obvious falsity, comedic intent, and method of delivery, can be further shielded from liability under the fair use copyright defense of parody.[103] Although Hustler did not infringe any of Falwell's copyrights in its publication, we do know—from *Campbell*—that parody is valued highly

97 Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994).

98 *See infra* note 133.

99 *See supra* Part II.B.

100 Larry Flynt, *The Porn King and the Preacher: How I Found Myself in Jerry Falwell's Embrace*, L.A. TIMES, May 20, 2007, at M1.

101 Hustler Magazine v. Falwell, 485 U.S. 46 (1988). The lampoon purported to be a disclosure of Falwell's first sexual experience and asserted, *inter alia*, that this had occurred in an outhouse and was between Falwell and his mother. The piece was immediately regarded by readers as exactly what it was: a parodic, ad hominem attack of Falwell, not readily misunderstood to be an assertion of fact. *Id.* at 48.

102 Although the issue was not raised, the article at question was in fact a satire—or maybe just outright appropriation—as well, but of the Italian alcoholic beverage Campari, not Falwell or Moral Majority. Although the article was not "targeting" or "attacking" Campari in any way, it undoubtedly mimicked the distinctive Campari "First Time" ad campaign. The campaign involves publishing celebrity interviews about their first time drinking Campari, with the transparent double entendre of being about the interviewee's first sexual experience. In Hustler's lampoon of Falwell, the allusion to Campari ads was the explicit, albeit fabricated, message to be conveyed (or "conjured up") to readers. *See id.*

103 *See* Campbell v. Acuff-Rose Music, 510 U.S. 569, 578–81 (1994) (holding parody acceptable for a fair use inquiry).

enough even to vitiate the otherwise inexcusable infringement of constitutionally provided-for copyright protection.[104] Parody—like any other type of speech—deserves protection, subject only to generally accepted limits on speech. And implicit in First Amendment doctrine is the idea that permissible speech will frequently excuse the resultant harms, at least to some extent.

Recall, as discussed already, that defenses to a tort can even excuse related, proportionate criminal acts.[105] *A fortiori*, such a defense could potentially excuse other related torts such as defamation or intentional infliction of emotional distress. In the tort of copyright infringement, and more specifically its defense of fair use, the tort itself is quite likely inextricably intertwined with First Amendment theory.[106] In addition to excusing Hustler from the harms it caused Falwell, the excuse framework can likewise excuse harms resulting from fair use—both are First Amendment issues.

The suit Falwell brought, however, was not the only public judicial spectacle between the two men. When Moral Majority began sending photocopies of a Hustler attack on Falwell to their entire mailing list, Flynt, of course, could not stand for such treatment, so Hustler sued Moral Majority for copyright infringement.[107] This case, too, was destined to become a legal chestnut, this time specifically on the issue of copyright fair use. But in the second round, it was Falwell who was vindicated.[108]

Although Flynt was allowed to publish his attacks on Falwell as free speech, the Ninth Circuit in *Hustler II* held that rebuttal of a copyrighted work by its subject could excuse the act of infringing.[109] Obviously, the successful fair use defense likewise excuses related economic harm done to the copyright holder. As Professor Gordon asserts, this appears to be a self-defense fair use justification.[110]

But let us now imagine a slightly enhanced version of this case, one where Falwell additionally brought personal harm to Flynt through his use of Hustler's copyrighted work. If such harm was not precluded by First Amendment doctrine, and found at trial to have actually existed, Falwell might still have an excuse. To see this, we must again return to general excuse and justification principles at common law from time immemorial.

Self-defense, either from physical or other harm, is a justification because, normatively, we want such behavior to be allowed as a matter of law.[111] We do not want further harms to occur, but if they are incident to

104 *Id.* at 579–80.
105 *See supra* note 63 and accompanying text.
106 As was surely the case in *Hustler*, 485 U.S. 46.
107 Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148 (9th Cir. 1986).
108 *Id.* at 1156.
109 *Id.* at 1153.
110 Gordon, *supra* note 46, at 154.
111 *See* SMITH, *supra* note 50, at 8–9.

the self-defense and proportional to the action being defended against, we will excuse the retaliator.[112] Thus, in our hypothetical extension of the Flynt-Falwell facts, Falwell's self-defense *justification* might in turn *excuse* at least some measure of resulting emotional distress to Flynt.

(2) The *Wind Done Gone Case*

Margaret Mitchell's novel, *Gone With the Wind*, has certainly been no stranger to criticism in recent decades.[113] Alice Randall chose to criticize Mitchell's work in a uniquely parodic way. Randall decided to tell another fictional story—one replete with the same cast of characters as Mitchell's tale. However, Randall's tale was told from the perspective of Mitchell's African-American characters. Controversy surrounding Randall's story, *The Wind Done Gone*, eventually reached the docket of the Eleventh Circuit Court of Appeals, where it was held that a fair use defense as parody was appropriate.[114]

Professor Gordon has highlighted *The Wind Done Gone* as another example of self-help or self-defense remedy to harms inflicted by a copyrighted work, like Falwell's distribution of Hustler page photocopies.[115] By Gordon's own admission, though, this view is subject to some criticism.[116] I would indeed object to the categorization of the work as one of self-defense.[117] Nevertheless, the work should receive some measure of protection, although by means of *excuse, not justification*.

Justifications, such as self-defense, are a class of activities that society deems appropriate, notwithstanding the harms they inflict.[118] And, at least to some degree, society encourages such actions.[119] However, this has an important consequence in a case such as Randall's and the harm she experienced.[120] Were so-called self-defense actions encouraged among mem-

112 *See id.*; Gordon, *supra* note 46, at 152.

113 *See* Hubert H. McAlexander, Gone With the Wind (Novel), NEW GEORGIA ENCYCLOPEDIA (Jan. 20, 2004) (Book Review), http://www.georgiaencyclopedia.org/nge/Article.jsp?id=h-2427 (last visited Oct. 12, 2007).

114 Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001).

115 *See* Gordon, *supra* note 46, at 174–75; Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148 (9th Cir. 1986).

116 Gordon, *supra* note 46, at 175 n.72. Here Professor Gordon acknowledges that a personal attack self-defense privilege may not be available where whole groups are attacked, while nevertheless concluding "that the *Falwell* case could be treated as suitable precedent for the privilege of group self-defense." *Id.*

117 It seems that only relatively small groups could coherently self-defend, but certainly not a group as large as the one on behalf of whom Randall claims to speak. Gordon refers to and cites Randall's statement of harm, recalling that "Randall said she would rather have been 'born blind' if blindness would have enabled her to avoid reading Mitchell's novel, so great was the emotional harm she felt." *Id.* at 174 (footnote omitted). But such exaggeration will get one further in the realm of literature than in most lawsuits.

118 *See supra* Part III.A.

119 *See id.*

120 Although the harm mentioned seems rather hyperbolic, there can be no doubt that Randall and many others have experienced very real, albeit intangible, harm. *See supra* note 117.

bers of a large group, such self-defense could easily result in an aggregately overwhelming force against the original work, inflicting far greater harm to the original copyright holder (and perhaps others) than is proportionate to the harm experienced or threatened. The common law has always required "proportionality" in any type of justification defense.[121] If copyright begins actively employing a justification-based defense, there is no reason to bypass this basic standard.

Still, Randall's work should clearly fall within fair use boundaries because of the specific facts, intentions, and circumstances—the traditional rationale of granting *excuses* at common law. As the court duly noted, "there is no great risk that readers will confuse [*The Wind Done Gone*] for part of *Gone With the Wind*'s 'ongoing saga.'"[122] Confusion and resultant economic harm will thus become part of the test proposed here.[123]

b) Fair Use in Satire: *Dr. Seuss Enterprises v. Penguin Books*

Courts have made clear—and rightly so—that what the appropriator calls a work is not determinative of its actual classification as satire or parody. The book *The Cat NOT in the Hat!*, for instance, included on its cover the qualification "A Parody," though the Ninth Circuit Court of Appeals properly reclassified the work as a satire.[124] However, as this paper seeks to prove, satire can in fact be valuable and should be eligible for protection as fair use.

The book at issue was written in the distinctive style of Dr. Seuss, but was not overtly critical of Dr. Seuss.[125] Rather, it sought to retell the story of O.J. Simpson's trial for the Brown and Goldman murders.[126] Although Simpson was acquitted, many people felt that the acquittal was a travesty of justice.[127] The book, though comical, certainly expressed just such a sentiment. Although the book was clearly a satire, the defendants consistently referred to it as parody, perhaps in an attempt not to offend the Supreme Court's parody-satire distinction.

The court harshly criticized the satirist, finding the "fair use defense is 'pure shtick' and that their post-hoc characterization of the work is 'completely unconvincing.'"[128] But what Penguin and Dove essayed was very much in keeping with what the satirist traditionally strives to do.[129] They

121 JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 221 (3d ed. 2001).

122 Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1281 (11th Cir. 2001).

123 *See infra* Part IV.A.2.

124 Dr. Seuss Enters. v. Penguin Books USA, 109 F.3d 1394 (9th Cir. 1997).

125 *Id.* at 1401.

126 *Id.* at 1396.

127 *See generally* Peter Charles Hoffer, *Invisible Worlds and Criminal Trials: The Cases of John Proctor and O.J. Simpson*, 41 AM. J. LEGAL HIST. 287.

128 *Dr. Seuss*, 109 F.3d at 1403.

129 *See generally* discussion *supra* Part II.C (discussing the craft of satire and its subtle delivery of often moral messages, in a tone of righteous indignation).

insisted that "[t]he Parody . . . transposes the childish style and moral content of the classic works of Dr. Seuss to the world of adult concerns."[130] Specifically, the author sought to "(1) comment on the mix of frivolousness and moral gravity that characterized the culture's reaction to the events surrounding the Brown/Goldman murders, (2) parody the mix of whimsy and moral dilemma created by Seuss works such as *The Cat in the Hat* . . . ."[131] While the latter may well be nothing more that a post hoc rationale to conform to the demands of case precedent, the "mix of frivolousness and moral gravity" seems an obvious object of the work. This most certainly comes across in the book's rhymes, such as:

> One Knife?
>
> Two Knife?
>
> Red Knife
>
> Dead Wife.[132]

Perhaps a rather tasteless depiction, but tastelessness alone is not enough to quench First Amendment protection. Aestheticism is rarely an acceptable rationale for a court to adopt, particularly in the copyright context.[133]

It is hard to imagine much, if any, actual harm to Dr. Seuss Enterprises that could have resulted from the sale of *The Cat NOT in the Hat!*, yet the court denied protection because the piece was *satirical*.[134] The Ninth Circuit has acknowledged that "[p]arody is regarded as a form of social and literary criticism, having a socially significant value as free speech under the First Amendment."[135] But we know from *Rogers*[136]—cited even by Justice Kennedy in his *Campbell* concurrence—that *both parody and satire* are valued for their social commentary.[137]

One must ask whether the court's estimation that the work did not "hold his style up to ridicule" is too subjective a test.[138] Again emphasizing the subtlety of satire, the more proper inquiry for the Court to make should perhaps be to the availability of substitutable styles.

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130 *Dr. Seuss*, 109 F.3d at 1402.

131 *Id.*

132 *Id.* at 1401.

133 Campbell v. Acuff-Rose Music, 510 U.S. 569, 582 (1994).

> Whether . . . parody is in good taste or bad does not and should not matter to fair use. As Justice Holmes explained, "it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits."

Id. (alteration in original).

134 *Dr. Seuss*, 109 F.3d 1394.

135 *Id.* at 1400.

136 Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).

137 *Id.* at 310.

138 *Dr. Seuss*, 109 F.3d at 1401 (emphasis omitted).

c) Fair Use in Camp: *Elvis Presley Enterprises v. Capece*

Camp may involve parody, satire, or lie in between the two.[139] But, like satire, camp will apparently remain unprotected if it lacks purely parodic elements. Put differently, direct attacks against a specific target are required to successfully defend any appropriation. To see an example of camp and its relation to parody, we will examine a set of facts from a case that did just that. Although it was actually a trademark (not a copyright) case, there is essentially no distinction between the two fields in the issue of parody and satire as fair use.[140] Moreover, this specific set of facts amply illustrates the problems of legally distinguishing and muddling parody and satire.[141]

Elvis Presley Enterprises, Inc. (EPE) holds all trademarks, copyrights, and publicity rights belonging to the Elvis Presley estate, including at least seventeen federal trademark registrations for "Elvis Presley" or "Elvis."[142] More than 700,000 visitors each year make the pilgrimage to the Elvis estate, Graceland.[143] In April 1991, Barry Capece, through a limited partnership called "Beers 'R' Us", opened a nightclub in Houston, Texas and called it "The Velvet Elvis."[144] Details of the establishment, from the court opinion, paint a vivid picture. There were velvet paintings of celebrities and female nudes; a bare-chested Mona Lisa; lava lamps; cheap ceramic sculptures; beaded curtains; vinyl furniture; Playboy centerfolds covering the men's room walls; and menu offerings such as "Love Me Blenders" (a frozen drink), peanut butter and banana sandwiches, and "Your Football Hound Dog" hotdogs.[145]

Although making explicit reference to Elvis, it is unclear whether Elvis was the direct target of parody or was merely used to represent the owners' perceived tastelessness of the entire era. There are no doubt many other plausible rationales for the use of an Elvis theme. The Fifth Circuit Court of Appeals, however, in reversing the district court, held a likelihood

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139 *See supra* Part III.B.1.c.

