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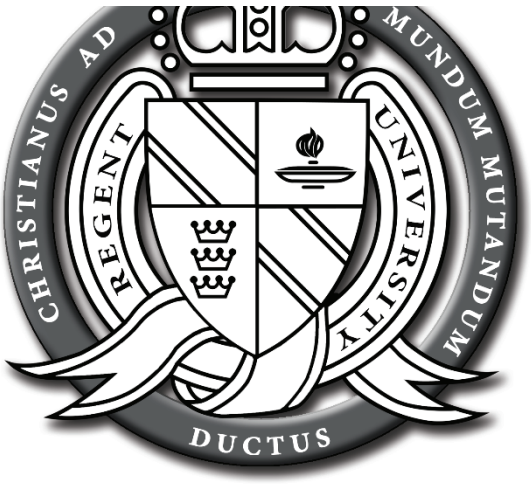

The seal of the Regent University Law Review symbolizes the Christian heritage of Regent University. The shield represents the shield of faith. The crown at the top of the crest declares the One we represent, our Sovereign King, Jesus Christ. The three crowns represent the Father, Son, and Holy Spirit. The flame and the lamp represent the lamp of learning and the fire of the Holy Spirit. Laced throughout the crest is a ribbon that signifies the unity Christians share. The mission of Regent University is embodied in the surrounding words "DUCTUS CHRISTIANUS AD MUNDUM MUTANDUM"— "Christian Leadership to Change the World."

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INTRODUCTORY REMARKS AT FREE SPEECH SYMPOSIUM

Chief Justice Mark Martin (Ret.)[*]

On March 21, 2019, President Donald Trump issued Executive Order 13864, "Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities" ("Free Speech EO").[1] The Free Speech EO seeks to protect free inquiry and speech at postsecondary institutions by encouraging colleges and universities "to foster environments that promote open, intellectually engaging, and diverse debate, including through compliance with the First Amendment for public institutions and compliance with stated institutional policies regarding freedom of speech for private institutions."[2] Colleges and universities that fail to "promote free inquiry" are at risk of federal withholding of "research or education grants."[3]

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[*] Dean and Professor of Law at Regent University School of Law. These introductory remarks were given at the Free Speech Symposium held at Regent University School of Law on October 12, 2019.

[1] Exec. Order No. 13864, 84 Fed. Reg. 58,11401 (Mar. 21, 2019).

[2] *Id.* at 58,11401.

[3] *Id.* at 58,11402; Jonathan Allen, *Trump Order Withholds Money from Colleges that Don't Promise to Protect Free Speech*, NBC (Mar. 21, 2019, 4:37 PM), https://www.nbcnews.com/politics/white-house/trump-signs-order-withholding-money-colleges-don-t-promise-protect-n986056. Of course, the constitutional protection for free speech binds only government institutions such as state-run colleges and universities. Steven P. Aggergaard, *The Question of Speech on Private Campuses and the Answer Nobody Wants to Hear*, 44 MITCHELL HAMLINE L. REV. 629, 632 (2018). Private schools, however, promulgate and administer institutional policies that seek to promote freedom of intellectual inquiry and speech in order to maintain a rich learning environment characterized by the free exchange of ideas. M.C. Sungaila et al., *Free Speech at Private Universities: Protected or Not?*, LAW360 (May 2, 2017), https://www.law360.com/articles/919291 (citing Baker v. Kohn, 457 U.S. 830, 840 (1982), and Widmar v. Vincent, 454 U.S. 263, 268–69 (1981)). The Free Speech EO includes private schools within its ambit and threatens to withhold research dollars if their own "stated institutional policies regarding freedom of speech" are not observed. Exec. Order No. 13864, 84 Fed. Reg. at 58,11401–02.

My introductory remarks at this symposium on collegiate free speech, to be sure, are not designed to evaluate comprehensively the competing arguments between those who believe that free speech has been suppressed on university campuses and those who do not. Rather, my modest goal is to share a few intentionally provocative musings to introduce the Regent University Law Review symposium on student free speech.

Let's start with a fundamental question: Is free speech essential at American colleges and universities? Absolutely!

While freedom of speech is often conceived as protecting particular modes of expression, this paradigm is too limiting. Rather, freedom of speech preserves the deeper interest that individuals in a pluralistic society have in protecting freedom of thought.[4] Humans naturally process the world through the means of language.[5] Accordingly, they must have freedom to think without undue linguistic constraint. George Orwell, in his novel *1984*, explored what might happen in a world where the government controlled language and used that power to shape what one could think.[6] Orwell's predictions should frighten us all: He foresaw a dystopia where citizens were stripped of their abilities to hold any original ideas—not just ideas that might conflict with the powers that be—to such an extent that individual identity was quelled by the individuals themselves.[7]

From the outset, America's founders understood that, if the Republic was to address challenges without resorting to sectarian violence or governmental tyranny, the citizenry would need to be guaranteed the right to safely generate and exchange ideas free from the threat of political reprisal.[8] After all, as revolutionaries themselves, the founders

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[4] Michele Cotton, *Correcting the Generally Accepted but Unjustified Interpretation of the Free Speech Clause*, 17 FIRST AMEND. L. REV. 1, 14–16 (2018).

[5] *See id.* at 14 (explaining the intertwined concepts of thought and expression by emphasizing that people share their thoughts with one another by speaking those thoughts aloud).

[6] GEORGE ORWELL, 1984 300 (Signet Classics, 1950).

[7] *See* William H. Rehnquist, *1984*, 102 MICH. L. REV. 981, 987 (2004) (describing how Big Brother, George Orwell's dystopian government, "crush[ed] . . . the individual spirit of the citizens," and eventually "the great majority [became] so deadened by the regime that its members never strayed from their love for him").

[8] *See* Cotton, *supra* note 4, at 8 (stating that the Framers were influenced by Cato's Letter No. 15 of 1720, which emphasized that free speech is essential to public liberty and free government by holding oppressive government at bay). See CATO, *No. 15 Of Freedom of Speech: That the Same is Inseparable from Publick Liberty* (Feb. 15, 1721), *reprinted in* 1 JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS OR ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 79, 80–82 (Ronald Hamowy ed., 6th ed. 1995), for an expression of Cato's full sentiment, particularly that:

> The best princes . . . encouraged and promoted freedom of speech [because] they knew that upright measures would defend themselves, and that all upright men would defend them.

understood that some conflicts would be inevitable "in the course of human events."[9] Thus, in the context of freedom of inquiry and speech, they envisioned the First Amendment as a bulwark against the new government's ability to suppress the individual ability to develop and share ideas and concepts.[10]

This American conception of free inquiry and speech differs markedly from the totalitarian suppression occurring in many regions of the world. In countries where free speech is not protected, students may learn about important concepts such as artificial intelligence, block chain, and nuclear fusion,[11] but those totalitarian regimes with Orwellian mindsets prevent those same students from developing the critical thinking skills central to innovation.[12] Those skills simply cannot flourish in an environment that prohibits free thought and expression. The Free Speech EO intends to protect students' ability to develop critical thinking skills by preserving the freedom of speech and expression.[13]

> . . . .
>
> [They knew that] [f]reedom of speech is the great bulwark of liberty; [the two] prosper and die together: . . . it is the terror of traitors and oppressors, and a barrier against them.
>
> . . . .
>
> [Never] did [] any government, who practiced impolitick severity, get any thing by it, but infamy to themselves, and renown to those who suffered under it.

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

10 *See* Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1296 (1998) ("In the late eighteenth century, Americans generally believed that freedom of thought, belief, and expression were among the natural rights of individuals. These freedoms were . . . inherent in republican citizenship . . . [and guarded citizens'] liberties against governmental encroachment.").

11 *See* John Bennett, *The Totalitarian Ideological Origins of Hate Speech Regulation*, 46 CAP. U. L. REV. 23, 51–53, 55 (2018) (identifying totalitarian regimes in the Soviet Union and China where academic free speech is severely limited and indoctrination is accomplished through compulsory university courses); Ming Zhang & Virginia M. Lo, *Undergraduate Computer Science Education in China*, SIGCSE '10: PROC. 41ST ACM TECHNICAL SYMP. COMPUTER SCI. EDUC. 396–97 (March 2010) (showing that computer science is a popular undergraduate major in China).

12 *See* Bennett, *supra* note 11, at 90 ("The outcome of entrenched [indoctrination] is a corrupted form of inquiry, where vital questions are never asked . . . [and] groupthink is solidified and the life of the mind is limited, not to mention the negative impact on research and social inquiry."); *Critical Thinking Skills Stymied by 'Propaganda'*, TIMES HIGHER EDUC., Feb. 11, 2016, at 1 (pinpointing the Chinese government's teaching of propaganda on the goodness of China and socialism as a deterrent in Chinese students' ability to develop critical or alternatives ways of thinking); Lu Yan, Understanding Critical Thinking in American Higher Education: from Chinese International and Domestic STEM Students' Perspectives 19–21, 24–25, 27 (2018) (unpublished Ph.D. dissertation) (on file with the Iowa State University Digital Repository) (explaining how, compared to their Western counterparts, Chinese STEM students struggle to develop critical thinking skills essential to the scientific research process because of greater restrictions on their freedom of expression).