140 *See* Steven M. Perez, *Confronting Biased Treatment of Trademark Parody Under the Lanham Act*, 44 EMORY L.J. 1451.

> Although distinct as legal theories, there is no evidence to suggest that copyright and trademark laws require different valuations of parody. Both require a level of transformation of the original to make their point. Often the same subject can be parodied with both trademark and copyright. . . . The opinion seems to echo the notion that trademark law may not be the proper remedy for expressive parody if there is no threat of market substitution . . . .

Id. at 1496–97.

141 The Supreme Court even quoted a trademark case in *Campbell*: "First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed." Yankee Publishing v. News America Publishing, 809 F. Supp. 267, 280 (S.D.N.Y. 1992) *quoted in* Campbell v. Acuff-Rose Music, 510 U.S. 569, 583 (1994).

142 Elvis Presley Enters. v. Capece, 141 F.3d 188, 191 (5th Cir. 1998).

143 *Id.*

144 *Id.*

145 *Id.* at 192.

of confusion with EPE.[146] Thus, the campy Velvet Elvis nightclub was deemed not privy to the fair use defense, resulting in an injunction against its continued operation.[147]

Put simply, the district court had it right,[148] at least if fair use cases were analyzed according to the model suggested in this article. The district court found that the parodic message, among other things, was enough to withstand the Lanham Act (trademark) consumer confusion analysis.[149] A colorful cadre of "expert" consumers of Elvis paraphernalia not only provide evidence but also seem to have quintessential reactions to parody and satire, as discussed above:

> In an attempt to prove actual confusion, Plaintiff offered the testimony of four witnesses. Three of the four witnesses were members of the Elvis Presley fan club in Austin, Texas. These fan club members were all women ranging in age from mid-forties to early seventies. They had been shown samples of ads for "The Velvet Elvis" one month before trial and had the opportunity to visit the bar the day before testifying. The first woman, an Elvis fan since age seven and a five time visitor to Graceland, testified that she was *offended by the nude paintings of women and the audacity of the bar's owner to hang these paintings in the same room with pictures of Elvis*. The second woman, who had an extensive collection of Elvis memorabilia and had been to Graceland twenty-five times, testified that she was also *not pleased to see Elvis's memorabilia in a bar, much less a bar that openly displayed portraits of nude women*. The third woman, who was the President of the Austin Elvis Presley Fan Club and claimed to have been to Graceland between forty and fifty times, was likewise *offended by the nudity in the decor and was disappointed to have Elvis's name associated with an establishment of this type*. The fourth witness was a man who had been to both "The Velvet Elvis" bars. He testified that when first visiting the original "The Velvet Elvis," he initially thought he might be able to buy some Elvis merchandise. He *quickly realized*, though, upon closer inspection of the bar's decor, *that the bar had nothing to do with Elvis Presley*. Consistently, each witness acknowledged that once inside "The Velvet Elvis" and given an opportunity to look around, each had no doubt that the bar was not associated or in any way affiliated with E[lvis Presley Enterprises].[150]

After considering this and other evidence, the district court properly realized the value of the satirical statement being made.[151] Their opinion did not give carte blanche authorization to use Elvis' marks, however. They found confusing and enjoined the actual advertisement used to promote the bar.[152] But allowing the bar to exist was a great, albeit ultimately

146 *Id.* at 204.
147 *Id.* at 207.
148 *Contra id.* at 196, 207.
149 Elvis Presley Enters. v. Capece, 950 F. Supp. 783, 796 (S.D. Tex. 1996), *rev'd*, 141 F.3d 188 (5th Cir. 1998).
150 *Id.* (emphasis added).
151 *See id.* at 797–98.
152 *Id*. at 797.

Pyrrhic, victory for fair use by the district court. The court of appeals issued the fatal blow to fair use and—worse yet—further muddied the apparent legal distinction between parody and satire.[153]

IV. THE SPECTRUM OF SATIRICAL FAIR USE: JUDICIAL ADMINISTRATION

So far, this article has discussed the general, then applied it to the specific. To wit, common law notions of excuse and justification have been discussed at length, and then used to re-reason the holdings in actual cases in which the fair use defense has been raised. At this point, however, we reach the climax of our story and, remembering everything learned so far, embark on the derivation of a new analytical framework with which to examine fair use defense of satire. The result will more closely tailor the goals of fair use protection by restricting protection for what might otherwise be protected as parody, while allowing for many works that would currently be denied protection (depending on the court),[154] as satirical works that do not contain purely parodic elements.

By seeing how the excuse and justification paradigm might have been applied in the cases already discussed, we have drawn out what factors emerge as powerful indicia of the appropriateness of fair use. For instance, in the *Wind Done Gone* discussion, it emerged as critical that Randall's work would not easily be confused or result in much economic harm to the original, such that the court was willing to *excuse* (though not *justify*) the appropriation of Mitchell's characters.[155]

In this section, we will use the insights gained in earlier sections, organizing them into a multi-factor test with which to examine claims of fair use. The factors will be aligned—or "ranked," if you will—in some rough approximation of importance. Conceptually, the factors might be thought of as comprising a spectrum (from greater to less importance) that warrants extension of the fair use defense.

There is no doubt that the alleged user bears the burden in any claim of fair use. "Fair use is an affirmative defense, so doubts about whether a given use is fair should not be resolved in favor of the self-proclaimed parodist."[156]

A. Substantive Factors to be Considered (Five-Factor Test)

We have looked at examples of appropriated use in parody, satire, and camp. Each have been reanalyzed under the excuse and justification rubric.[157] By looking at these cases, the re-reasoning performed here, and the

153 *See Elvis Presley Enters*., 141 F.3d 188.

154 *See supra* Part II.B.

155 Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1281 (11th Cir. 2001) (Marcus, J., concurring).

156 Campbell v. Acuff-Rose Music, 510 U.S. 569, 599 (1994) (Kennedy, J., concurring).

157 *See supra* Part III.B.2.

general common law principles of excuse and justification, we have been able to determine the factors of greatest import. These elements, discussed individually below, are the backbone of the proposed method of fair use analysis. These factors are not designed to conflict or challenge any of the statutory considerations; they are intended merely to provide further guidance on the application of general common law principles of excuse and justification[158] in conjunction with statutory protection for fair use. The factors here need not be in lieu of § 107; the two may (and should) be used in conjunction.

1. Subjective Intent of Infringer

If the paradigm of excuse and justification is in fact a proper manner in which to analyze fair use, then it is only proper to likewise take into account the subjective intent of the party accused of the tort.[159] After all, even in criminal law, the intent can excuse,[160] or at least lessen the penalty for an otherwise inexcusable act.[161] An example is the person that reasonably, while nonetheless inaccurately, appraises a danger in a situation and acts in what is believed to be self-defense. Such a person might be acquitted, but will almost certainly be punished less severely than would normally be required for the act committed. Similarly, while it should by no means be determinative, the intent of the appropriator of a copyrighted work seems to be a quite logical consideration.

2. Manifested Effects on the Market

Market effects—in any market—are complex phenomena. They may or may not be readily observed and are only occasionally as predictable as one would hope. But they, too, are an important consideration. It is important to remember that effects will arise both intentionally and unintentionally and may either hurt or help the appropriated work. This part of the analysis must be performed with the utmost diligence.

When the appropriator has intended to harm the sales of the appropriated work, there can be little justification for sustaining fair use if the appropriator's work is, or can be, a substitute for the original.[162] However, even where the intent is to do harm, when this intent arises in order to remedy another harm, it may still be acceptable, such as in the *Wind Done Gone* case.[163] Intent should not be imputed merely by the fact of a com-

158 *See supra* Part III.A.

159 *See supra* Part III.A.2.

160 *See supra* Part III.A.1.

161 *See id.*

162 "In his discussion of the fourth factor, Souter noted that a parody, by commenting on the original, serves a different market function than that found in the original." Jeremy Kudon, Note, *Form Over Function: Expanding the Transformative Use Test for Fair Use*, 80 B.U. L. REV. 579, 596 (2000). Exploitation or other appropriation of goodwill is certainly not the type of use to be encouraged.

163 *See supra* Part III.B.2.a.2.

mercial use.[164]

Profits earned do not mean that economic harm to the owner of the appropriated work was intended.[165] For instance, works critical of another that are sold for a profit are still entitled to some fair use defense, even though they may harm sales of the works they critique.[166]

3. Injury

Injury is certainly an important factor. But injury is not only a consideration of the harm done to the copyright owner. Even more important when operating in the excuse and justification framework, injury to those other than the owner—that is, injury caused by the copyrighted material—can give rise to a strong defense against infringement, as in *The Wind Done Gone*.[167]

4. "Value" of the Satire

Copyright itself exists in order to promote the "useful arts."[168] We have also seen that parody and satire are valid forms of criticism and commentary.[169] That being understood, though, it is reasonable to conclude that not all parody or satire is as "useful" as others. Thus, in determining the "value" of a satire, it is important to first make two distinctions: commentary versus criticism. Commentary is often directed at a "general style, the genre of art to which [a work] belongs, or society as a whole . . . ."[170] Criticism, on the other hand, almost always "target[s] the original," which is what *Campbell* tells us is required to qualify as parody.[171] Thus, in extending the penumbra of fair use to satire, it is perfectly consistent with *Campbell* to give greater weight to satire that is critical in message.[172]

By a parity of reason, we can make a similar distinction *within* the two classes of commentary and criticism. That is, greater weight ought to be attributed to commentative works that comment on (in order of least to strongest presumption of value): (1) society at large, (2) a class or group of persons, (3) a class or genre of copyrighted works, (4) a specific work

164 "[T]he Court of Appeals [in *Campbell*] faulted the District Court for 'refusing to indulge the presumption' that 'harm for purposes of the fair use analysis has been established by the presumption attaching to commercial uses.'" Campbell v. Acuff-Rose Music, 510 U.S. 569, 574 (1994) (citation omitted).

165 "Fully evaluating the [purpose and character] requires more than just examining the use's degree of commerciality." William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 684 (1993).

166 *Id.* at 684–85.

167 See discussion of *Hustler Magazine v. Moral Majority* and *The Wind Done Gone*, *supra* Part III.B.2.a.1–2.

168 U.S. CONST. art. I, § 8, cl. 8.

169 *See supra* note 25 and accompanying text.

170 Campbell v. Acuff-Rose Music, 510 U.S. 569, 597 (1994) (Kennedy, J., concurring).

171 *Id.* at 597–98.

172 *Id.* at 599.

and/or its creator. The same hierarchy should likewise be applied to critical works. And the hierarchy is again consistent with *Campbell*'s insistence upon a definite target.[173] While this type of valuation allows broader protection, it still favors works that specify a target, but makes no bright line distinctions.

5. Relevance or Necessity of Appropriated Work to the Satire

Necessity is perhaps the hardest and most subjective determination to make. But one can intuit that commentary on society at large is less likely to necessitate appropriation of any one work than commentary on a class or style of works. This element of the test is one that allows for a totality of circumstances type analysis. While subjective, it merely supplements the other factors we have looked at.

V. THE SIGNIFICANCE AND IMPACT OF THE PROPOSED METHOD

The method proposed in this article truly is a modest proposal. The method would incorporate and refine existing Court doctrine, leading to greater consistency and ability to exercise First Amendment speech rights. The proposed analysis would result in a lesser protection for satire than that afforded to parody, yet in some sense a shadow of parody's protection.

Excusing and justifying satire would expand the scope of fair use commentary and criticism, but this cost would be far exceeded by the value inherent in protecting discursive speech. Copyright and free speech frequently collide. Such collision results in either copyright or free speech confining or restricting the other. Unfortunately, as the law stands currently, satire is all too often falsely imprisoned. Hopefully the test proposed here gives judges—the dutiful jailers—the keys to free satire.

CONCLUSION

The "Spectrum of Fair Use" analysis has qualities that many might see as a fatal flaw: uncertainty, subjectivity, and arbitrariness. But so does the current standard under *Campbell*. Relying on the common law pedigree of excuse and justification simultaneously lends credibility, while necessarily importing case-specific and highly fact-intensive analysis.[174] But at least the satirist will have a way to deliver modest proposals without having to become a parodist.[175]

A commenter on a draft of this paper rightly questioned the self-proclaimed "modesty" of the proposal herein, intimating that (not unlike the best satirists) your humble author is masquerading a radical idea in the guise of modest doctrinal proposals. Perhaps so, perhaps not; I leave that

173 *Id.* at 597.
174 *See supra* Part III.
175 *See supra* text accompanying note 72.

to readers to decide.

Gulliver's Travels leads its readers through stirring journeys.[176] For those that wish to opine on their meaning, that process can likewise prove exciting. But Swift's contemporary intellectual compatriots face a very different adventure if they satirize, for they face a new Brobdingnag:[177] the courtroom. This proposal is no way intended to turn satirists into the Brobdingnagians of copyright law, but it is most certainly intended to help satirists rise above their current status under the law as tiny Lilliputians and savage Yahoos.[178]

176 JONATHAN SWIFT, GULLIVER'S TRAVELS (Walter J. Black, Inc. 1943).
177 *See id.*
178 *See id.*

Transgenic Crops in the Age of Human Rights: Moral Uncertainty and Rational Risk Policy

Jeffrey J. Mindrup

INTRODUCTION

History has proven it is characteristically human to modify the environment for some perceived benefit. Since the domestication of plants and animals more than 10,000 years ago, humankind has manipulated plants to improve yields and provide more food. This process evolved from breeding to crossbreeding and now to genetic engineering. In 1996, the first genetically modified crop available for commercial use reached the market.[1] In the ten years since, the use of genetically engineered or transgenic crops has proliferated at impressive rates despite an ongoing debate about the ethical implications and possible consequences of genetically altered food. Between 2003 and 2004, the use of transgenic crops worldwide increased by 20% to a total of 200 million acres.[2] In 2004, 8.25 million farmers in 17 countries planted genetically altered crops, thereby joining a $4.7 billion market.[3] The rate at which transgenic crops are overtaking traditional varieties is even more surprising. Between 1997 and 2002, the percentage of soybeans that were Roundup Ready® soybeans, a transgenic variety, increased from 1.9% to 74% and transgenic cotton increased from just 4% in 1997 to 70% in 2002.[4] In addition to the proliferation of existing plants, scientists are developing and testing new varieties with traits ranging from pest and drought resistance to improved nutrition and taste.[5]

Despite this growth, or perhaps because of it, the argument over transgenic crops has only intensified over the past ten years. At the same time, transgenic crops are often absent from broader discussions of the ethical propriety of genetic engineering. The genetic alteration of plants shares many of the foundational issues that make ethical discussions of genetic engineering of humans and other animals so difficult. Nevertheless, some substantial differences and the unique history of transgenic crops provide a

1 CLIVE JAMES, PREVIEW: GLOBAL STATUS OF COMMERCIALIZED BIOTECH/GM CROPS: 2004, at viii (ISAAA Briefs No. 32-2004), *available at* http://www.isaaa.org/Resources/publications/briefs/32/download/isaaa-brief-32-2004.pdf.

2 *Id.* at iii.

3 *Id.* at iii, vii.

4 Michele C. Marra et al., *The Payoffs to Transgenic Field Crops: An Assessment of the Evidence*, 5 AGBIOFORUM 43, 43 (2002), *available at* http://www.agbioforum.org/v5n2/v5n2a02-marra.pdf.

5 *See* John Charles Kunich, *Mother Frankenstein, Doctor Nature, and the Environmental Law of Genetic Engineering*, 74 S. CAL. L. REV. 807, 810 (2001).

unique opportunity to learn how to address the issues underlying the biotechnology debate. The importance of food has the public engaged—but substantially fewer moral and religious objections to genetically altered food remove some of the blinding passion that accompanies the idea of genetically altered animals and humans. The clear goals of using transgenic crops to abate world hunger and the existing regulatory structure also provide a framework for discussing issues related to genetic engineering that is absent when applying gene technology to animals or humans. As such, the development of transgenic foods and the subsequent debate provide a unique learning opportunity for effectively structuring the debate of these difficult issues. Mistakes by advocates and opponents of transgenic crops early in the discussion have polarized the arguments, obfuscated the public's understanding of the issues, and foreclosed a productive discourse about transgenic plants. By appreciating mistakes made in handling an issue that is less complex than those on the horizon, we can avoid the temptation to engage in empty rhetoric and properly weigh the benefits and risks of genetic engineering.

DEVELOPMENT OF GENETIC ENGINEERING

At a point near the end of the last European Ice Age, humans began domesticating and exploiting plants and animals.[6] Throughout the past ten to fifteen thousand years, humanity has used the limits of available technology to manipulate plants to improve both the yield and the variety of the food supply.[7] This activity took a great step forward in 1865 when Gregor Mendel, a Moravian monk who had been experimenting with peas, published "Versuche über Pflanzen-Hybriden" ("Experiments with Plant Hybrids").[8] By exposing the basic laws of heredity, Mendel's work formed the foundation for modern genetics. For over a hundred years, scientists, farmers, and even hobbyists applied Mendel's lessons through traditional breeding techniques to transfer genes between the same or closely related species of plants and animals.[9] Then, in the mid-1970s, scientists discovered a process known as recombinant DNA technology, whereby scientists remove discrete sections of a DNA molecule and replace them with others.[10] The emergence of this technology immediately touched off ethical discussions in the scientific community.[11]

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6 PETER J. UCKO & G.W. DIMBLEBY, THE DOMESTICATION AND EXPLOITATION OF PLANTS AND ANIMALS, at xvii (Aldine Publishing Co. 1968).

7 *See id.* at xvii–xx.

8 GREGOR MENDEL, EXPERIMENTS IN PLANT HYBRIDISATION (Harv. Univ. Press 1965) (1866); *See also* PETER PRINGLE, FOOD INC.: MENDEL TO MONSANTO—THE PROMISES AND PERILS OF THE BIOTECH HARVEST 9 (Simon & Schuster 2003).

9 *See* Karen Charman, *"Biotechnology Will Feed the World" and Other Myths*, 6 PR WATCH NEWSLETTER (Ctr. for Media & Democracy, Madison, WI), Oct.–Dec. 1999, at 8, *available at* http://www.prwatch.org/prwv6n4.pdf.

10 THOMAS A. SHANNON, MADE IN WHOSE IMAGE? GENETIC ENGINEERING AND CHRISTIAN ETHICS 4 (Humanity Books 2000).

11 *See* LISA YOUNT, BIOTECHNOLOGY AND GENETIC ENGINEERING 10 (Facts on File rev. ed. 2004).

Though part of an ongoing scientific debate, genetic engineering took a significant legal turn in 1980 in the seminal case of *Diamond v. Chakrabarty*.[12] In *Chakrabarty*, the United States Supreme Court observed that the "laws of nature, physical phenomena, and abstract ideas" were not patentable under 35 U.S.C. § 101[13] because new plants and minerals are "manifestations of . . . nature, free to all men and reserved exclusively to none."[14] However, in a 5-4 decision, the Court determined a human-made, genetically engineered bacterium was patentable as a new and useful "manufacture or composition of matter."[15] The Court stated Congress intended the statute to "include anything under the sun that is made by man."[16] In reaching its decision, the Court rejected arguments made in an *amicus* brief filed by scientists and ethicists suggesting a "parade of horribles," including the potential for pollution and disease as well as the loss of biological diversity.[17] The Court reasoned any action it might take would have little effect deterring the scientific mind and that such determinations of policy were for the legislative process.[18]

HUNGER AND HUMAN RIGHTS

As the Court noted, the decision in *Chakrabarty* did not spawn genetic engineering, but it did dramatically affect the debate. Proponents of genetically modified organisms, which now included agribusiness interests, began to tout the potential for transgenic crops to end world hunger. The political environment was also ripe for transgenic crops. As part of a global human rights movement, the United Nations declared in 1974, "[e]very man, woman, and child has the inalienable right to be free from hunger and malnutrition in order to develop fully and maintain his physical and mental faculties."[19] Ethicists concerned about human rights also targeted American foreign policy. Author Henry Shue argued that certain things were "basic rights"—those goods that are necessary for the enjoyment of any other rights.[20] Control of these goods, food being among the most obvious, creates a duty not to deprive and a duty to aid the hungry.[21] Despite the focus on human rights, improvements in agriculture, and changes in the world economy, the number of malnourished people around the world has been consistently more than 800 million for decades.[22] Dramatic growth in

12 447 U.S. 303 (1980).

13 *Id.* at 309.

14 *Id.* (quoting Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127, 130 (1948)).

15 *Id.*

16 *Id.* (quoting S. Rep. No. 82-1979, at 5 (1952); H.R. Rep. No. 82-1923, at 6 (1952)).

17 *Id.* at 316.

18 *Id.* at 317.

19 2 ENCYCLOPEDIA OF BIOETHICS 869 (Warren T. Reich et al. eds., Simon & Schuster MacMillan rev. ed. 1995) [hereinafter BIOETHICS].

20 HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 22–29 (Princeton Univ. Press 2d ed. 1996).

21 *Id.* at 55–60.

22 *See, e.g.*, 2 BIOETHICS, *supra* note 19, at 869; FOOD & AGRIC. ORG. OF THE U.N., THE STATE OF FOOD INSECURITY IN THE WORLD 2004, at 5 graph (2004), *available at*

the world's population and the depletion of natural resources raise serious questions about the carrying capacity of the earth as we begin the twenty-first century.[23] Biotechnology offers transgenic crops as a key component in solving both the agricultural and environmental crises.

BENEFITS OF TRANSGENIC CROPS

The dire situation regarding world hunger and population growth provides proponents of biotechnology with their strongest argument. From the beginning, transgenic crops have benefited from the clear goal of reducing world hunger. Many scientists who have devoted their lives to improving food and food production around the world argue that genetic engineering is essential "to improve the quantity, quality, and availability of food."[24] Proponents of biotechnology see agricultural improvements as indispensable to the ability to feed the 8.3 billion people anticipated in the next quarter century.[25] Transgenic crops offer increased yields, dependability, and nutritional quality to food producers around the world.[26] Improvements in food production could have beneficial effects on the environment as well. Replacing traditional crops with transgenic varieties could allow farmers to bring less land under cultivation, which would protect natural habitat and actually preserve biodiversity.[27] Transgenic crops also offer the potential to conserve environmental resources by reducing pesticide and herbicide use as well as creating foods more fit to the local environment.[28] In this way, transgenic crops become a win-win proposition—crops that produce higher yields with less harm to the environment. In theory, and more recently in practice, scientists are able to tailor crops to a particular growing environment or the nutritional needs of a particular population. Scientists around the world have developed plants that "resist insects, disease, drought, salt, and herbicides."[29] The Third World is already benefiting from the technology. Small-scale farmers in Africa, who desperately need agricultural technology to improve food production in some of the most acidic soil in the world,[30] benefit from transgenic seeds and crop protection technologies targeted to local growing conditions and practices.[31] Given

ftp://ftp.fao.org/docrep/fao/007/y5650e/y5650e00.pdf.

23 2 BIOETHICS, *supra* note 19, at 870–71.

24 *See* Norman Borlaug, Letter to the Editor, *Open Letter to the Editor*, INDEPENDENT (London), Apr. 20, 2000, *reprinted in* THE ETHICS OF FOOD: A READER FOR THE TWENTY-FIRST CENTURY 74, 77 (Gregory E. Pence ed., 2002) [hereinafter ETHICS OF FOOD].

25 *See id.* at 78.

26 *Id.* at 79.

27 Kurt Buechle, Note, *The Great, Global Promise of Genetically Modified Organisms: Overcoming Fear, Misconceptions, and the Cartagena Protocol on Biosafety*, 9 IND. J. GLOBAL LEGAL STUD. 283, 290 (2001).

28 SHANNON, *supra* note 10, at 13.

29 YOUNT, *supra* note 11, at 13.

30 Cornell University News Service, *Crop Engineered to Grow in Poisonous Soil*, SCIENCE DAILY, Aug. 29, 2007, http://www.sciencedaily.com/releases/2007/08/070827153025.htm.