13 Exec. Order No. 13864, 84 Fed. Reg. at 58,11401.

Indeed, the Free Speech EO states: "Free inquiry is an essential feature of our Nation's democracy, and it promotes learning, scientific discovery, and economic prosperity."[14] As the Supreme Court stated over fifty years ago, "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[15] The Court continued:

> History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.[16]

American culture has long valued student free speech, even unpopular speech, as essential to the learning process, especially for postsecondary students.[17] Indeed, our Constitution guarantees this right.[18] So, end of discussion—right? Not quite. Students report deprivations of First Amendment rights at our colleges and universities.[19] If such speech suppression is occurring at postsecondary institutions, this is ample justification for a student free speech symposium.

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[14] *Id.*

[15] Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

[16] *Id.* at 251.

[17] *See Campus Rights: What We Defend*, FIRE (Apr. 19, 2020, 12:38 PM), https://www.thefire.org/about-us/campus-rights/?gclid=EAIaIQobChMImNyWrPb06AIVBY_ICh0zMgN1EAAYASAAEgIrZvD_BwE

> ("Freedom of speech is a fundamental American freedom and a human right, and there's no place that this right should be more valued and protected than America's colleges and universities. . . . The intellectual vitality of a university depends on [competition of ideas in the 'marketplace of ideas']—something that cannot happen properly when students or faculty members fear punishment for expressing views that might be unpopular with the public at large or disfavored by university administrators.").

[18] U.S. CONST. amend I. It does so much more broadly than merely the context of student free speech. As the Court stated in *West Virginia State Board of Education v. Barnette*: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." 319 U.S. 624, 642 (1943).

[19] Tom Lindsay, *Most College Students Agree That Campus Free Speech Is Waning*, FORBES (May 31, 2019), https://www.forbes.com/sites/tomlindsay/2019/05/31/new-report-most-college-students-agree-that-campus-free-speech-is-waning/#15be7e891433; Cathy Young, *Deniers of the War on Free Speech on College Campuses Are Dead Wrong*, USA TODAY (Mar. 15, 2018), https://www.usatoday.com/story/opinion/2018/03/15/christina-hoff-sommer-free-speech-under-attack-college-campuses-cathy-young-column/424704002/.

Classical liberalism suggests that minority viewpoints deserve equal opportunity to be expressed in the marketplace of ideas.[20] In recent years, many colleges and universities have adopted campus speech codes.[21] Some justify the new campus speech codes as necessary for students to feel comfortable on the college campus so that they can learn without distraction.[22] But that ignores a key fact about human development: "Like the immune system, children must be exposed to challenges and stressors (within limits, and in age-appropriate ways), or they will fail to mature into strong and capable adults, able to engage productively with people and ideas that challenge their beliefs and moral convictions."[23] In both young children and college students, challenges encourage growth in ways that comfort cannot.

Some states have taken steps to protect student speech. According to Jonathan Butcher of the Heritage Foundation, several states have enacted legislation to protect free speech on campus, and others are considering similar proposals.[24] Butcher asserts, "[i]deas are powerful, and choosing to fear an idea instead of learning to understand it or overcome it with a better one is a poor life strategy. Things we disagree with won't go away if we pretend they don't exist."[25]

America stands at a crossroads: Will the right to free thought and free inquiry, as embodied in the First Amendment's Free Speech Clause, uncensored and protected regardless of viewpoint, survive at twenty-first century American colleges and universities? Remember, this level of free speech protection is the exception—not the rule—in most regions of the world. Even Western Europe has diminished free speech protections for its students in postsecondary settings.[26] In my view, the Free Speech EO

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[20] *See* THE FEDERALIST NO. 10 (James Madison) (expressing that the rights and interests of minority citizens must be taken into consideration in order to have a truly representative government); *Influences of Classical Liberalism*, AM. POL. CULTURE (Feb. 16, 2020), https://dlc.dcccd.edu/usgov1-2/influences-of-classical-liberalism (emphasizing classical liberalism's focus on free markets, free speech, and political equality).

[21] David L. Hudson, *Free Speech on Public College Campuses Overview*, FREEDOM F. INST., https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/free-speech-on-public-college-campuses-overview/ (last updated Mar., 2018).

[22] *Id.*; Gerald Uelman, *A Pro-con Discussion of Speech Codes and Free Speech*, SCU (Nov. 15, 1990), https://www.scu.edu/character/resources/campus-hate-speech-codes/.

[23] GREG LUKIANOFF & JONATHAN HAIDT, THE CODDLING OF THE AMERICAN MIND 31 (2018).

[24] Jonathan Butcher, *Will Free Speech Survive on College Campuses?*, HERITAGE FOUND. (Oct. 30, 2018), https://www.heritage.org/education/commentary/will-free-speech-survive-college-campuses.

[25] *Id.*

[26] *See* Rachel Schraer & Ben Butcher, *Universities: Is Free Speech Under Threat?*, BBC (Oct. 23, 2018), https://www.bbc.com/news/education-45447938 (surveying campus incidents that show restrictions on speech, and positing that further speech repressions might occur due to strict campus speech policies); Eugene Volokh, *Belgium Bans a Wide*

is intended as a shot across the bow, seeking to promote free speech for all students and warning college administrators of the possible sanction (withholding research dollars) for speech suppression.

Even so, the current trend is moving in the direction of limiting student expression to "protect" and comfort those who might disagree. As Lukianoff and Haidt observe in *The Coddling of the American Mind*: "Grossly expanded conceptions of trauma and safety are now used to justify the overprotection of children of all ages—even college students, who are sometimes said to need safe spaces and trigger warnings lest words and ideas put them in danger."[27] Jonathan Butcher observes that challenges are arising around the country to the right of students to "express themselves—and be protected while doing so."[28] This trend towards speech suppression in our colleges and universities turns the Socratic tradition on its head by artificially shielding students from views they find offensive or uncomfortable. This should concern every American.

Americans should also be concerned about the views on free speech of the students themselves.

> [A] supposedly reassuring poll, the Gallup-Knight Foundation survey, found that 70% of students felt it was more important for colleges to have "an open learning environment" with diverse viewpoints, even at the cost of allowing offensive speech, than to create a "positive" environment by censoring such expression.
>
> And yet, when about 30% of college students favor censorship, it should be a cause for alarm—especially because that's up from 22% two years ago. Moreover, 53% of students believe "promoting an inclusive society" is a higher priority than protecting free speech rights. Over a third say it is sometimes acceptable to shout a speaker down, and one in 10 approve of violent disruption. The last figure may seem small, but it means some 2 million collegians in the United States believe it can be OK to use violence to stop speech they don't like. That's not good news.[29]

Range of Sexist Speech, WASH. POST (Mar. 21, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/21/belgium-bans-a-wide-range-of-sexist-speech/?noredirect=on (discussing a proposed Belgian law that broadly restricts speech referring to sex or gender or evoking sexual stereotypes).

[27] LUKIANOFF & HAIDT, *supra* note 23, at 31–32.

[28] Butcher, *supra* note 24.

[29] Cathy Young, *Op-Ed: Half of College Students Aren't Sure Protecting Free Speech Is Important. That's Bad News.*, L.A. TIMES (Apr. 8, 2018, 4:05 AM), https://www.latimes.com/opinion/op-ed/la-oe-young-free-speech-on-campus-20180408-story.html.

Nearly one-half of college students say they favor "campus speech codes."[30] But, who defines properly neutral contours of acceptable student inquiry and speech? And even if we had such a trusted authority, does the risk of offense outweigh the benefits of free thought and free inquiry? Yet, Emma Kerr notes a drop in student support for campuses that allow free speech over those that limit offensive speech, falling from "78 percent to 70 percent" since 2016.[31]

Perhaps even more disturbing, some colleges and universities allow students to shut down or veto controversial speakers. According to David Hudson,

> A related problem on college and university campuses concerns the shutting down of controversial speakers. The point of a college and university is to serve as a marketplace of ideas, to give students, faculty, staff, and others the opportunity to hear different points of views. However, many controversial speakers have been disinvited, disrupted, or otherwise prohibited from conveying their speeches. This raises the problem of the "heckler's veto."[32]

Hudson bemoans the institutional move toward designating student "safe spaces," highlighting its inconsistency with "the purpose of higher education" of exposing "students to different and challenging ideas."[33] But he observes that the behavior codes "found strong support from some administrators, faculty and students who were convinced that by controlling speech it would be possible to improve the [campus] climate."[34] Those administrators and faculty assumed "that limiting harassment on campus would spare the would-be victims of hate speech psychological, emotional and even physical damage."[35]

Hudson also notes that while the federal courts have struck down student speech codes, "hate-speech policies not only persist, but have also actually increased in number despite court decisions striking them down."[36] If speech-suppressing forces of any stripe, in their creation of new speech suppression codes, will not follow longstanding free speech principles, we have indeed begun a worrisome chapter in

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[30] Emma Kerr, *College Students Want Free Speech—Sort Of*, CHRON. HIGHER EDUC. (Mar. 12, 2018), https://www.chronicle.com/article/College-Students-Want-Free/242792.

[31] *Id.*

[32] Hudson, *supra* note 21.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* (citing Jon B. Gould, *The Precedent That Wasn't: College Hate Speech Codes and the Two Faces of Legal Compliance*, 35 L. & SOC'Y REV. 345 (2001)).

the American history of student free speech as well as compliance with the rule of law itself.