31 *See* Florence Wambugu, *Why Africa Needs Agricultural Biotech*, *in* GENETICALLY MODIFIED FOODS: DEBATING BIOTECHNOLOGY 304, 305 (Michael Ruse & David Castle eds., 2002) [hereinafter GENETICALLY MODIFIED FOODS].

the disparities of world food distribution, it is disingenuous for privileged societies to take an excessively cautious approach to genetically engineered foods when the vast majority of humankind cannot afford that luxury.[32]

To proponents, society reaps these benefits at little cost. Characterizing the process as an extension of traditional breeding practices, genetic engineers find no moral objection to manipulating nature to develop transgenic crops.[33] In fact, some see genetic engineering as preferable because it is more precise than traditional breeding methods.[34] While traditional breeding transfers genes between organisms, genetic modification involves moving only a single gene.[35] Thus, the ability arises to make beneficial combinations that were impossible by traditional breeding. Genetic scientists then use these combinations to engineer products suited to the planting conditions or nutritional needs of a certain area, thereby increasing food production and nutrition in ways not possible without biotechnology.[36] While science must be respectful of natural processes and wary of hubris, the reality of human expansion demands the increased production and nutrition biotechnology can provide.

OPPOSITION TO TRANSGENIC CROPS

Despite the admirable goals and potential benefits of transgenic crops, biotechnology faces persistent opposition. The arguments against biotechnology generally take two forms: 1) moral or ethical objections to tampering with nature, and 2) a fear of unintended consequences, which tends to focus on human health and the environment. For many reasons, the preliminary development of biotechnology did not involve a significant debate about the wisdom of genetic engineering itself. First, there was little organized opposition to confront the rapidly developing technology.[37] Those who held views that science should not meddle with nature were isolated and were not organized. Next, as demonstrated by the *Chakrabarty* Court's treatment of ethical concerns, opponents had difficulty finding an audience for vague moral arguments urging restraint. In contrast to the proponents of genetic engineering who express clear goals of ending hunger, moral objections prove difficult to articulate.[38] The relation of genetic engineering of crops and animals to traditional breeding and natural evolution also muted many of the concerns that the public eventually developed in relation to genetic modification of human beings. At the time the first generation of modified crops were entering development, there was very little

32 Borlaug, *supra* note 24, at 77–78.

33 *See* J. Howard Beales III, *Modification and Consumer Information: Modern Biotechnology and the Regulation of Information*, 55 FOOD & DRUG L.J. 105, 106 (2000).

34 C. of Food, Agric., & Envtl. Sci., Ohio St. Univ., GMO: FAQ (Frequently Asked Questions), http://web.archive.org/web/20020403135603/http://ohioline.osu.edu/gmo/faq.html (last visited Sept. 1, 2007) [hereinafter OSU GMO FAQ].

35 *Id.*

36 *See* SHANNON, *supra* note 10, at 13.

37 *See* Kunich, *supra* note 5, at 813–14.

38 *See* 2 BIOETHICS, *supra* note 19, at 932.

emphasis on wrongness because there was, and continues to be, no general concern for plant welfare.[39] Moreover, since humans had been breeding plants and animals for much of history, opponents had the burden of showing how the use of the new technology was ethically suspect.[40] In time, opponents have attempted to articulate a fundamental difference between traditional breeding and the splicing of traits between species, but this distinction has not really appeared to take root with the public.[41]

MORAL CONSIDERATIONS AND THE LACK OF RELIGIOUS OBJECTION

A dearth of religious objection to genetic engineering compounds the difficulty of articulating a moral objection to genetically altered foods. In fact, most religions find genetically modified organisms compatible with their doctrine—even supporting biotechnology if used properly.[42] The issue then becomes not a question of *if* but a question of *how*. Much of the religious acceptance of interventions in nature proceeds from the Bible. In Genesis, God commands humanity to take dominion over the earth: "[F]ill the earth and subdue it; and have dominion over the fish of the sea and over the birds of the air."[43] Starting from this premise, the Catholic view of genetic engineering has evolved but has remained consistently supportive. In fact, the Second Vatican Council ("Vatican II") determined mastery over nature was part of God's will.[44] Rather than being deterred from building up the world, man is compelled to do so.[45] The view of many who contributed to Vatican II is that man is a co-creator with God.[46] However, Vatican II did recognize limitations on man's role as a creator, stating, "[A]ll things are endowed with their own stability, truth, goodness, proper laws, and order. Man must respect these as he isolates them by the appropriate methods of the individual science or arts."[47] This approach recognizes the legitimacy of altering nature and the autonomy of science as long as the creator is given proper reverence.

Pope John Paul II modified the approach taken by Vatican II, but did not reject it. In his view, since the order of nature, though not fixed, had its origin in God, man's guide must be in harmony with the law of nature.[48] At the Jubilee of the Agricultural World, November 11, 2000, Pope John Paul II noted the concerns of the scientific community about the sustainability of the present agricultural system.[49] Specifically addressing the ge-

39 *Id.* at 936.
40 *Id.* at 933.
41 *See* Kunich, *supra* note 5, at 812-13.
42 2 BIOETHICS, *supra* note 19, at 932.
43 *Genesis* 1:28.
44 SHANNON, *supra* note 10, at 36.
45 *Id.*
46 *Id.* at 38.
47 *Id.* at 42.
48 *Id.* at 36.
49 Pope John Paul II, Address at Jubilee of the Agricultural World (Nov. 11, 2000), *reprinted in* GENETICALLY MODIFIED FOODS, *supra* note 31, at 111, 111–14.

netically engineered food, he expressed the need for the utmost care in the assessment and valuation of the consequences of modification.[50] The Pope cautioned, "[Biotechnologies] must be submitted beforehand to rigorous scientific and ethical examination, to prevent them from becoming disastrous for human health and the future of the earth."[51] Though the Catholic position is rooted in natural law, there is no morally absolute objection to genetic engineering based on that natural law. In the absence of a complete prohibition, the focus becomes one of personal responsibility and stewardship to prevent exploitation and unintended consequences.[52]

Though also cognizant of the biblical text, the Protestant approach is slightly different. However, it too stops well short of a prohibition of genetic modification. Taking a more holistic approach, Protestants tend to locate the debate within an ecological setting.[53] One view finds this difference possibly rooted in the Reformation, which emphasized sin and its destructive effects on humanity.[54] In contrast to the Catholic view, the Protestant position derives more from a concept of stewardship than one of natural law.[55] For example, Methodists see God as the creator, man as his stewards, and technology in service to both humanity and God.[56] Similarly, the Orthodox Church sees humanity as "both a given and a potential."[57] Again, the emphasis is on the use and consequences of genetics rather than prohibition based on any moral argument.

Although the issue is very complex under Jewish law and the doctrine is still evolving—there is no outright objection to genetically modified foods.[58] Judaism takes the view that God created the universe but left it in an incomplete state.[59] God created Adam as a partner who is charged with completing the creation by finding the cure for disease and producing enough food for the hungry.[60] Technology should work toward the benefit of humanity without violating divine rules.[61] This approach defers the determination of morality to the assessment of the consequences. The benefits must outweigh the risks, but if they do, genetically engineered foods have a place in society.

Similar to the scriptural approach taken by other religions, Islam adopts a worldview rooted in revelation.[62] Religious leaders conduct a

50 *Id.* at 112.
51 *Id.*
52 SHANNON, *supra* note 10, at 55.
53 *Id.* at 78.
54 *Id.*
55 *Id.* at 79.
56 *Id.* at 61.
57 *Id.* at 62.
58 *See* Carl Feit, *Genetically Modified Food and Jewish Law (Halakhah)*, *in* GENETICALLY MODIFIED FOODS, *supra* note 31, at 123, 124.
59 *Id.*
60 *Id.*
61 *Id.* at 124.
62 Mohammad Fadel, *Islam and the New Genetics*, 13 ST. THOMAS L. REV. 901, 901 (2001).

case-by-case analysis of emerging technologies based on four sources: the Qur'an; God's word as revealed to Mohammed; the sunna, the normative practice of the Prophet Muhammad here on earth; and community standards.[63] If none of these is available, the leaders adopt a utilitarian approach.[64] In practice, the assessment of a new technology or situation depends on reason by analogy—a practice that seems similar to common law jurisprudence in the United States and England. Under the Islamic approach, human intervention in nature is permissible so long as the purpose for the intervention is for the benefit of human beings.[65] Man does not violate any prohibition against changing God's creation if he promotes welfare by reducing need or treating a disease.[66] However, those leaders in the Islamic community who are more conservative do favor complete prohibition. As evidence of the impropriety of tampering with nature, these leaders rely on the passage of the Qur'an which provides: "And He created everything, and determined [each thing] precisely."[67] If God created each thing precisely, man has no authority to tamper with God's creation. Another well-established principle in Muslim ethics may also have a practical effect on whether transgenic crops are morally acceptable. Muslims believe that the removal of existing harm deserves greater precedence than achieving new benefits.[68] Even if it is not always conceptually easy to distinguish the difference, this precept may suggest a different approach on a case-by-case basis.[69] Although no general prohibition exists, Islamic ethics may require a specific assessment of goals before adopting genetically modified foods as the solution.

This brief examination of religious views on genetic engineering demonstrates the absence of a *per se* prohibition on genetic enhancement of the world's food supply based on religion. Moreover, the judiciary has also foreclosed any personal religious objection by finding that the United States' regulatory scheme, which allows transgenic crops to be sold without labeling, does not violate the free exercise of religion by persons who object to transgenic crops.[70] Absent any religious objection, the analysis of the morality of transgenic crops largely lends itself to an assessment of the risks and rewards. The focus becomes eliminating unintended consequences and assuring that the intended consequences are just. The analysis is utilitarian in nature, deciding how to best use the technology for the benefit of humankind, rather than based in moral absolutes. As such, opponents have struggled to articulate an argument against genetically altered crops based on morality.

63 *Id.* at 901–02.
64 *Id.* at 902.
65 *Id.* at 903.
66 *Id.*
67 *Id.* at 904 n.6 (*quoting al-Furqan* 25:2 (THE QUR'AN)).
68 *Id.* at 909–10.
69 *Id.* at 910.
70 *See* Alliance for Bio-Integrity v. Shalala, 116 F. Supp. 2d 166, 179–80 (D.D.C. 2000).

LOST OPPORTUNITY

This difficulty of articulating moral opposition to transgenic crops and genetic engineers' reaction to it represents a primary failing in the discussion regarding the exploration of biotechnology. Proponents did not find anything intrinsically wrong from a theological point of view nor any well-framed argument against genetic engineering. As such, they assumed their desired ends were just and forged ahead without engaging the community in a meaningful dialogue that could have ameliorated many of the public's misgivings about biotechnology. Whether borne of arrogance, a drive for profits, or a single-minded devotion to discovery, some scientists and agribusiness executives failed to understand that, for many people around the world, there is still an ethical issue to balance with the laudable goal of feeding the hungry.

Science is an institution that deserves great respect, but that respect results from the efforts of those visionaries who have explained to the public how a scientific discovery could benefit humankind. In the laboratory, the scientific method operates independently of social pressures, but to realize its potential, science must interact with the outside world. Science has the ability to create new technology, but the proper use of that technology is often a matter of values. Science must inform traditional beliefs, but also proceed with an understanding of the anxiety caused by the displacement of existing values. Further complicating the issue, science is not fully operating in its normal fashion in the development of many transgenic plants. Collegial competition and peer review yield to market competition, the threat of negative publicity, and the jealous protection of patents. These factors foster an atmosphere of secrecy that engenders societal skepticism.

EVOLVING OPPOSITION

Critics of transgenic crops also accuse proponents of portraying the skeptical public as misinformed or uneducated.[71] For example, Leon Kass, currently Chairman of the President's Council on Bioethics (the "Council"), suggests that scientists cast the issue as beneficial knowledge versus ignorant and superstitious anxiety.[72] Given the larger issues involved, Kass believes the public is right to be ambivalent about genetic engineering.[73] He believes people's worries are in touch with the deepest matters of human dignity, and we ignore them at our peril.[74]

Despite the expansion of transgenic crops and the difficulty of expressing moral opposition without a religious objection, opponents of transgenic crops continue to press arguments for limiting genetic engineer-

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71 Matthew Rich, Note, *The Debate Over Genetically Modified Crops in the United States: Reassessment of Notions of Harm, Difference, and Choice*, 54 CASE W. RES. L. REV. 889, 900–01 (2004).