Some people simply do not wish to accord free speech to anyone who dares to offer a view different from their own. These censors of speech mince no words about their desire to shut down anyone holding an opposing viewpoint.[37] But, if we remove protections for freedom of speech, freedom of inquiry, and freedom of thought on college campuses, we will do great damage to our cherished pluralistic society. Americans, including college students, must not succumb to the temptation to suppress unpopular ideas. On the contrary, we must trust and respect our fellow citizens enough to allow them to sort out freely their answers to polarizing questions without fear of reprisal.

Moreover, an authoritarian approach to speech directly contradicts our American experience under the First Amendment.[38] When significant pluralities of citizens—who just happen to have minority viewpoints—are no longer accorded free-speech protection, their First Amendment rights have been effectively abrogated. We should not be so quick to judge an idea simply because it offends our sensibilities or deeply-held beliefs—better that an offensive, but correct, idea be given time in the sun than barred in favor of a more seemingly benign, but sinister, idea.

To be sure, there are proper limits to free speech on campus, just as there are proper limits to falsely shouting, "Fire!" in a crowded theater.[39] As Hudson notes, "There are clearly forms of expression associated with conduct that can be banned, including fighting words, libel, falsification of research findings, plagiarism and cheating. In these instances, . . . the limitation placed on

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[37] *See How Far Will They Go to Shut Down Free Speech on Campus?*, IN DEF. LIBERTY (Jul. 15, 2019), https://indefenseofliberty.blog/2019/07/15/how-far-will-they-go-to-shut-down-free-speech-on-campus/ (calling attention to the disrupted speech of invited speakers, college faculty, and college presidents who have been chased off stage, shouted down, and threatened with violence); Jeremy Bauer-Wolf, *Free Speech Advocate Silenced*, INSIDE HIGHER ED (Oct. 6, 2017), https://www.insidehighered.com/news/2017/10/06/william-mary-students-who-shut-down-aclu-event-broke-conduct-code (featuring the incident when an invited ACLU speaker was unable to continue her presentation on free speech because students at the College of William and Mary shut down her speech).

[38] Talia Alexis Capozzoli, *Limiting Speech and Political Correctness: Authoritarian Beliefs and Tendencies*, UNIV. ARIZ. (May 2018), http://hdl.handle.net/10150/630302.

[39] *See* Schenck v. United States, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

expression is not a matter of the speaker's viewpoint or message."[40] Clearly, though, mere bruised feelings or exposure to challenging ideas should not justify the censorship of student free speech; "[t]he First Amendment cannot be evaded that easily."[41]

In areas of the world run by Orwellian extremists, there is no free speech. With 416,800 American soldiers having given their lives to protect our free speech rights from fascist regimes in World War II,[42] our generation must be equally vigilant to guard against these new, internal threats to free speech. Should we fail to safeguard our free-thinking, free-inquiring, and free-speaking heritage from the modern counterparts of past authoritarian threats, America will cease to be an exemplar of the Socratic tradition. There are groups, both on left and right, who favor only violence and oppression; they cannot stomach the idea of debate.[43] These groups will never support free speech rights for those they oppose. In this challenging vortex, Americans must renew their commitment to respect the right of free expression of those with whom they disagree—that is how pluralism works for all in a free society. Reasonable minds on the left and right must stand united against the extremist threat to freedom of thought and free speech.

Enough for now. Let's get on with some free speech!

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[40] Hudson, *supra* note 21.

[41] *See* R.A.V. v. St. Paul, 505 U.S. 377, 392–93 (1992) (discussing that protecting individuals from being injured by opposing ideas is not enough to limit free speech rights); Thomas Healy, *Who's Afraid of Free Speech? What Critics of Campus Protests Get Wrong About the State of Public Discourse*, ATLANTIC (June 18, 2017), https://www.theatlantic.com/politics/archive/2017/06/whos-afraid-of-free-speech/530094/ (conceding that free speech can at times be painful, but defending such pain as the necessary price to protect minority views and meaningful public discourse).

[42] *Research Starters: Worldwide Deaths in World War II,* NAT'L WWII MUSEUM, https://www.nationalww2museum.org/students-teachers/student-resources/research-starters/research-starters-worldwide-deaths-world-war (last visited Feb. 26, 2020); Jessie Szalay, *What Is Fascism?*, LIVE SCI. (Jan. 25, 2017), https://www.livescience.com/57622-fascism.html.

[43] Joshua J. Dyck et al., *Republicans and Democrats Both Say They Support Democratic Freedoms—but That the Other Side Doesn't*, WASH. POST (Aug. 3, 2017, 8:00 AM), www.washingtonpost.com/news/monkey-cage/wp/2017/08/03/both-republicans-and-democrats-say-they-support-democratic-freedoms-but-that-the-other-side-doesnt/.

THE NEED TO INCREASE FREE SPEECH PROTECTIONS FOR STUDENT AFFAIRS PROFESSIONALS

Noah C. Chauvin[*]

Over the past several years, the issue of free speech on college and university campuses has been the subject of renewed academic focus. Scholars have considered and debated the extent of campus free speech rights for students, faculty, and outside speakers.[1] *Much of the scholarship has focused on the ways in which student affairs professionals restrict freedom of speech, from punishing students for using microaggressions to leading so-called bias response teams.*[2] *Scholars have largely ignored the free speech* rights *of student affairs professionals.*

To a certain extent, this makes sense. Employees, even government employees, have very limited speech rights when they are at work; employers are empowered to restrict what their employees say and how they say it. However, there is good reason to afford student affairs professionals greater speech protections than they currently have. Student affairs professionals have taken on an increasingly greater role in educating college students—the very reason that college faculty and students have stringent speech protections.

In this Article, I argue that when student affairs professionals are involved in the campus mission of creating and disseminating knowledge, they should be afforded greater speech protections than they currently have. I examine four potential sources for those greater protections: The First Amendment to the Constitution, state statutes and constitutions, President Trump's recent executive order concerning free speech on college campuses, and academic culture. I argue that while free speech law is important, academic culture is ultimately the most likely source of speech protections for student affairs professionals.

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[*] J.D., William & Mary Law School 2019; B.A., SUNY Geneseo, 2016. This paper benefitted from presentation at the *Regent University Law Review* Symposium on "Contemporary Free Speech in the Law," as well as comments on an earlier draft from Matt Strauser and conversations with Dennis Chauvin, Tessa Tilton, and Kyle Wood. All opinions—and all errors—are my own.

[1] *See infra* note 9 and accompanying text.

[2] *See* sources cited *infra* note 9.

INTRODUCTION

If you ask education experts why the cost of secondary education is so high in the United States, one of the answers you will frequently get is that colleges are spending more than ever on ancillary services, such as "housing, meals, health care, and transportation."[3] The data bear this out: In addition to spending more per capita on college education than virtually any other country, the United States spends "more than three times the average for the developed world" on ancillary services.[4] This is in large part because American colleges and universities provide their students a different suite of services than do their Canadian or European counterparts, such as a greater number of residence and dining halls.[5]

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[3] Amanda Ripley, *Why is college in America so expensive?*, ATLANTIC (Sept. 11, 2018), https://www.theatlantic.com/education/archive/2018/09/why-is-college-so-expensive-in-america/569884/ [https://perma.cc/8SKV-2VS7]; *see also* OECD, EDUCATION AT A GLANCE 2018, at 254 (2018), https://www.oecd-ilibrary.org/education/education-at-a-glance-2018_eag-2018-en;jsessionid=qh4iNaH0dWQptRsxARwvAlRd.ip-10-240-5-100 [https://perma.cc/LR2S-793A] (ranking the costs of U.S. education as higher than most other developed counties).

[4] Ripley, *supra* note 3; OECD, *supra* note 3, at 255.

[5] Ripley, *supra* note 3.

In order to provide these services to students, colleges and universities must hire staff members to administer them. Student services have long been part of the college experience in the United States.[6] However, in the last three decades the number of student affairs professionals has skyrocketed. Between 1993 and 2009, the number of administrative officials at colleges grew by sixty percent, more than *ten times* the rate at which tenured faculty positions rose.[7] In 2016, post-secondary institutions employed more than 185,000 student affairs professionals ("SAPs").[8]

In recent years, free speech at colleges and universities has been subject to renewed attentions from scholars, politicians, and the popular press.[9] For instance, in 2019 alone, six states have enacted laws protecting free speech on campus.[10] The focus of these attentions has been primarily

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[6] *See* Michael S. Hevel, *Toward a History of Student Affairs: A Synthesis of Research, 1996–2015*, 57 J.C. STUDENT DEV. 844, 847–51 (2016) (noting the employment of the first student affairs professional in 1834 and documenting that by the early twentieth century most colleges and universities employed student affairs professionals to supervise housing and execute discipline).

[7] Paul F. Campos, *The Real Reason College Tuition Costs So Much*, N.Y. TIMES (Apr. 4, 2015), https://www.nytimes.com/2015/04/05/opinion/sunday/the-real-reason-college-tuition-costs-so-much.html [https://perma.cc/FEV5-TBE6]. Indeed, some university systems have seen the total number of tenured faculty fall, while college administrators increased by 221 percent. *Id.*

[8] SCOTT A. GINDER ET AL., DEP'T OF EDUC., ENROLLMENT AND EMPLOYEES IN POSTSECONDARY INSTITUTIONS, FALL 2016; AND FINANCIAL STATISTICS AND ACADEMIC LIBRARIES, FISCAL YEAR 2016, at 16 (2017), https://nces.ed.gov/pubs2018/2018002.pdf [https://perma.cc/C3RP-EN5Y]. These numbers include only professional staff members, and not the many student staff members, such as Resident Assistants, who are employed part-time in student affairs positions. *Id.* at B-6.

[9] *See generally, e.g.*, 2019 ALA. ACTS 396; SIGAL R. BEN-PORATH, FREE SPEECH ON CAMPUS (2017); ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS (2017); GREG LUKIANOFF & JONATHAN HAIDT, THE CODDLING OF THE AMERICAN MIND 235–271 (2018); KEITH E. WHITTINGTON, SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH (2018); Clay Calvert, *Reconsidering Incitement,* Tinker*, and the Heckler's Veto on College Campuses: Richard Spencer and the Charlottesville Factor*, 112 NW. U. L. REV. ONLINE 109 (2018); Noah C. Chauvin, *Policing the Heckler's Veto: Toward a Heightened Duty of Speech Protection on College Campuses*, 52 CREIGHTON L. REV. 29 (2018); Erwin Chemerinsky, *The Challenge of Free Speech on Campus*, 61 HOW. L.J. 585 (2018); Stephen M. Feldman, *Broken Platforms, Broken Communities? Free Speech on Campus*, 27 WM. & MARY BILL RTS. J. 949 (2019); Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801 (2017); Katlyn Ayn Patton, Note, *Trumping the First Amendment: Student-Driven Calls for Speech Restrictions on Public College Campuses*, 68 CASE W. RES. L. REV. 189 (2017); Nicholas A. Schroeder, Note, *Avoiding Deliberation: Why the "Safe Space" Campus Cannot Comport with Deliberative Democracy*, 2017 BYU EDUC. & L.J. 325 (2017); Megan McArdle, *Campus Free Speech is Threatened. But How Much?*, WASH. POST (Apr. 13, 2018, 3:13 PM), https://www.washingtonpost.com/blogs/post-partisan/wp/2018/04/13/campus-free-speech-is-threatened-but-how-much/?noredirect=on&utm_term=.b7540fef63ee [https://perma.cc/X9EG-EWWK].

[10] The six states that enacted such laws in 2019 were Alabama, Arkansas, Iowa, Kentucky, Oklahoma, and South Dakota. *See infra* Appendix. In total, sixteen states have

on the free speech rights of students, faculty, and invited speakers.[11] As yet, the free speech rights of college staff members—particularly those of non-academic staff members—have received relatively little attention. This Article seeks to partially fill that gap.

At first blush, a paper discussing the free speech rights of SAPs might seem odd. To begin with, as one civil rights lawyer told me when I described this project to her, "they don't have any!"[12] Moreover, most discussions of SAPs and campus speech focus on the ways in which SAPs themselves *threaten* speech.[13] Nonetheless, it is my thesis that SAPs' free speech rights are under-protected in certain important respects. I argue that SAPs' duties can be divided into two general categories: enforcing college policy and teaching. When SAPs are enforcing college policy, they should have the same level speech protections they currently do. However, when they are performing a teaching role, they should enjoy the heightened speech protections currently enjoyed (as a matter of both positive law and academic culture) by faculty members.

The Article proceeds in three parts. Part I provides background information on what student affairs staff members do, and why we should care about threats to their speech. Part II discusses four sources of speech protections on college campuses—the First Amendment, state laws, President Trump's recent executive order regarding free speech on campus, and academic culture—and evaluates whether they could provide increased speech protection for SAPs. Part III is a brief conclusion.

I. STUDENT AFFAIRS PROFESSIONALS

American colleges and universities employ tens of thousands of SAPs.[14] They are involved in virtually every aspect of student life on campus. As employees on college campuses, there can be little doubt that student affairs professionals face numerous threats to their right to free expression. Some of those threats are inherent on contemporary college campuses.[15] These pressures are felt by anyone who lives, works, or

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enacted statutes protecting student speech on campus. Robert McIntosh, *Alabama Governor Signs Bill into Law to Better Protect Student and Faculty Free Speech Rights*, FIRE (June 7, 2019), www.thefire.org/alabama-governor-signs-bill-into-law-to-better-protect-student-and-faculty-free-speech-rights/ [https://perma.cc/L8TL-AWS2]. For a full list of these states, see Appendix, *infra*.

[11] *See, e.g.*, McArdle, *supra* note 9 (discussing the free speech rights of outside invited speakers); McIntosh, *supra* note 10 (reporting the new state laws protecting student and faculty speech on campus).

[12] This point is further discussed in Part II, *infra*.

[13] *E.g.*, Speech First, Inc. v. Schlissel, 939 F.3d 756, 761–63 (6th Cir. 2019); Chauvin, *supra* note 9, at 38–43.

[14] GINDER ET AL., *supra* note 8, at 16.

[15] *See generally* Chauvin, *supra* note 9, at 32–35 (discussing the volatile nature of free speech on the modern college campus).

studies at an American college or university.[16] However, other threats are specific to student affairs staff. This Part briefly reviews what SAPs do, and then discusses why we should care about threats to SAP speech.

A. What Do SAPs Do?

SAPs have a wide array of duties that vary dramatically depending on the position they hold and the institution they work for. It is therefore somewhat difficult to describe the typical duties of individual student affairs staff. However, while individual results may vary, I argue here that SAPs' job duties can be broken down into two general categories: enforcing school policy and teaching. This distinction is important because, as I discuss below in Part I.B.2, I believe that SAPs should have heightened speech protections when they are teaching students, but not when they are merely enforcing college policy.

The first general role SAPs play on campus is enforcing campus policy. This can take many forms. For instance, a residence hall director who catches underage students drinking and directs them to pour out their alcohol is enforcing policy. Likewise, a Title IX coordinator opening an investigation into an alleged sexual assault or a faculty adviser informing the would-be founders of a new student group what items must go in their organization's constitution are also enforcing college policy. While the exact duties will vary dramatically from position to position (not to mention from school to school), the hallmark of an enforcement duty in my formulation is that SAPs do not exercise any discretion in performing it. There are clearly defined parameters for performing the duties, and SAPs may not deviate from them.

In contrast, SAPs performing the second category of duty—educating students—do have discretion. For example, think of a residence hall director making a billboard or putting on and educational program for her students. She may be given some broad instructions, such as "make a bulletin board about sexual health" or "do a program about how to get internships," but the specific details are left up to her. She can decide whether the bulletin board should include a section on abstinence, or whether internship-seeking students would be better served by hearing from a representative of the career services office or a local human resources coordinator. While the SAPs may be given defined goals, how they achieve them is left to their discretion.[17] Too, it may sometimes be

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[16] *Id.*

[17] *See* DEP'T OF RESIDENCE SERVS. RESIDENTIAL CMTYS., KENT ST. UNIV., RESIDENT ASSISTANT MANUAL 21–22 (2014), https://www.kent.edu/sites/default/files/ra-manual-14-15.pdf [https://perma.cc/BYF7-5YFV] [hereinafter RA MANUAL] (discussing the goal of inclusivity and offering several suggestions for how to implement that goal).

the case that SAPs are left with almost total discretion to choose their own goals, with only very broad instructions such as to make bulletin boards or put on programs that are "educational in nature."[18]

Of course, enforcing college policy and teaching students are not binary; they fall on a spectrum of SAP duties. Many duties will fall in a gray area somewhere between teaching and enforcement. One example would be an SAP tasked with responding to microaggressions.[19] If students are engaging in behavior that is unintentionally inappropriate or offensive, it is bound to cause conflict that many SAPs would be required to mediate.[20] SAPs who step in to resolve a conflict, say by sitting down with the offending student to discuss why her behavior is a problem, could be seen as enforcing college policy.[21] This is particularly the case if the SAP simply tells the student that her behavior is a problem and that it needs to stop. But the SAP could just as easily give the offending "student[] advice on how to be polite and avoid giving accidental or thoughtless offense in a diverse community"[22]—undoubtedly a teaching role, and surely more valuable to both the offending student and the college community than simply telling her that her behavior is wrong and she needs to stop.

For duties such as responding to microaggressions that fall somewhere between enforcing college policy and educating students, I believe that courts and policymakers should treat the *act* of performing the duty as enforcing college policy, but the *means* of performing the duty as teaching. To give a concrete example, I will return to the SAP who is tasked with responding to a microaggression. She does not have discretion in choosing whether to do so; in that respect, responding to microaggressions is a way of enforcing college policy. However, the means by which she chooses to respond to the microaggression should be seen as a teaching role, because there are many appropriate, constructive ways to respond to a microaggression.[23]

There is some reason to be moderately skeptical of the claim that SAPs act as educators. For one thing, the claim that SAPs play a role in

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[18] *Id.* at 22.

[19] Microaggressions, for those unfamiliar, are "brief and commonplace daily verbal, behavioral, or environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative . . . slights" against traditionally underrepresented groups. LUKIANOFF & HAIDT, *supra* note 9, at 40. Free speech advocates have criticized the concept of microaggressions because the term captures unintentional behavior that is only subjectively offensive. *Id.* at 40–41.

[20] *E.g.*, RA MANUAL, *supra* note 17, at 21.

[21] *See id.* at 20–21 (listing the duty to "interrupt harmful or exclusionary behavior in the community" as one of several ways resident advisors are expected to "honor[] human differences" within their residential communities).