72 LEON R. KASS, LIFE, LIBERTY, AND THE DEFENSE OF DIGNITY: THE CHALLENGE FOR BIOETHICS 120 (2002).

73 *Id.*

74 *Id.*

ing itself. Groups opposed to genetically altered crops argue that the persistent resistance in Europe, the United States, and around the world demonstrates public resistance to genetically engineered food independent of possible consequences.[75] Notwithstanding the acceptance of genetic engineering by the world's organized religions, many opponents of biotechnology still build their arguments for prohibition or restraint on a basis of vague spirituality. A useful device in the debate about genetically altered food has been to focus any discussion of morality on the genetic alteration of humans and then project the public's uncertainty or apprehension back to genetic alteration in any form, including the alteration of plants.[76] The idea is to gain support for categorical prohibition against any type of intervention in nature based on morality and driven by fear of chimeras or loss of humanity. Though some objections to genetic alteration are real, such arguments when made by interested groups appear to be designed to capitalize on the resurgence of piety and sanctimonious environmental activism currently en vogue in American culture.

More constructively, ethicists struggle to find real limitations on science and self-interest in an age when technology and the rate of advancement can quickly surpass our ability to understand the personal, social, and cultural implications of a new discovery. Representative of this effort, the Council reflects the struggle between progress and the amorphous apprehension many people still hold about genetic engineering. The Council sees biotechnology as a form of human empowerment, but the techniques of the technology do not define its purposes.[77] Therefore, society's focus must be on the abilities and goals of biotechnology, rather than the process itself.[78] By adopting this view, the Council concedes the validity of genetic engineering and aligns itself with the position held by the majority of the world's religions. As such, the issue again becomes a matter of degree or balance rather than a complete prohibition.

The Council seems to suggest a limitation on genetic engineering based on a vague religiosity and a form of natural law affected by modern environmentalism.[79] Wary of "upsetting eons of gradual and exacting evolution," the Council is concerned with the problem of hubris.[80] The Council also notes the precautionary principle and its conservative approach to interventions into the natural world with some deference, but never actually adopts the principle's heavy burden on new technology.[81] Instead, the

75 Gregory E. Kaebnick, *On Genetic Engineering and the Idea of the Sacred: A Secular Argument*, 13 ST. THOMAS L. REV. 863, 863–64 (2001).

76 *Id.*

77 *See* THE PRESIDENT'S COUNCIL ON BIOETHICS, BEYOND THERAPY: BIOTECHNOLOGY AND THE PURSUIT OF HAPPINESS 2 (2003), *available at* http://www.bioethics.gov/reports/beyondtherapy/beyond_therapy_final_webcorrected.pdf [hereinafter COUNCIL ON BIOETHICS].

78 *Id.* at 2–3.

79 *Id.* at 287.

80 *Id.*

81 *See id.* The precautionary principle is an environmental idea that posits, "[w]hen an activity raises threats of harm to human health or the environment, precautionary measures should be taken

Council proposes that "[m]odesty born of gratitude for the world's 'givenness' may enable us to recognize that not everything in the world is open to any use we may desire or devise . . . ."[82] Noting man's Promethean aspiration to remake nature to serve our purposes and satisfy our desires, the Council states that this approach is erroneous because it risks unintended consequences and reveals an improper disposition to the naturally given world.[83] The Council's observations are of little help in determining any practical limitation on science and the role of the law or government in deciding or moderating complex moral issues. It is difficult to translate an academic argument about the proper disposition toward nature into an understanding of what *ought* to be and how the law can effectuate that desired result. Although the impact on the environment and the resulting effects on humanity are central to the discussion of genetic engineering, the absence of ethical directives about what ought to be done leaves us with limitations designed to avoid unintended consequences.[84]

The Council also observes that part of the trouble with genetic engineering is that the uncertainty of the goals that should ensure man's interventions are not just representations of will or ends in themselves.[85] However, this potential criticism does not readily apply in the field of transgenic crops. Putting any profit motive aside, everyone would agree that providing the means for the world's population to feed itself is an admirable goal. Accordingly, transgenic crops should be an easier issue on which to reach consensus than genetic engineering of animals or humans. Focusing on the specific issue of transgenic crops would elevate the debate about the prudence of genetic engineering. Scientists and the public could then work together to determine whether transgenic crops are proper tools to increase food production and, if so, the ways in which society can acceptably use these tools.

While the Council represents a view of genetic engineering that reflects a cautionary approach based in a vague, contemporary religiosity, others have attempted secular explanations for a reluctance to tamper with nature. Philosopher Gregory E. Kaebnick argues that terms like "Frankenfood," a term commonly used by critics to describe genetically modified plants, reveal that part of the public's concern is with meddling *per se*.[86] In addition to concern about unintended consequences, the terminology suggests concern about tampering with something intrinsically valuable to humanity. Kaebnick argues the apprehension about biotechnology is not reli-

even if some cause-and-effect relationships are not fully established scientifically." Science and Environmental Health Network, Wingspread Statement on the Precautionary Principle, (1998), http://www.sehn.org/state.html#w [hereinafter Wingspread Statement].

82 COUNCIL ON BIOETHICS, *supra* note 77, at 289.

83 *Id.* at 287–89.

84 MICHAEL J. REISS & ROGER STRAUGHAN, IMPROVING NATURE?: THE SCIENCE AND ETHICS OF GENETIC ENGINEERING 63 (1996).

85 COUNCIL ON BIOETHICS, *supra* note 77, at 289.

86 Kaebnick, *supra* note 75, at 864.

gious, but instead is a secular version of the sacred.[87] Employing Ronald Dworkin's view of the sacred, Kaebnick notes: "[t]he most compelling example of a secular notion of the sacred is the widespread view that the environment ought to be treated with respect."[88] Perhaps rooted in Henry David Thoreau's *Walden*, in which the author chronicled his life in the woods, the modern environmental movement urges ethical limitations on humanity's interactions with the natural world.[89] Humanity's exploitation of the environment for its own ends at the expense of other species violates something sacred.[90]

Conceptually, it is easy to support the idea of man living harmoniously with nature. To an extent, humanity's unique ability to alter the natural order imposes a duty of stewardship. Most people agree it is in humanity's interest for nature to thrive in diversity. However, taken too far, this idea of harmony denies the reality of limited resources and the brutality of nature itself. Throughout history, men and women have battled other men and women as well as other species for the resources needed for survival. The only remedy for this ongoing struggle is to increase the supply of resources, or to lower the demand for existing resources. Recognition of this reality is essential to an informed debate about humankind's relationship with nature.

Furthermore, as we have seen, the difficulty with an appeal to the sacred is that it seems "vague, inarticulable, and emotional, particularly when compared to the central concepts of Kantian or utilitarian thought."[91] As such, moral discussions of the sacred are difficult to criticize or defend.[92] This ambiguity makes it particularly difficult to engage in a productive discussion of limits, especially when proponents of biotechnology are entrepreneurs and intrepid scientists, both of whom deal in concrete, analytical terms. Further, desire compels scientists and entrepreneurs to remove limitations even when they seem insurmountable. This compulsion is hardly conducive to a dialogue with opponents espousing vague notions of the sacred, no matter how widely held.

In attempting to define a means by which we can argue about the sacred, Kaebnick roots the concept in the philosophical tradition based on deeper values or virtues.[93] Traditionally, virtue ethics includes respect for "thicker values" like kindness, honor, integrity, responsibility, loyalty, humility, and conscientiousness, as opposed to "thinner" values like autonomy and utility.[94] The sacred reincorporates moral beliefs about humanity's relationship with nature in contrast to popular notions of maximizing hap-

87 *Id.*
88 *Id.* at 865.
89 HENRY DAVID THOREAU, WALDEN (1910).
90 *Id.*
91 *Id.*
92 *Id.*
93 *Id.* at 866.
94 *Id.*

piness or eliminating deprivations of some feature of rationality that offer little help with defining the proper relationship.[95] To this end, Kaebnick suggests adopting a deontological counterpart to the consequentialist "cautionary principle," which he describes as holding that a novel project or endeavor that realistically might cause harm to the environment or public health may not be undertaken until there is reasonable evidence that harm can be avoided.[96] In the same way, the sacred view treats the world with restraint, shifting the burden of proof to those proposing a new type of intervention.[97] Any discussions of proposed interactions with nature must begin with recognition of the value in leaving nature as it is regardless of consequences.[98] An absolute ban is not necessary under a secular approach, but a reasoned public debate requires acknowledging deep-seated convictions about our relationship with the natural world.

AGRIBUSINESS RESPONDS

Although moral objections are difficult to articulate, the corporations developing transgenic crops have become more responsive to ethical concerns. Similar to the virtue ethics underpinning a secular notion of the sacred, some companies that develop transgenic seeds have adopted a stewardship model much like that espoused by several of the leading religions. For example, DuPont, a leading manufacturer of transgenic seeds, adopted guiding principles based on ensuring food safety, protecting the environment, conserving biodiversity, and engaging stakeholders, as well as working to improve food, nutrition and the quality of life.[99] Seed companies like DuPont see themselves as respectful of the wishes of society and protecting the environment with caution and care while balancing those interests with the need for increased productivity. Keeping in mind the obvious influence of a well-compensated public relations department, DuPont's statement and similar pledges by others in the biotechnology industry, represents an attempt to re-engage the public in a discussion of difficult issues. While skepticism is reasonably appropriate, the shared language of stewardship and responsibility should serve as a starting point for a dialogue about basic moral issues and the benefits and risks that are the heart of debate over genetic engineering.

PRACTICAL LIMITATIONS AND THE RISK OF UNINTENDED CONSEQUENCES

In addition to the persistent, though amorphous, moral objection some individuals have to transgenic crops, much of the public and many in the scientific community share concerns about the risks posed by such crops and whether the purported benefits outweigh the risks to health and the en-

95 *Id.* at 871–72.

96 *Id.* at 872–73.

97 *Id.* at 872–73, 876.

98 *Id.* at 872–73.

99 DuPont, Bioethics Guiding Principles, http://www.dupont.com/biotech/difference/principles.html (last visited Sept. 5, 2007).

vironment.[100] Although the rhetoric frequently suggests absolute moral limitations, the details of the debate essentially boil down to scientific arguments or assessments of risk.[101] However, that reality does not eliminate a values-based discussion of transgenic crops, but merely alters the form of the discussion. Risk-based cost-benefit analysis inherently involves balancing different practical and ethical interests to reach a consensus that enables action.

In the cost-benefit area, opponents of genetic engineering employ scientific and socio-cultural arguments that are more tractable than those made for prohibition of genetic engineering based on moral absolutes. Though initially unprepared for the explosion of biotechnology in the 1990s, critics now express tangible concerns about safety and the environment that frequently resonate with the public.[102] As time has passed, opponents of transgenic crops have more information to support their arguments and an effective support network to publish their views.

EROSION OF THE MORAL HIGH GROUND

To start, opponents have tried to remove some of the moral high ground from those who claim transgenic crops will be able to feed the world. Acknowledging the dire state of nutrition in the world, opponents argue that starvation is not a result of insufficient production, but is in fact a distribution problem.[103] The United Nations World Food Program notes that there is currently more than enough food produced, but the problem is one of access.[104] Failures in the distribution system and political pressures prevent adequate supplies of food from reaching those in need. In addition, critics argue that many farmers cannot afford to grow modern crops and consumers cannot afford to buy them—a fact not helped by increased corporate control over food resources.[105] Further, many opponents believe the purported benefits of transgenic crops are not suited to ecological, small-scale agriculture practiced by the majority of farmers around the world.[106] The high costs of research and development prompted many researchers to focus on seed varieties that would have the widest application worldwide.[107] Arguably, this broad approach has prevented many areas most in need of increased production from benefiting from the technology.

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100 Marc A. Saner, *Real and Metaphorical Moral Limits in the Biotech Debate*, 19 NATURE BIOTECHNOLOGY 609 (July 2001), *reprinted in* GENETICALLY MODIFIED FOODS, *supra* note 31, at 78–79.

101 *Id.* at 78.

102 YOUNT, *supra* note 11, at 15.

103 *Id.* at 18.

104 Charman, *supra* note 9, at 9.

105 *Id.*

106 VANDANA SHIVA, *Genetic Engineering and Food Security in* STOLEN HARVEST, (South End Publisher 2000), *reprinted in* ETHICS OF FOOD, *supra* note 24, at 130, 132.