[22] LUKIANOFF & HAIDT, *supra* note 9, at 43.

[23] *See id.* at 42–43 (detailing various ways of conducting sensitivity training with students).

educating students often comes from SAPs themselves.[24] However, self-interested though the claim may be in some cases, it at least manages to pass the smell test. Students spend the bulk of their time in college and university outside of the classroom.[25] Surely it is reasonable to believe that they are learning during that time, and that SAPs play a role in that learning. Accepting then, that SAPs play a role in educating students, I argue that it is critical to protect SAP speech that is directed towards educating students.

B. Why Should We Protect SAPs' Speech?

Typically, proponents of free speech on campus see SAPs themselves as threats to free expression on campus.[26] However, as I discuss below in this Section, SAP speech itself is under threat. After I discuss that threat, I argue that SAP speech that is directed toward educating students should be protected, because this will encourage people of diverse viewpoints to become SAPs. This, I argue, ensures that students receive a robust education outside of the classroom. The Section concludes with a short sub-section on special speech-related concerns for residential SAPs such as residence hall directors.

1. There Are Threats

To begin with, there are threats to SAPs' speech rights. Some of these threats have gained national attention. For instance, Nicholas and Erika Christakis served in residential life positions at Yale University until they were effectively forced out by students who were offended by an email that Erika had written.[27] The offending email was a response to a message that Yale administrators sent out to all students, advising them to avoid wearing Halloween costumes that were "culturally unaware or insensitive."[28] Erika, an expert in early childhood education, sent an email to the students under her charge acknowledging "genuine concerns about cultural and personal representation" and applauding students for taking

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[24] *See, e.g.*, RA MANUAL, *supra* note 17, at 20–21 ("One of the major roles of the RA is that of educator.").

[25] *See* LINDSEY M. BURKE ET AL., HERITAGE FOUND., ISSUE BRIEF NO. 4589, BIG DEBT, LITTLE STUDY: WHAT TAXPAYERS SHOULD KNOW ABOUT COLLEGE STUDENTS' TIME USE 1–2 (2016), http://report.heritage.org/ib4589 [https://perma.cc/7GE7-N8KD] (reporting that college students only spend an average of 1.18 hours in the classroom per day).

[26] Speech First, Inc. v. Schlissel, 939 F.3d 756, 761–63 (6th Cir. 2019); Chauvin, *supra* note 9, at 38–43.

[27] Conor Friedersdorf, *The Perils of Writing a Provocative Email at Yale*, ATLANTIC (May 26, 2016), https://www.theatlantic.com/politics/archive/2016/05/the-peril-of-writing-a-provocative-email-at-yale/484418/ [https://perma.cc/58HH-T5TC].

[28] *Id.*

efforts to avoid offending their peers.[29] However, she questioned whether students were best served by administrators asserting norms of appropriate behavior, rather than allowing students to develop them themselves.[30] Christakis questioned whether administrators had "lost faith in young people's capacity . . . to exercise self-censure, through social norming, and also in [their] capacity to ignore or reject things that trouble [them]."[31] Erika included in her email a quote from Nicholas, who advised students "if you don't like a costume someone is wearing, look away, or tell them you are offended. Talk to each other. Free speech and the ability to tolerate offense are the hallmarks of a free and open society."[32]

"Many students were outraged by the email," and they made sure the Christakises knew it.[33] They circulated a petition expressing their chagrin that they had been advised "to meet the offensive parties head on, without suggesting any modes or means" to make those confrontations productive.[34] Students did not stop with circulating the petition. Shortly after Erika sent her email, a group of protestors surrounded Nicholas as he was walking through a campus quad.[35] They demanded that he issue an apology for his wife's email, and rejected his attempts to respond to the substance of their concerns.[36] When the Christakises would not apologize for the email, students began to demand that they step down from their residential positions.[37] While many Yale faculty members signed a public letter in support of the Christakises, their residential life colleagues and school administrators made no such efforts.[38] Facing continued controversy, the Christakises decided to resign at the end of the school year.[39]

Fortunately, incidents such as those faced by the Christakises appear to be relatively rare. However, I do not believe this is an indication that SAPs' free speech rights are adequately protected. Rather, the relative lack of controversy is a result of the remarkable ideological homogeneity of the student affairs field. Samuel J. Abrams, a professor of politics at Sarah Lawrence College, noted this phenomenon in a recent essay

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29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.* A video of the confrontation between Nicholas and the protestors is available at Foundation for Individual Rights in Education, *Yale University Students Protest Halloween Costume Email (VIDEO 3)*, YOUTUBE (Nov. 6, 2015), https://www.youtube.com/watch?reload=9&v=9IEFD_JVYd0&feature=youtu.be [https://perma.cc/7WDP-8LUA].

37 Friedersdorf, *supra* note 27.

38 *Id.*

39 *Id.*

published in the *New York Times*.[40] In that essay, Abrams reported a survey he had conducted of approximately "900 'student-facing' administrators—those whose work concerns the quality and character of a student's experience on campus."[41] He found that the ratio of liberal to conservative administrators in the United States was 12:1.[42] This compares to a liberal-to-conservative ratio of 2:1 among incoming students, and of 6:1 among faculty.[43]

Based on these data, then, the relatively low instance of SAP speech being suppressed is not a function of adequate SAP speech protection, but rather a result of an SAP culture that is ideologically homogenous. In academia, "when a field lacks political diversity, researchers tend to congregate around questions and research methods that generally confirm their shared narrative, while ignoring questions and methods that don't offer much support."[44] Assuming that similar principles apply in the world of student affairs—and based on anecdotal evidence there is good reason to believe that they do[45]—the low incidence of SAP speech being suppressed is most likely a result of conservative voices being sidelined, rather than an adequate culture or practice of SAP speech protection. As I discuss in the next sub-section, this "political and ideological monoculture" among SAPs does a major disservice to students.[46]

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[40] Samuel J. Abrams, *Think Professors Are Liberal? Try School Administrators*, N.Y. TIMES (Oct. 16, 2018), https://www.nytimes.com/2018/10/16/opinion/liberal-college-administrators.html [https://perma.cc/X5P2-GAGF]. After Abrams published his essay, students at Sarah Lawrence College occupied a campus building and demanded that they (along with "three faculty members of color") be allowed to review Abrams's tenure. Colleen Flaherty, *When Students Want to Review a Tenured Professor*, INSIDE HIGHER ED (Mar. 13, 2019), https://www.insidehighered.com/news/2019/03/13/students-sarah-lawrence-want-review-tenure-conservative-professor-who-criticized [https://perma.cc/G3RA-6WAY].

[41] Abrams, *supra* note 40. Abrams's definition of a student-facing administrator roughly corresponds with my definition of an SAP.

[42] *Id.*

[43] *Id.* Others have identified a 5:1 liberal-to-conservative ratio among faculty. LUKIANOFF & HAIDT, *supra* note 9, at 110–11.

[44] LUKIANOFF & HAIDT, *supra* note 9, at 112.

[45] Abrams, for instance, was inspired to conduct his survey of student-facing administrators after he "learned that the [Sarah Lawrence College] Office of Student Affairs, which oversees a wide array of issues including student diversity and residence life, was organizing many overtly progressive events—programs with names like 'Stay Healthy, Stay Woke,' 'Microaggressions' and 'Understanding White Privilege'—without offering any programming that offered a meaningful ideological alternative." Abrams, *supra* note 40.

[46] Samuel J. Abrams, *One of the Most Liberal Groups in America*, INSIDE HIGHER ED (Nov. 8, 2018), https://www.insidehighered.com/views/2018/11/08/college-administrators-are-more-liberal-other-groups-including-faculty-members [https://perma.cc/9MY5-D4TG].

2. Most Effective Means of Teaching

I am not merely interested in protecting SAP free speech for the sake of protecting SAP free speech, though I do believe that protecting free expression is a moral good. Rather, I believe that the most compelling reason for protecting SAP speech is that SAPs play an important role in educating college students, and students learn best when they are taught by people employing a diverse array of methods and perspectives. As Erwin Chemerinsky and Howard Gillman have put it:

> [F]reedom of speech is essential to freedom of thought because a person cannot develop an independent point of view about the world unless he or she is exposed to different ideas about what is important and what beliefs are most meaningful, and is permitted to converse with others about their experiences or beliefs.[47]

There is a genuine risk that students who are exposed to only one worldview from SAPs will have an unrealistic understanding of many aspects of how to be productive members of an adult community, such as how most people resolve interpersonal conflicts outside of the relatively protective school environment.

If we return to the example from Part I.A of the residence hall director asked to respond to a microaggression, we can see this principle in action. There are multiple valid ways to respond to a student who is using microaggressions. One, described above, is to sit down with the offending student and help her to understand why her behavior—though unintentional—is hurtful to members of her community, and to discuss how she can change her behavior to be more respectful of others. On the other hand, an equally valid response would be to speak with the *offended* student, to discuss why she was hurt by the microaggression, and to help her develop strategies for responding to such microaggressions that both minimize her own hurt and spark productive dialogue with the offending student.[48] The best response of all would probably be to have these conversations with both students, either individually or together.

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[47] CHEMERINSKY & GILLMAN, *supra* note 9, at 24.