107 Matthew Feldman, et al., *Why So Much Controversy Over Genetically Modified Organisms? Answers to 10 Frequently Asked Questions about GMOS*, CIMMYT, Feb. 7, 2000, http://www.cimmyt.org/abc/10-faqaboutgmos/htm/10-faqaboutgmos.htm

The agribusiness corporations producing the majority of the modified crops have amplified the fear of a monopoly over the world's food supply by aggressively protecting their research. Following *Chakrabarty* and related legislation, breakthroughs in genetic engineering are patentable as intellectual property. Owners of those patents vigorously protect their proprietary interests in significant ways. Contrary to typical farming practices, farmers who purchase transgenic seeds cannot save and replant seeds.[108] This is a particular concern in developing countries where farmers have reused seeds for centuries to try to improve yields.[109] Under a typical licensing agreement, farmers purchase seeds sold for a single season.[110] The following planting season farmers must either re-license or purchase new seeds.[111] Farmers accused of violating such agreements have found themselves defending lawsuits.[112] In fact, one of the leading manufacturers of transgenic seeds, Monsanto, claims ownership for genes and plants containing its patented material regardless of where they are or how they got there.[113] Further alarming farmers and many governments, Monsanto and the United States government hold a patent on so-called "terminator technology" that makes seeds sterile and of no value beyond a single planting.[114] The dominant concern is that a few multinational corporations could control the entire food supply. In response to a public outcry, there is an international moratorium on use of the seeds, but recent efforts to test the seeds in field trials have renewed concern about the technology.[115] While expressing legitimate concern, these arguments reveal that much of the apprehension surrounding genetic engineering is less about science or morality than it is about the economic influence of large multi-national corporations.

The concentration of biotechnology and the potential for abuse is also a central concern of religious leaders who approve of genetic engineering in theory. The Catholic Church has expressed concern that excessive intellectual property rights to widely used crops could have a devastating impact on developing nations.[116] Pope John Paul II observed, "All too often, the fruits of scientific progress, rather than being placed at the service of the entire human community, are distributed in such a way that unjust inequalities are actually increased or even rendered permanent."[117] Noting

108 Rich, *supra* note 71, at 898.

109 *See id.*

110 *Id.*

111 *Id.*

112 Asgrow Seed Co. v. Winterborer, 513 U.S. 179 (1995).

113 Rich, *supra* note 71, at 912.

114 Stephen Leahy, *Ban Endures on Terminator Seeds*, INTER PRESS SERVICE NEWS AGENCY, Feb. 11, 2005, http://www.ipsnews.net/interna.asp?idnews=27410

115 *Id.*

116 Archbishop Agostino Marchetto, Address to the Convention Organized by the Catholic University of the Sacred Heart on the Theme of "New Frontiers for Bioethics: The Biotechnologies" (Nov. 18, 2000), *available at* http://www.vatican.va/roman_curia/secretariat_state/documents/rc_segst_doc_20001118_marchetto-univ-sacred-heart_en.html.

117 Pope John Paul II, Message of the Holy Father to the Group "Jubilee 2000 Debt Cam-

the "social mortgage" on all private property, he counseled, "The law of profit alone cannot be applied to that which is essential for the fight against hunger, disease and poverty."[118] Similarly, the World Council of Churches stated that, "justice is denied if 'biotechnology is used to increase the control of the rich nations and groups over the biological resources of creation . . . .'"[119] Islam also focuses on distributive justice, noting that "benefits should not be priced to exclude the poor and underprivileged from benefiting from the advances of science."[120] Clearly, discussions of the proper allocation of the benefits of transgenic crops should be a part of the public debate, but the risk of exploitation does not necessitate a prohibition on genetic engineering.

Unfortunately, even if all the questions about distribution are satisfactorily answered, the disagreement about the safety of genetically modified foods has undermined the ability for transgenic crops to help end world hunger. Resistance to transgenic crops in Europe has spread to some of those who stand to benefit the most from the promises of new biotechnology. To the dismay of biotechnology supporters, several countries in dire need of food have refused donations that contained genetically altered grain.[121] In August of 2002, the African nations of Zambia, Zimbabwe, Mozambique, and Malawi rejected U.S. corn from the United Nations Food Programme, citing fear of health risks or the loss of European markets for their own products.[122] Whether economically or socially based, the criticisms of biotechnology and the companies that own the patents have dramatically slowed the pace of implementation around the world.

EVALUATING REAL RISK TO HUMAN HEALTH AND THE ENVIRONMENT

In addition to questioning the purported benefits, opponents also express genuine concern for potential risks to individual health and the environment. Critics contend that proper risk assessment requires more than we know.[123] In contrast to traditional breeding, which enabled breeders to observe any untoward effects developed over time, rapid changes facilitated by genetic engineering could create wide-scale unintended consequences.[124] Most of the concerns focus on two areas: food safety and the effect on the environment.[125] Opponents of transgenic crops express concern about both the means and the ends of genetic engineering. For example, many see the introduction of genetically altered products into the food

paign,"(Sept. 23, 1999), *available at* , http://www.vatican.va/holy_father/john_paul_ii/speeches/1999/september/documents/hf_jp-ii_mes_23091999_jubilee-2000-debt-campaign_en.html.

118 *Id.*

119 SHANNON, *supra* note 10, at 65 (citations omitted).

120 Fadel, *supra* note 62, at 909 (citations omitted).

121 YOUNT, *supra* note 11, at 17–18.

122 *Id.* at 17–18.

123 2 BIOETHICS, *supra* note 22, at 933.

124 *Id.*

125 David Magnus & Arthur Caplan, *Food for Thought: The Primacy of the Moral in the GMO Debate*, *in* GENETICALLY MODIFIED FOODS *supra* note 31, at 80, 81.

supply as an experiment on unwilling subjects without following the scientific method.[126] Critics contend that testing has been inadequate at every stage of the process. Moreover, scientists are splicing genes into food products from species that do not interbreed in nature and often have no history of food use.[127] One of the primary health concerns is that allergens unknown to consumers could pose risk of illness or death. For example, one variety of soybeans genetically altered with a protein from a Brazil nut had to be abandoned after millions of dollars of development when researchers discovered people who were allergic to Brazil nuts were also allergic to soybeans with the spliced protein.[128]

Proponents counter that there is a consensus in the scientific community that there is nothing inherently unsafe about splicing genes from one organism to another and that any disagreement about the process concerns specific classes and uses.[129] They reiterate that safety depends on the food's properties and have nothing to do with the process by which it is produced.[130] Even though transgenic crops receive more testing than any other food item, critics argue that transgenic crops receive no extensive laboratory testing, leaving the effects of long-term exposure to transgenic crops largely unknown.[131] The difficulty with this long-term exposure argument is that the same can be said for almost any scientific advancement relating to human beings, including everything from inoculations to electricity. While uncertainty suggests caution, it certainly does not justify paralysis.

A second area of concern is the potential impact of genetically altered plants on the environment. Some scientists note the dangers of releasing new organisms into existing ecosystems.[132] In particular, concern centers on the difficulty of estimating the effects of genetic drift from modified plants to native populations, which could threaten the environment. Such drift could reduce biodiversity as genetically enhanced plants take over and push out natural competitors.[133] The threat of genetic drift is not only theoretical, as gene flow may already be occurring. Many in the scientific community were alarmed when genetically modified corn contaminated the national treasury of corn at Capulalpan, Mexico, despite the Mexican government's prohibition on genetically modified corn—a program specifically designed to protect the native gene pool.[134] This type of unintended drift

126 KATHLEEN HART, EATING IN THE DARK 4–8 (2002).

127 Mae-Wan Ho, *The Unholy Alliance*, 27 THE ECOLOGIST 152 (July-Aug. 1997), *reprinted in* ETHICS OF FOOD, *supra* note 24, at 80, 84. *See, e.g.*, HART, *supra* note 126, at 33 (listing genes with no history of food use being inserted into food products).

128 YOUNT, *supra* note 11, at 15; *see also* OSU GMO FAQ, *supra* note 34.

129 OSU GMO FAQ, *supra* note 34.

130 *Id.*

131 Thomas O. McGarity, *Seeds of Distrust: Federal Regulation of Genetically Modified Foods*, 35 U. MICH. J. L. REFORM 403, 417 & n.84 (2002).

132 Rich, *supra* note 71, at 895–97.

133 *Id.* at 895–96.

134 *Id.* at 896–97.

could lead to a loss of biodiversity and a tendency toward uniformity that makes crops more vulnerable to pests and pathogens that will co-evolve.[135]

Moreover, there is a risk that the genes could pass to wild relatives, creating what critics describe as "superweeds."[136] Wild plants that acquire genes that make them more resistant to herbicides would require stronger herbicides that in turn could do more damage to the environment or endanger natural plants and animals that depend on those plants for food. Similarly, scientists are concerned about resistance to pesticides. Corn with a gene from the bacterium *Bacillus thuringensis (Bt)* that is toxic to many insects is one of the most widely planted transgenic crops.[137] Critics worry that as insects build immunities to *Bt* toxins, new pesticides may have to be developed.[138] In addition, the loss of *Bt* as a pesticide would be devastating to organic farming, which relies heavily on the natural pesticide.[139]

Proponents admit that science does not yet know all of the effects of biotechnology. Nevertheless, they suggest the risks are unlikely to materialize and that users can substantially reduce the risks by proper measures, such as planting refuges around fields of transgenic crops to sustain populations of insects susceptible to the toxins.[140] Proponents also argue that transgenic crops have a less drastic effect on the environment than existing means.[141] Even though many opponents of genetic engineering attempt to paint a picture of transgenic crops forced on the small, family farmer who wishes only to grow a few vegetables for sale at the local market, the reality is that industrial farms using large amounts of chemicals grow the majority of the world's food.[142] Any change caused by genetic engineering must be seen in this context and not compared to an idyllic view of the American farmer that may have never existed, and certainly would not be able to respond to the expanding agricultural needs of the world today.

Opponents of transgenic crops agree that appropriate precautionary means can reduce the risks to health and the environment.[143] Correspondingly, proponents of genetically altered crops concede that the potential risks associated with some technologies outweigh the benefits.[144] One nat-

135 MARC LAPPE & BRITT BAILEY, AGAINST THE GRAIN: BIOTECHNOLOGY AND THE CORPORATE TAKEOVER OF YOUR FOOD (Common Courage Press 1998), *reprinted in* ETHICS OF FOOD, *supra* note 23, at 156, 158–63.

136 YOUNT, *supra* note 11, at 14; Rich, *supra* note 71, at 895.

137 YOUNT, *supra* note 11, at 14.

138 Rich, *supra* note 71, at 895.

139 CHARLES M. BENBROOK ET AL., PEST MANAGEMENT AT THE CROSSROADS 221 (1996); YOUNT, *supra* note 11, at 14.

140 OSU GMO FAQ, *supra* note 34.

141 *See id.*

142 *See* WENDELL BERRY, *The Unsettling of America*, *in* THE UNSETTLING OF AMERICA: CULTURE AND AGRICULTURE (1977), *reprinted in* ETHICS OF FOOD, *supra* note 24, at 5, 17–25; Skip Spitzer, *Industrial Agriculture and Corporate Power*, GLOBAL PESTICIDE CAMPAIGNER Aug. 2003, at 1.

143 *See* RICHARD A. POSNER, CATASTROPHE: RISK AND RESPONSE 38 (2004) (discussing the process of bioconfinement as a method of reducing the dangers of transgenic crops) ; OSU GMO FAQ, *supra* note 32 (discussing the requirements of plant refuges to sustain nearby insect populations).

144 Magnus & Caplan, *supra* note 125, at 83.

ural philosophical framework for assessing the appropriate choices and means is utilitarianism. Under this view, stakeholders must weigh the risks and benefits and determine which outcome maximizes utility as measured by the net benefit to society.[145] As demonstrated by the abandonment of the soybean with the Brazil nut gene, some products may be too dangerous to develop in relation to the anticipated benefit while others are worthwhile. Conceptually, a utilitarian view seems appropriate, but as applied, it proves very difficult given the range of values worldwide.

RATIONAL RISK POLICY: ALLOCATING COSTS AND BENEFITS

One issue that inevitably arises is who will bear the costs and who will reap the benefits.[146] This issue has particular poignancy with respect to transgenic crops because private corporations in large industrialized countries primarily own the technology, whereas the targets are often the poorest countries of the third world.[147] Moreover, the public is wary of the technology and assumes that the risks it perceives are motivated by the profit margins of privately held corporations. Potential evidence of a skewed utility analysis is that most of the first generation crops appear to be suited to wide distribution and corporate profit motives, such as selling herbicides in conjunction with the seeds, rather than improving yields in difficult third world climates or improving nutrition or taste for consumers.

VARIATIONS IN RISK TOLERANCE

Another disabling feature is that individuals have vastly different levels of tolerance for risk depending on their situation. Rational people frequently disagree about how much risk is acceptable given possible outcomes—witness the stock market, the insurance industry, and Las Vegas. Different people look at the same information and reach different conclusions. For example, Judge Richard A. Posner argues that proponents of transgenic crops, like Indur Goklany, underestimate the danger that the process might get out of hand and that a genetically modified plant or animal will out-compete and destroy native species.[148] In contrast, Goklany looks at the same evidence and believes the benefits clearly outweigh the costs.[149] Goklany argues that opponents of genetically modified crops ignore the potential downside of not using the technology because they deem the crops too risky.[150] He observes that "[f]ew actions are either unmitigated disasters or generate unadulterated benefits."[151] Therefore, in a situa-

145 *Id.*

146 CASS R. SUNSTEIN, RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT 124–25 (2002).

147 GENETICALLY MODIFIED FOODS, *supra* note 31, at 299.

148 POSNER, *supra* note 143, at 38–39 (2004).

149 *Id.*; INDUR M. GOKLANY, CTR. FOR THE STUDY OF AM. BUS. POLICY STUDY 157: APPLYING THE PRECAUTIONARY PRINCIPLE TO GENETICALLY MODIFIED CROPS, (Aug. 2000), *reprinted in* GENETICALLY MODIFIED FOODS, *supra* note 31, at 265, 266.

150 *Id.* at 265.

151 *Id.* at 266.

tion in which the outcome is ambiguous because both the costs and benefits are uncertain, you must compare all of the consequences and then determine which action is preferable.[152] In certain situations, inaction could be the riskier behavior.[153] This analysis demonstrates the difficulty in deciding whether adopting transgenic crops or banning them entails more risk, especially given the degree of uncertainty and people's varying levels of tolerance for risk. Frequently, people are quick to assert their view as the correct one, but it is difficult to find "right" answers to matters so affected by personal values. The number of variables and the lack of good information on which to base effective risk assessments demonstrate the need for a sustained public dialogue on this issue rather than sensationalist headlines and visceral reactions.

FLAWED RISK ANALYSIS

The frequency with which risk decisions are flawed further complicates any assessment of risk. Research demonstrates that individuals overestimate the small risks they face and underestimate the more substantial ones.[154] Moreover, when assessing risks, individuals tend to pay a great deal of attention to risks perceived as new or novel, but very little to those to which they have become accustomed.[155] For example, a new food additive is more likely to get attention than risks posed by improper diet and lack of exercise.[156] There is even dissonance within the food context. Many people reluctant to accept foods developed by what they see as an unnatural process have no problem eating foods with labels full of artificial ingredients and preservatives. This tendency to be overly attentive to novel risks could cause the public to overestimate small risks associated with emerging biotechnologies, prompting consumers to make inefficient decisions.

Furthermore, modes of thinking and mental shortcuts that facilitate normal decision-making are often ineffective or even problematic in the risk context.[157] Without cognitive shortcuts, individuals could not function when confronted by the astronomical number of choices modern society presents. However, the shortcuts necessitated by everyday life are frequently inadequate for rational risk assessment. Risk ambiguity in a situation can generate irrational responses.[158] In fact, three common fallacies apply with considerable force to the issue of transgenic crops. These fallacies affect decision making about risk and associated cost-benefit analysis regarding potential environmental and health risks.[159] First, people tend to

152 *Id.* at 265–66.
153 *Id.* at 266.
154 W. KIP VISCUSI, RATIONAL RISK POLICY 6 (1998).
155 *Id.* at 17.
156 *Id.*
157 SUNSTEIN, *supra* note 146, at 84.
158 VISCUSI, *supra* note 154, at 18.
159 SUNSTEIN, *supra* note 146, at 36.

believe that "risk is an all or nothing" proposition.[160] An activity or product must be either dangerous or safe. Second, people are generally "committed to a belief in the benevolence of nature," so people always see human activities as being more dangerous than natural ones.[161] This belief in the benevolence of nature could cause opposition to transgenic crops without understanding the harsh effects nature often has on agriculture in many parts of the world. For some, a proper reverence for nature unrealistically forecloses tampering with nature in any way. Finally, many people have a "zero-risk" mentality.[162] Undoubtedly due in part to the significant scientific advancements in the twentieth century, the public believes it is possible to remove all, or nearly all, of the risk from an activity.[163] This belief creates unrealistic expectations and acts as a bar to potentially beneficial products such as transgenic crops. For a technology to satisfy such a low level of acceptable risk, any benefit must be unrealistically large to counterbalance even the smallest risk of harm. Such standards could deny society considerable benefits without an understanding of the corresponding costs.

COMPOUNDED DIFFICULTY

The divergence of expert scientific opinion regarding the safety of transgenic crops compounds the difficulties the public has assessing risk. When there are divergences in judgment regarding the degree of risk, people tend to place a greater weight on the worst-case scenario.[164] Substantial disagreement in the scientific community is likely to cause not only confusion but also alarmist responses.[165] The strong resistance to transgenic crops in Europe and the growing resistance in the United States, despite any evidence of an adverse health effect, arguably demonstrate such a response. Adding to the difficulty of accurately assessing risk, "self-interested private groups are entirely willing to exploit the underlying forces" to promote a particular point of view.[166] For example, the manufacturers of transgenic crops exploit concerns about population growth and public compassion for the world's hungry for financial gain under a thin auspice of altruism.[167] Similarly, "European companies have tried to play up fears of genetically engineered food as a way of fending off competition from American farmers."[168] Politicians and environmental groups have also exploited uncertainty about genetic engineering to promote their own interests.[169]

160 *Id.*
161 *Id.*
162 *Id.*
163 *Id.*
164 VISCUSI, *supra* note 154, at 21.
165 *Id.*
166 SUNSTEIN, *supra* note 146, at 91
167 *See* SHIVA, *supra* note 106, at 131.
168 SUNSTEIN, *supra* note 146, at 92.
169 *Id.* at 91–93; THOMAS BERNAUER, GENES, TRADE, AND REGULATION: THE SEEDS OF

Instead of improving the assessment process, political and social forces exacerbate the cognitive limitations confronting risk assessments. As discussed above, opponents tend to minimize or even ignore risks presented by alternatives to biotechnology. Often risk analysis requires assessment of risk-risk tradeoffs.[170] There may be competing risks arising from an alternative policy or behavioral responses to it, but activists tend to downplay or ignore the alternative risks.[171] For example, if genetically modified crops allow better yields under lower tillage, the preservation of natural habitat may present a net benefit in biodiversity and environmental protection. Similarly, if transgenic crops in fact require fewer herbicides, the environment may benefit overall as compared to conventional practices. On the other hand, if proponents are unable to convince the intended beneficiaries of relief that transgenic crops represent a safe alternative, as was the case with the rejected food relief in Africa in 2002,[172] the purported benefit does not materialize and may not justify the risk. In contrast to the currently polarized positions in the debate over transgenic crops, effective risk analysis will require a collaborative effort to overcome the problems people have assessing risk.

If people do not have accurate risk perceptions, providing information can remedy the market failure.[173] Information can play an important role in fostering better risk decisions.[174] The disagreement about the risks associated with transgenic crops and the cognitive limitations affecting the assessment of those risks suggest both the importance and the difficulty of designing an appropriate regulatory regime. Effective risk analysis is both necessary for regulation and potentially aided or impeded by it. Information generated by the regulatory process can assist individuals in making individual risk assessments. In the nature of a feedback loop, the public discourse, which includes actions by government agencies, shapes individual risk judgments that then feed back into the public discourse.[175] In this way, the risk assessment process compounds the effect of inaccurate information. As such, only a system that provides accurate information to the public can foster an environment in which the public can reach a consensus on the difficult issue of genetic engineering.

REGULATION OF TRANSGENIC CROPS

Opponents of the current regulatory framework for transgenic crops in the United States criticize it as too deferential to business interests.[176] The

CONFLICT IN FOOD BIOTECHNOLOGY 68–70 (2003).

170 VISCUSI, *supra* note 154, at 169–70.

171 *Id.*

172 YOUNT, *supra* note 11, at 17–18.

173 VISCUSI, *supra* note 154, at 26.

174 *Id.* at 43.

175 SUNSTEIN, *supra* note 146, at 92–93.

176 *E.g.*, Kurt Eichenwald et. al, *Biotechnology Food: From the Lab to a Debacle*, N.Y. TIMES, Jan. 25, 2001, *reprinted in* GENETICALLY MODIFIED FOODS, *supra* note 31, at 31–40.

process by which the government implemented the current regulatory system fostered these criticisms and resulted in another failure of proponents of transgenic crops to effectively engage the public. In an atypical move, executives from Monsanto met with Vice President George Bush at the White House in 1986 and requested regulation of genetically altered food designed to reassure the public that the underlying science was safe.[177] Rather than engage the public in a rational dialogue about the risks and benefits of genetic engineering to ensure public acceptance, Monsanto purportedly adopted a strategy of manipulating market perceptions. Initially, the biotechnology industry traded political capital to get favored regulations, while gradually trying to win support from the public and environmental groups.[178] In time, however, Monsanto's strategy changed to one designed to erase regulatory barriers and ignore the complaints of critics on the way to rushing the new technology to market.[179] The strategy and resulting regulatory scheme galvanized opposition and undermined any meaningful debate.[180]

The regulatory framework for transgenic crops involves the coordination of three federal agencies.[181] The Food and Drug Administration ("FDA") is responsible for regulating genetically modified food and feeds.[182] The United States Department of Agriculture's ("USDA") Animal and Plant Health Inspection Service ("APHIS") regulates importation and interstate movement of genetically modified crops, as well as oversees the introduction of transgenic crops into the environment.[183] Finally, the Environmental Protection Agency ("EPA") is responsible for regulating plants that produce pesticides.[184]

Opponents of transgenic crops have been the most critical of the FDA's policies. The thrust of the FDA's regulatory approach is to assess the risk posed by the product itself without regard to the process by which it was developed.[185] Oversight is only appropriate when the risk is unreasonable and when the benefits of oversight are greater than the related costs.[186] Under the provisions of the Federal Food Drug and Cosmetic Act ("FFDCA"), the FDA is responsible for regulating new foods and food additives.[187] The FFDCA gives the agency the power to regulate food labe-

177 *Id.* at 31–32.

178 *Id.* at 32–33.

179 *Id.* at 33, 39.

180 *Id.* at 33.

181 Coordinated Framework for Regulation of Biotechnology: Announcement of Policy; Notice for Public Comment, 51 Fed. Reg. 23,302, 23,304 (June 26, 1986).

182 *Id.*

183 *Id.*

184 *Id.*

185 Statement of Policy: Foods Derived from New Plant Varieties; 57 Fed. Reg. 22,984 (May 29, 1992) [hereinafter Statement of Policy].

186 Emily Marden, *Risk and Regulation: U.S. Regulatory Policy on Genetically Modified Food and Agriculture*, 44 B.C. L. REV. 733, 741 (2003).