[48] Greg Lukianoff and Jonathan Haidt recommend that a student who believes that another person has used a microaggression should say the following to the offending person, "I'm guessing you didn't mean any harm when you said that, but you should know that some people might interpret that to mean . . . ." LUKIANOFF & HAIDT, *supra* note 9, at 42.

However, on a campus where the SAPs are ideologically homogenous, they are likely to coalesce around a single set of values in their teaching.[49] By no means do I mean to imply that the approach taken by liberal SAPs is necessarily wrong, or that an approach taken by conservative SAPs is necessarily right. Rather, I believe that both liberals and conservatives bring valuable perspectives that students can learn from, and that students' education will be much enriched if they can learn from both. After all, "[s]ometimes the left-leaning view turns out to be correct, sometimes it's the right-leaning view, but on average, students will get closer to the truth if they are exposed to debates among credentialed [teachers] who approach difficult problems from differing perspectives."[50] SAPs, many of whom have master's degrees in education or student affairs,[51] can certainly function in this role, provided that they have not all coalesced around a single approach to teaching students.

None of this is to say that SAPs should have carte blanche to say whatever they like in any situation. Although I believe that SAPs deserve more robust speech protections, the change I am calling for is relatively limited: SAPs should have heightened speech protections when they are teaching students, but not when they are merely enforcing campus policy. As I discuss below in Part II, SAPs can, as a matter of law and policy, be fired for what they say on the job. A residence hall director who advises underaged students on how to best sneak alcohol into the dorms should not go undisciplined in some misguided nod towards respecting the views of libertarians. However, when SAPs take on a teaching role—such as when they have to decide whether an educational program on safe sex should include a segment on the values of abstinence—their speech should be protected.

3. Special Concerns for Residential Employees

Residential SAPs, such as residence hall directors and resident assistants, are particularly vulnerable to speech restrictions on campus. When I refer to residential SAPs, I mean college employees who live where they work: they are "obligated to live in the provided apartment" in the

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[49] *Cf. id.* at 112 (discussing the tendency of researchers to unite around questions that confirm their beliefs and to ignore questions that do not confirm their beliefs when there is a lack of diversity in their field).

[50] *Id.* at 113.

[51] *See Selecting a Student Affairs Graduate Program*, ACPA, https://www.myacpa.org/selecting-student-affairs-graduate-program [https://perma.cc/5DGZ-2BZP] (last visited Feb. 1, 2020) ("If you hope to become successful in middle or upper management in student affairs, a graduate degree is necessary, as the field of student affairs continues to be specialized by people with advanced degrees.").

residence hall they are assigned to.[52] Residential SAPs are in some senses always on the clock, because they are expected to respond to crises and emergencies as they arise, no matter the hour.[53] As a result, both private and public schools have frequently expressed a willingness to punish SAPs for speech, particularly speech that is critical of the school, *even when that speech occurs outside of the scope of the SAP's official duties*.[54]

These restrictions on residential SAPs' speech are especially concerning because residential SAPs' duties include "educational initiatives."[55] Some of these duties are relatively obvious, as discussed above in Part I.A, and include tasks such as putting on educational programming and designing educational bulletin boards.[56] Other duties, such as counseling students who are having roommate challenges or responding to microaggressions are closer calls, but still qualify as teaching students under my framework because they involve (or should involve) the SAP's discretion.[57] Speech protections for residential SAPs should not be different than they are for other SAPs, and the threats to residential SAP speech are no different from the general threats to SAP speech.[58] However, given the special nature of residential SAP jobs, restrictions on their speech are likely to be more common than for other SAPs. Although all SAPs would benefit from increased speech protection on campus, the need is most urgent for residential SAPs.

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[52] *E.g.*, *Residence Life Employment Opportunities*, GENESEO, https://www.geneseo.edu/residence-life/employment-opportunities [https://perma.cc/98GP-WT5L] (last visited Feb. 1, 2020).

[53] *See id.* (explaining that the position requires each residential SAP to participate in an on-call rotation of crisis response duty).

[54] *See* Peter Bonilla, *Yes, Resident Assistants Have Free Speech Rights Too*, FIRE (Aug. 21, 2012), https://www.thefire.org/yes-resident-assistants-have-free-speech-rights-too/ [https://perma.cc/Q3GC-G9QT] (reporting Florida Gulf Cost University's policy that RAs could not speak out against the school in a public forum); Kara Burke, *Revised RA Contract Lead to Tension, Confusion Over Expected Responsibilities*, LAMRON (Sept. 13, 2018), https://www.thelamron.com/posts/2018/9/13/revised-ra-contracts-lead-to-tension-confusion-over-expected-responsibilities [https://perma.cc/XPL3-7GLD] (discussing a college's policy that resident assistants' behavior on and off campus should represent the school's ideals).

[55] *Residence Life Employment Opportunities*, *supra* note 52.

[56] *E.g.*, RA MANUAL, *supra* note 17, at 22.

[57] To this point, I would note that the Christakises, discussed above in Part I.B.1, were residential SAPs. Friedersdorf, *supra* note 27. Erica's email was a discretionary response to the message sent by the Yale administrators. *Id.*

[58] *See* Bonilla, *supra* note 54 (criticizing speech restrictions on residential SAPs' off campus speech).

II. SOURCES OF SPEECH PROTECTION ON COLLEGE CAMPUSES

SAPs currently have relatively limited speech protections on campus. This Part reviews four current sources of speech protection on campus—the First Amendment, state laws, President Trump's recent executive order regarding free speech on campus, and academic culture. For each source of speech protection, I evaluate its current state with respect to SAPs and discuss its potential to serve as a greater source of SAP speech protection in the future.

A. The First Amendment

The First Amendment provides powerful speech protections. It makes it very difficult for the government to limit the speech of its citizens.[59] However, as I discuss in this Section, governments have substantially more latitude to restrict speech when they are dealing with certain classes of their own employees. For this reason, the First Amendment does not currently provide much protection for SAPs. However, if courts were to recognize that SAPs perform teaching duties in addition to enforcing college policy, then the First Amendment could be a powerful source of speech SAP speech protection.

1. Current State

The First Amendment prohibits the government from "abridging the freedom of speech."[60] The Supreme Court incorporated the Free Speech Clause of the First Amendment against state and local governments in *Gitlow v. New York*, so state colleges and universities are bound by it.[61] Due to the state action doctrine—which says that only governments can violate the Constitution, not private individuals—private schools are not constitutionally required to protect freedom of speech.[62] Still, though, the Constitution has the potential to provide substantial protection to a great many SAPs, because it prevents public schools from infringing on free speech rights, including (sometimes) the free speech rights of their

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[59] A full account of the ways in which free speech is protected on college campuses is outside of the scope of this Article, but is available in Chauvin, *supra* note 9, at 38–49.

[60] U.S. CONST. amend. I.

[61] Gitlow v. New York, 268 U.S. 652, 666 (1925); *see also, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 823, 828–29 (1995) (applying the First Amendment's Free Speech Clause to the University of Virginia's actions).

[62] *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 645 (1943) (Murphy, J., concurring) (discussing that the right to freedom of speech is "guaranteed by the Constitution against State action").

employees.[63] (The Constitution looms particularly large when one considers that in 2017, more than 73 percent of post-secondary students in the United States attended public schools.[64])

Non-faculty employees of state schools, including SAPs, have relatively limited free speech protections at work.[65] This is because they have the same speech protections as any civil servant—which is to say almost no protections at all.[66] A government employee's speech is only protected if she speaks "as a citizen" addressing "a matter of public concern."[67] Even then, the speech is only protected if the employee shows that "[her] interest in speaking outweighs the government's interest 'as an employer, in promoting the efficiency of the public services it performs through its employees.'"[68] As the Supreme Court has made clear, even speech that addresses a matter of public concern is unprotected if it is made "pursuant to [a government employee's] official duties."[69] Courts have universally applied this restrictive public employee speech analysis to SAPs, even when SAPs have claimed that they are entitled to heightened protections by virtue of the First Amendment's safeguards for academic freedom.[70]

Faculty members at public schools, on the other hand, appear to have greater speech protections than is typical for public employees, at least when their speech is related to their research and teaching. The Supreme Court has twice considered the issue of whether faculty speech related to their research and teaching duties is protected, first in *Sweezy v. New Hampshire*,[71] decided in 1957, and then a decade later in *Keyishian v.*

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[63] Currently there is only a narrow category of free speech for school employees—faculty speech related to academic scholarship. *See* discussion *infra* notes 96–98 and accompanying text.

[64] *See* NAT'L CTR. FOR EDUC. STATISTICS, INST. OF EDUC. SCIS., DIGEST OF EDUCATION STATISTICS: 2018 tbl.105.30 (2019), https://nces.ed.gov/programs/digest/d18/tables/dt18_105.30.asp [https://perma.cc/8DGS-BZXW] (reporting that in 2017, 14,560 students attended public school out of the 19,766 students enrolled in a post-secondary institution).

[65] *See, e.g.*, Moss v. Univ. of Notre Dame Du Lac, No. 3:13 CV 1239, 2016 WL 5394493, at *5 (N.D. Ind. Sept. 27, 2016); Peebles v. Chi. State Univ., No. 15 C 2547, 2015 WL 2006434, at *2 (N.D. Ill. May 1, 2015); Savage v. Gee, 716 F. Supp. 2d 709, 716–17 (S.D. Ohio 2010), *aff'd*, 665 F.3d 732, 735 (6th Cir. 2012); Wells v. Bd. of Trs. of Cal. State Univ., No. C 05-02073 CW, 2006 WL 2583679, at *5 (N.D. Cal. Sept. 7, 2006).