187 21 U.S.C. §§ 301–399 (2000).

ling and approve all food additives.[188] New substances added to foods must get approval in advance unless the FDA determines the substance is "generally recognized as safe" ("GRAS").[189] In 1992, the FDA announced a narrow view of its regulatory role with regard to genetically altered plants in its "Statement of Policy: Foods Derived from New Plant Varieties" ("Statement of Policy").[190] The FDA decided to apply existing regulations rather than generate new regulations for genetically modified varieties.[191] In its Statement of Policy, the FDA announced that genetically modified crops are the "substantial equivalent" of crops developed through conventional breeding.[192] As such, crops produced by the process of gene splicing are GRAS and therefore not subject to regulation as a food additive.[193] Based on this determination, the FDA completes no pre-market review of the products and requires no special labeling.[194] Moreover, the producer rather than the FDA makes the determination as to whether a product qualifies as GRAS.[195] However, even without pre-market regulation, producers face strong incentives to market safe products, including the threat of FDA seizure, bad publicity, tort liability, and even criminal liability.[196]

JUDICIAL DEFERENCE

Despite the apparent inconsistency presented by allowing a patent for a product that qualifies as a "distinct and new variety"[197] of plant and the determination that the plant is the "substantial equivalent"[198] to existing varieties and therefore not subject to approval or labeling, the FDA's position has been vindicated by the courts. In *Alliance for Bio-Integrity v. Shalala*,[199] a coalition of opponents of genetic engineering contested the FDA's policy on genetically modified foods on several grounds.[200] The District Court for the District of Columbia determined the FDA did not violate various procedural requirements when it developed its policy on transgenic crops.[201] The court rejected the substantive challenges to the agency's policy and deferred to the FDA's presumption that transgenic crops are GRAS.[202] The court was also deferential to the FDA's position that no "material change" had occurred in the foods in question, obviating any

188 *Id.*
189 21 U.S.C. § 321(s) (2000).
190 *See* Statement of Policy, *supra* note 185.
191 *Id.* at 22,984.
192 Rebecca M. Bratspies, *Myths of Voluntary Compliance: Lessons From the StarLink Corn Fiasco*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 593, 607 (2003).
193 *See* Statement of Policy, *supra* note 185, at 22,990.
194 Bratspies, *supra* note 192, at 607.
195 *Id.* at 609.
196 *Id.*
197 PlantPatent.com, Frequently Asked Questions, http://www.plantplanet.com/faq.html#faq006 (last visited Nov. 11, 2007).
198 Bratspies, *supra* note 192, at 607.
199 116 F. Supp.2d 166 (D.D.C. 2000).
200 *Id.* at 166, 170.
201 *Id.* at 173.
202 *Id.* at 178.

need for the agency to impose a labeling requirement.[203] In fact, the court noted the FDA's limited power to consider consumer demand when making labeling decisions.[204] The decision made it clear that a legal challenge would not be a very productive means of changing regulatory policy regarding transgenic crops. However, the discovery process did uncover some disagreement among scientists at the FDA regarding the agency's policy, which critics have used to cast further doubt on the wisdom of, and motivation for, the FDA's policy on risk assessment.[205] The trial also heightened public awareness of biotechnology and fueled the perception that the government was not sufficiently overseeing the development and marketing of transgenic products.[206]

COST-BENEFIT REGULATION

Though criticized as overly deferential to the interests of the biotechnology industry,[207] the current regulatory scheme is consistent with the trend toward cost-benefit regulation. Under the cost-benefit approach, an agency assesses the magnitude of a problem, attempts to assess tradeoffs, and uses effective and inexpensive tools to promote desired outcomes.[208] Proponents of this method argue that it is necessary, given the limited resources available.[209] Furthermore, proponents suggest the goal is not to let companies save money or to scale back regulation, but to ensure that regulation is undertaken with a firm sense of its consequences.[210]

The cost-benefit approach to regulation recognizes that the overestimation of highly publicized risks creates pressure on governmental behavior, especially when risks are novel and generate an exaggerated public response.[211] As a result of strategic errors early on, the response to genetic alteration of food represents just such a reaction, resulting in many groups calling for a total ban.[212] However, every regulation entails opportunity costs, and well-intentioned but ineffective risk regulations should not be viewed as morally or ethically superior.[213] Regulation can lead to two types of errors: 1) rejecting something that is safe and effective or 2) approving something that is not safe and effective.[214] Due to the cognitive difficulties people have assessing risk, current regulatory policies often

203 *Id.* at 178–79.

204 *Id.* at 179.

205 *Id.* at 177 & n.7. *See also* Alliance for Bio-Integrity, http://www.biointegrity.org (last visited Oct. 29, 2007).

206 Marden, *supra* 186, at 756.

207 Genetically Engineered Food, Center for Food Safety, http://www.centerforfoodsafety.org/geneticall7.cfm (last visited Oct. 29, 2007).

208 SUNSTEIN, *supra* note 146, at 4–5.

209 *See id.* at 6.

210 *Id.*

211 VISCUSI, *supra* note 154, at 24–25.

212 *See, e.g.*, Genetically Modified Foods & Islam, http://www.muzammal.clara.net (last visited Oct. 29, 2007).

213 VISCUSI, *supra* note 154, at 128.

214 *Id.* at 85.

place excessive weight on the second type of error.[215] The public is much more sensitive to errors of commission, which involve identifiable victims, than to errors of omission, where the loss of life or harm is statistical.[216] This tendency causes the public to favor overly-cautious regulation. For example, many opponents of transgenic crops favor adopting the precautionary principle, which posits, "When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically."[217] This idea shifts the scientific burden of proof to those proposing a new activity.

While proponents of cost-benefit regulation acknowledge some truth in the precautionary principle, they believe the concept goes too far. For example, Cass Sunstein states, "Taken literally, the precautionary principle would lead to indefensibly huge expenditures, exhausting our budget well before the menu of options could be thoroughly consulted."[218] Public interest groups and politicians tend to foster the view that the public can have it all. To serve their own interests, these groups tend to exploit the public's tendency to overreact to visible victims and to require undue caution in hindsight. For example, one person harmed by a revolutionary drug on the evening news, has every public official clamoring to place blame for allowing the product to reach the public.[219] However, at the same time, those same politicians and the public bemoan regulatory processes that prevent drugs imported from other countries due to concerns about safety.[220]

LABELING AND THE RIGHT TO KNOW

Despite the judicial affirmation of the FDA's decision not to require mandatory labeling of transgenic foods, labeling continues to be one of the primary focuses of the debate. In contrast to the nebulous moral arguments in opposition to genetic alteration itself, arguments for labeling find support in other areas of the law. Advocates of labeling point out that consumer demand for labeling of genetically altered food remains consistently high. In 1999, a *Time* magazine poll found 81% of those polled wanted genetically engineered foods labeled, while the FDA received 50,000 written comments largely supportive of labeling.[221] In particular, the concerns about labeling include a desire to safeguard food, prevent allergic reactions, and

215 *Id.*

216 *Id.* at 85–86.

217 Wingspread Statement, *supra* note 81.

218 SUNSTEIN, *supra* note 146, at 103.

219 *See, e.g.*, *Merck Announces Global Withdrawal of Vioxx After Study Shows Risks*, LIFE EXTENSION, Sept. 30, 2004, http://www.lef.org/news/LefDailyNews.htm?NewsID=1126&section=DISEASE.

220 *See, e.g.*, Marv Shepherd, *Drug Importation and Safety from Drugs Obtained from Canada*, ANNALS OF PSYCHOTHERAPY, June 19, 2007 http://www.theannals.com/cgi/content/abstract/41/7/1288 (last visited Nov. 11, 2007).

221 Marden, *supra* note 186, at 760–61.

avoid interference with moral or religious practice.[222] Consumer groups argue that without a label, consumers are unable to choose what they eat and cannot make informed decisions in the marketplace.[223]

Furthermore, advocates of labeling note that, absent a label, people do not know they are placing themselves at risk, which is the opposite of the way agencies handle drugs and medical devices.[224] The difference in handling also suggests the public's expectations about what government agencies are doing to ensure the safety of transgenic food is greater than what regulators are actually doing. This criticism about the public's right to know proceeds from the idea of autonomy and finds traction in many of the same arguments that support informed consent. Autonomy proceeds from the assumption that a competent adult should be able to make her own decisions about what she wants to do with her own body. Since customers lack valuable information, they are unable to make intelligent choices about the foods they buy and the risks they assume.

In response, proponents of transgenic crops and the FDA maintain there is no difference between transgenic foods and those produced by traditional processes, thus labels are unnecessary.[225] Supporters further note that there is no evidence of adverse health effects associated with transgenic crops.[226] This lack of evidence causes supporters to question what information there is a duty to disclose. In addition, like informed consent, a question arises as to the standard that should determine what information the individual would want to know. It would be unrealistic to provide consumers with all the information available about all the components of each individual product, especially given the physical limitations of labeling. As such, a labeling program would be very limited in the meaningful information it provides consumers about safety and nutrition.

Moreover, consumers may perceive mandatory labeling as a negative signal or voluntary labeling as implying superiority.[227] Scientists and the food industry worry that a label would stigmatize transgenic crops, despite scientific evidence of their safety. Finally, critics of labeling note that excessive labeling can be counterproductive by providing unnecessary information.[228] Any information strategy is subject to the same cognitive limitations the public has making risk assessments, including that the costs may outweigh the benefit.[229] Paradoxically, too much labeling presents a se-

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222 *Id.* at 761.

223 Colin A. Carter & Guillaume P. Gruere, 6 AGBIOFORUM 43, 43 (2003), *available at* http://www.agbioforum.org/v6n12/v6n12a13-carter.pdf.

224 Sara Butcher, *Fraud-on-the-FDA and Genetically Modified Foods: Will the Action Stand?*, 22 REV. LITIG. 669, 704 (2003).

225 *See* SUNSTEIN, *supra* note 146, at 261.

226 Emily Robertson, *Finding a Compromise in the Debate Over Genetically Modified Food: An Introduction to a Model State Consumer Right-to-Know Act*, 9 B.U. J. SCI. & TECH. L. 156, 169 (2003).

227 *See* Rich, *supra* note 71, at 908.

228 SUNSTEIN, *supra* note 146, at 260–61.

229 *Id.*

rious risk of information overload, depriving consumers of any realistic opportunity to get valuable information about the products they consume.

COMPROMISE AND COMMON GROUND

Despite these potential difficulties, regulators have responded to public pressure for labels. Adopting a strong individual rights approach, Congress has twice attempted to pass the Genetically Engineered Food Right-to-Know Act, which would have created a labeling scheme independent of the FDA's determination.[230] Neither bill passed, but the growing pressure prompted the FDA to publish "Draft Guidance for Industry: Voluntary Labeling Indicating Whether Foods Have or Have Not Been Developed Using Bioengineering."[231] While maintaining its position that transgenic crops are safe, the FDA acknowledged that the diverging views on transgenic crops supported allowing manufacturers to voluntarily include some information regarding the development process as long as it was "truthful and not misleading."[232]

Although there are still objections on both sides of the issue, voluntary labeling appears to offer a reasonable compromise. As we have seen, some effective labeling would help counteract the cognitive difficulty consumers have assessing risks. In this way, the law merely assists economic actors in forming a well-informed contract. If people do not have accurate risk perceptions, their interactions will be inefficient. Some form of labeling takes advantage of the understanding that a well-designed information effort can play a constructive role in sounder risk decisions.[233] Moreover, regulation designed to provide information to the market can remedy the risk that dangerous products that are cheaper to produce will drive safer products out of the market when the consumer lacks pertinent information.[234] To be effective, labeling should be only one part of an overall information campaign to improve public understanding of transgenic crops and raise the level of the debate. Only accurate information can restore a reasoned discussion of the legitimate benefits and risks of transgenic crops.

CONCLUSION

As with most bioethical issues, it is unlikely that any single solution could satisfy all of the interested parties in the debate over genetically engineered foods. The failure of proponents of transgenic crops to effectively engage the public early in the process has polarized opinions on the issue and forestalled any meaningful discussion. Upon closer examination, how-

230 Robertson, *supra* note 226, at 170–71 (citing H.R. 3377, 106th Cong. (1999); S. 2080 106th Cong. (2000)).

231 Marden, *supra* note 186, at 761.

232 *Id.*

233 VISCUSI *supra* note 154, at 45.

234 SUNSTEIN, *supra* note 146, at 255. Despite advocating for information generally, Sunstein opposes labeling of genetically altered foods because he believes the risks of confusion outweigh any benefit. *Id.* at 260–61.

ever, it is clear that transgenic foods still represent an opportunity to open a dialogue that will help facilitate a consensus on this issue. Once open, that dialogue can help create a framework for deciding the more difficult genetic engineering issues on the horizon. The importance of food has the public engaged, and the lack of any religious objection to transgenic crops removes some of the passion that can cloud the discussion of bioethical issues. Without any significant fracture between the religious and the political, discussions of the propriety of transgenic crops should involve less tension than other biotechnology issues. In addition, the clear goals of transgenic crops provide a sound base on which to discuss the risks and benefits of transgenic crops.

Accurate information is central to an effective dialogue about transgenic crops. A regulatory environment focused on allowing the voluntary exchange of information lets those who want to share information do so, while facilitating an atmosphere of education that will enable the public to work toward a consensus on very difficult issues. The law is not particularly good at creating consensus, but instead works best when it allows for choice within limits and leaves a place for personal morality. A comprehensive information campaign can help do that. The free exchange of information and an educated dialogue also minimize the cognitive limitations that lead to irrational behavior.

Political leaders in the United States and around the world must take a more active role in promoting a productive dialogue about genetic engineering. In addition to voluntary labeling, the federal government should create an informational infrastructure to facilitate the exchange of information between manufacturers and the public. Government agencies, manufacturers, and opponents already provide a considerable amount of information on the Internet, but there is no single place a consumer can go to get information and compare the arguments. Part of an effective regulatory scheme should include an information clearinghouse for the most current information on biotechnology. With a better understanding of the real risks and benefits associated with genetic engineering, an engaged and educated public can work with the scientific community to determine what technologies are appropriate and how they can best be used to reach shared goals of meeting the agricultural needs of a growing population.