[66] *See* James G. Fahey, Note, United States v. National Treasury Employees Union: *Restrictions on Free Speech of Government Employees and the Rebalancing of* Pickering, 15 ST. LOUIS U. PUB. L. REV. 555, 555–56, 556 n.11 (1996) (discussing public employees' limited free speech rights).

[67] Connick v. Myers, 461 U.S. 138, 146–47 (1983).

[68] Savage v. Gee, 665 F.3d 732, 738 (6th Cir. 2012) (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).

[69] Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

[70] *See Savage*, 716 F. Supp. 2d at 718 (holding that the speech in question was unprotected regardless of any academic exception).

[71] 354 U.S. 234 (1957).

Board of Regents.[72] Since that time, the Court has not directly taken up the issue of faculty's job-related speech rights.[73]

Sweezy involved a professor at the University of New Hampshire who was investigated by the state to determine whether he was a "subversive person" (Communist), because subversive people were prohibited by state statute from teaching at state colleges.[74] The investigation focused on several areas, including Sweezy's and his wife's connections with Communists.[75] Notably, the investigators also questioned Sweezy about an article he had co-authored decrying capitalist violence and a lecture he had delivered on the future of socialism in the United States.[76] Sweezy refused to answer certain questions from the investigators, such as "Do you believe in Communism?"[77] He told investigators that "the questions were not pertinent" to the issue of whether he was a subversive person, "and that they infringed upon an area protected under the First Amendment."[78] Ultimately, a New Hampshire Superior Court judge found Sweezy to be in contempt of court for refusing to answer the questions.[79] The New Hampshire Supreme Court upheld this finding.[80]

The United States Supreme Court reversed.[81] In his opinion announcing this decision, Chief Justice Earl Warren observed that "[t]he essentiality of freedom in the community of American universities [was] almost self-evident."[82] This was so because "[s]cholarship cannot flourish in an atmosphere of suspicion and distrust."[83] Without freedom of inquiry, new discoveries could not be made, particularly "in the social sciences, where few, if any, principles are accepted as absolutes."[84] Imposing limits on what professors were allowed to research or believe would bind them in an intellectual "strait jacket" that "would imperil the future of our Nation" by compromising the "vital role . . . that is played by those who guide and train our youth."[85] Chief Justice Warren gave clear policy reasons why professors' academic freedom had

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[72] 385 U.S. 589 (1967).

[73] In *Garcetti*, 547 U.S. at 425, the Court explicitly declined to address whether "expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by th[e] Court's customary employee-speech jurisprudence."

[74] *Sweezy*, 354 U.S. at 243–46.

[75] *Id.* at 243.

[76] *Id.* at 242–44.

[77] *Id.* at 244.

[78] *Id.*

[79] *Id.* at 244–45.

[80] *Id.* at 245 (citing Wyman v. Sweezy, 121 A.2d 783 (1957)).

[81] *Id.* at 255.

[82] *Id.* at 250.

[83] *Id.*

[84] *Id.*

[85] *Id.*

constitutional import: "Teachers . . . must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[86] Chief Justice Warren tied the necessity of free inquiry on campus to the "fundamental [First Amendment] principle of . . . political freedom of the individual."[87] To his mind, the state's investigation violated Sweezy's rights because it both interfered with Sweezy's academic freedom and violated "the premise that every citizen shall have the right to engage in political expression and association."[88]

Keyishian involved similar facts and came to a similar outcome. That case involved faculty members at the University of Buffalo, a state school.[89] They were each required to sign "a certificate that [they were] not a Communist."[90] The school declined to renew one petitioner's contract when he refused to sign the certificate; two others continued to teach after refusing to sign, but were "subject to proceedings for their dismissal" if the Court found the certification process constitutional.[91] Fortunately for the faculty members, the Court found that the process violated the First Amendment.[92] In reaching this decision, the Court emphasized that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."[93] For that reason, the Court said, "[Academic] freedom is . . . a special concern for the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[94] The certification process was unconstitutional because it threatened to make certain topics off limits to professors in the classroom.[95]

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[86] *Id.*

[87] *Id.*

[88] *Id.* Not everyone shares this view of *Sweezy*. For instance, at the *Regent Law Review* Symposium where I first presented this paper, Claire Guthrie Gastañaga argued that *Sweezy* stood for the proposition that colleges as institutions, not individual professors, are entitled to First Amendment protections. Claire Guthrie Gastañaga, Exec. Dir., Am. Civil Liberties Union of Va., Don't Censor Me: Campus Speech and Hate Speech Panel at the Regent University Law Review Symposium: Contemporary Free Speech (Oct. 12, 2019). Ms. Gastañaga's position is supported by Justice Frankfurter's *Sweezy* concurrence, in which he discussed the "four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy*, 354 U.S. at 262–63 (Frankfurter, J., concurring). However, I believe that the *Sweezy* plurality's focus on the rights of individual faculty members and the Court's subsequent decision in *Keyishian* forecloses this interpretation.

[89] Keyishian v. Bd. of Regents, 385 U.S. 589, 591–92 (1967).

[90] *Id.* at 592.

[91] *Id.*

[92] *Id.* at 604.

[93] *Id.* at 603.

[94] *Id.*

[95] *See id.* (explaining that freedom of inquiry in the university setting is necessary for maturity and greater knowledge).

The Supreme Court's public employee speech doctrine makes clear that public employees can be fired for speech related to their employment.[96] However, cases such as *Sweezy* and *Keyishian* carve out an exception to this general rule by extending First Amendment protections to college faculty's research and teaching duties.[97] Indeed, the only time the Supreme Court has applied the standard public employee speech test to college faculty has been when the faculty member's speech has occurred off campus.[98] Taken together, then, the Supreme Court's public employee First Amendment cases indicate that when a person is enforcing college policy her speech is unprotected, but when she is teaching her speech is protected.

2. Potential

As discussed in Part I.A., I believe that when an SAP is enforcing college policy, her speech should not be protected, but when she is teaching students her speech should be protected. To me, this distinction flows clearly from the Court's cases: public college employees' speech in the course of their employment is generally unprotected, unless punishing them for that speech would "cast a pall of orthodoxy over the classroom."[99] If this interpretation is correct, then the First Amendment already protects public college SAPs' speech rights when they are performing the teaching function. The challenge, then, is not to change the underlying positive law, but to ensure that policymakers, college administrators, and—most importantly—courts view SAPs as teachers, at least in part.

For the reasons that I discussed above in Part I.A, I believe that this is the natural conclusion when one examines an SAP's duties. SAPs frequently must use their discretion when working with students on how to be better members of their community, often choosing between competing, equally valid conceptions of what makes a person a good

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[96] *See supra* notes 65–70 and accompanying text.

[97] *See supra* notes 71–95 and accompanying text.

[98] *See* Perry v. Sindermann, 408 U.S. 593, 598 (1972) (applying the public employee speech analysis in a case involving a professor who alleged that he was disciplined "based on his testimony before legislative committees and his other public statements critical of the [Board of] Regents' policies"); *see also* Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 566, 574–75 (1968) (using the standard public employee analysis in a case involving a public school teacher who was disciplined for writing a letter critical of the school district). Some lower courts, unfortunately, have not followed this distinction. *See, e.g.*, Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 674–75, 678 (6th Cir. 2001); Urofsky v. Gilmore, 216 F.3d 401, 406–07 (4th Cir. 2000). Those courts have greatly confused the doctrine regarding professor speech—and, I argue, greatly erred—by applying the standard public employee speech test to things that college faculty say in the classroom. *See Hardy*, 260 F.3d at 678 (using the public employee speech analysis for speech that took place within the classroom).

[99] *Keyishian*, 385 U.S. at 603.

citizen. In exercising that discretion, they play the "vital role" of "guid[ing] and train[ing] our youth" that the *Sweezy* plurality said justified heightened speech protections for college professors.[100] As I described in Part I.B, there is a substantial risk that without speech protections, a "pall of orthodoxy" will fall over SAP teaching.[101] Without speech protections for SAPs, the ideological homogeneity of the SAP profession will allow liberal SAPs to silence conservative voices among their own ranks. This is precisely the harm that the Court recognized and sought to avoid in *Sweezy* and *Keyishian*.[102]

In contrast, when public school SAPs are enforcing college policy, they are no different than ordinary civil servants, and they should not be entitled to the heightened First Amendment protections enjoyed by college faculty. Unfortunately, courts have thus far failed to recognize the distinction between SAPs' teaching and enforcement duties. For instance, in *Savage v. Gee*, the head librarian at Ohio State University's campus in Mansfield, Ohio recommended to the faculty-staff Executive Committee that incoming students be required to read one of several conservative-themed books.[103] One of the books the librarian, Scott Savage, recommended included "a chapter discussing homosexuality as aberrant human behavior that has gained general acceptance under the guise of political correctness."[104] In an increasingly combative series of emails, faculty members accused Savage of being a homophobe for suggesting the book, and Savage defended his choice.[105] Eventually, the school "filed a charge of discrimination/harassment" against Savage for "harassment based on sexual orientation."[106] Savage ultimately resigned from his job and filed lawsuits against several school officials, claiming among other things that they had violated his First Amendment rights.[107] In dismissing those claims, the court in *Savage* applied the standard public employee First Amendment analysis.[108]

One can certainly condemn Savage's choice of book and his conduct leading up to the harassment charge. The suggestion that homosexuality is aberrant is—to me—both offensive and wrong. That said, Savage's book suggestion should have been protected under the First Amendment. By suggesting the book, Savage was not acting as an ordinary civil servant merely enforcing college policy. Rather, he was contributing to Ohio

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[100] Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

[101] *Keyishian*, 385 U.S. at 603.

[102] *Sweezy*, 354 U.S. at 250; *Keyishian*, 385 U.S. at 603.

[103] Savage v. Gee, 716 F. Supp. 2d 709, 710–11 (S.D. Ohio 2010), *aff'd*, 665 F.3d 732 (6th Cir. 2012).

[104] *Id.* at 711.

[105] *Id.* at 711–12.

[106] *Id.* at 713.

[107] *Id.* at 714–15.

[108] *Id.* at 716–18.

State's mission of educating its students. Many professors disagreed with Savage's book suggestion, and they were well within their rights to do so. But that does not change the fact that had a *professor* suggested the Committee choose a book that "confront[ed] the accepted wisdom of Ohio State University," that it would have been a protected pedagogical choice.[109]

Surely a book choice designed to make students reevaluate whether the accepted wisdom of their school was correct falls squarely within *Keyishian*'s special First Amendment protections for college educators, which are designed to avoid "cast[ing] a pall of orthodoxy over the classroom."[110] Therefore, while the line of cases treating SAPs performing teaching duties as ordinary civil servants needs to be overturned, advocates bringing these cases need not seek to get rid of the courts' campus First Amendment jurisprudence altogether. Instead, they should work to ensure that courts understand that SAPs can play important teaching roles on campus. When SAPs do things that would be protected under the First Amendment if they were professors, they are entitled to that same First Amendment protections that professors receive.

B. State Law

Many states have statutes on the books that purport to protect free speech on campus, to at least the same extent as the federal Constitution does. One state even goes so far as to mandate speech protections on private college and university campuses. However, I ultimately conclude that state laws are a poor source of speech protection for SAPs, because they typically go no further than the First Amendment does to protect speech, and to the extent that they do, they may themselves be unconstitutional.

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[109] *Id.* at 711.

[110] Keyishian v. Bd. of Regents, 385 U.S. 589, 603. It seems to me that this would have been particularly true in 2006, the time at which the events in *Savage* took place. *Savage*, 716 F. Supp. 2d at 710–14. Then, the view that homosexuality was aberrant was mainstream—forty percent of American adults believed that gay or lesbian relations between consenting adults should be illegal. *Gay and Lesbian Rights*, GALLUP, https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx [https://perma.cc/8ZWF-4RZF] (last visited Jan. 24, 2020).

1. Current State

The states have their own powers to protect free speech. While states cannot provide *less* protection than is guaranteed by the First Amendment, they can choose to provide *more*.[111] However, while sixteen states have passed laws specifically protecting free speech rights on campus,[112] those laws do not appear to provide any greater protection than the First Amendment does. Most of the state statutes protecting free speech on campus make explicit that the purpose of the statute is to protect speech to the same extent as the First Amendment, and virtually all of them incorporate the time, place, and manner test that is a hallmark of First Amendment jurisprudence.[113] Moreover, these statutes focus primarily on the speech rights of students, not of staff members such as SAPs.[114] In short, although they are able to do so, most states do not provide greater speech protections on college campuses than are available under the federal Constitution. One state, however, has bucked the trend.

That state is California. It has a statute that requires private colleges and universities to abide by First Amendment principles.[115] This statute, the so-called "Leonard Law," is named for state Senator Bill Leonard, who first proposed it in 1992.[116] The law prohibits private colleges and universities from "subjecting a student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in [off campus]" would be protected by either the California or federal Constitution.[117] The law allows students whose speech is threatened to seek injunctive and declaratory relief, and makes them eligible for attorney's fees if they sue successfully.[118] The law specifically carves out an exception for religious institutions, which may restrict speech that is inconsistent with the school's "religious tenets."[119] The

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[111] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495–97 (1977).

[112] McIntosh, *supra* note 10; *see* Jeremy Bauer-Wolf, *Free Speech Laws Mushroom in Wake of Campus Protests*, INSIDE HIGHER ED (Sept. 16, 2019), https://www.insidehighered.com/news/2019/09/16/states-passing-laws-protect-college-students-free-speech (discussing several state legislative proposals aimed at protecting students' free speech rights on college campuses); *see also* Appendix, *infra*.

[113] *See* Appendix, *infra*. The time, place, and manner test is straightforward. Under the test, the government "may only regulate the time, place, and manner of . . . speech on campus, and may not regulate content." Chauvin, *supra* note 9, at 38.

[114] McIntosh, *supra* note 10.

[115] CAL. EDUC. CODE § 94367 (West, Westlaw through Ch. 870, 2019 Reg. Sess.); Steven P. Aggergaard, *The Question of Speech on Private Campuses and the Answer Nobody Wants to Hear*, 44 MITCHELL HAMLINE L. REV. 629, 669 (2018).

[116] Aggergaard, *supra* note 115, at 657–58.

[117] EDUC. § 94367(a) (Westlaw).

[118] *Id.* § 94367(b) (Westlaw).

[119] *Id.* § 94367(c) (Westlaw).

California Court of Appeal has clarified that the Leonard Law "creates *statutory* free speech rights for students of private postsecondary educational institutions," and that it does not "create or expand *constitutional* rights."[120] That is, the Law creates a statutory right of free speech on private campuses, the limits of which are coterminous with the constitutional right of free speech on public campuses.

There has only been one serious challenge to the Leonard Law. In that case, *Corry v. Leland Stanford Junior University*, the plaintiff sued Stanford University alleging that its speech code violated the Leonard Law. [121] Stanford raised four constitutional arguments as to why it should not be bound by the Law: it compelled Stanford to provide access to speech it disagreed with, it was a content-based speech rule, it interfered with Stanford's freedom of expression, and it interfered with Stanford's freedom of association, all, Stanford said, in violation of the First Amendment.[122] The trial court judge rejected all of Stanford University's constitutional objections to the Law.[123] Stanford elected not to appeal the court's decision,[124] and since that time the Leonard Law has stood largely unchallenged.[125]

2. Potential

In its current form, state law has limited potential as a source of speech protection for SAPs. This is the case for three reasons. First, state laws dealing with speech on campus generally protect only student speech, not the speech of educators or other campus professionals.[126] Second, in forty-nine states and the District of Columbia, state law speech protections go no further than the rights guaranteed by the federal Constitution.[127] Finally, we should be deeply suspicious of statutes such as California's Leonard Law which purport to limit the ability of private institutions to define the rules by which they govern their members. The

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[120] Yu v. Univ. of La Verne, 126 Cal. Rptr. 3d 763, 772 (Cal. Ct. App. 2011).

[121] No. 740309, at 1 (Cal. Super. Ct. Feb. 27, 1995). The decision in *Corry* is unreported but is available in full at https://web.archive.org/web/20050419211842http://www.ithaca.edu/faculty/cduncan/265/corryvstanford.htm [https://perma.cc/58J3-X734] (last visited Mar. 10, 2020).

[122] *Id.* at 25, 27, 32, 34, 36–37.

[123] *Id.* at 39–40.

[124] Press Release, Stanford University News Service, Statement on Corry vs. Stanford University President Gerhard Casper, Stanford University Faculty Senate (Mar. 9, 1995) (on file with Stanford University News Service).

[125] *See, e.g.*, *Yu*, 126 Cal. Rptr. 3d at 772 (rejecting the University's argument that § 94367 should be interpreted to "exclude speech directed at a school official regarding a school-related issue").

[126] *See* Appendix, *infra.*

[127] *Id.*; McIntosh, *supra* note 10.

first two points are self-explanatory, but this last one merits further discussion.

The Leonard Law does something truly remarkable. It forces private institutions to abide by constitutional values, even though the Constitution only applies to the Government. True, the California Court of Appeals has clarified that the Leonard Law only creates a statutory right, not a constitutional one.[128] However, since the statute prevents colleges from restricting speech that, if engaged in off campus, would be "protected from governmental restriction by the First Amendment to the United States Constitution," this is a distinction without a difference.[129] The fact is that California has found a way to force private schools to comply with the Constitution.

This is deeply concerning because the First Amendment, in addition to protecting free speech, also protects the freedom of association.[130] This has been the case since at least 1958, when a unanimous Supreme Court wrote that freedom of association was an "indispensable libert[y]," on par with freedom of speech and freedom of the press.[131] Private colleges and universities have their own associational rights.[132] Surely one of these rights must be the freedom to decide with whom they will associate, and on what grounds they will choose to maintain or end that association.[133] This view comports with Justice Frankfurter's concurring opinion in *Sweezy*, in which he identified "'the four essential freedoms' of a university" as the freedom "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may

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[128] *Yu*, 126 Cal. Rptr. 3d at 772.

[129] CAL. EDUC. CODE § 94367(a) (West, Westlaw through Ch. 870, 2019 Reg. Sess.). The Leonard Law also protects speech that would be covered by "Section 2 of Article I of the California Constitution." *Id.* This is concerning because "the California liberty of speech clause is broader and more protective than the free speech clause of the First Amendment." San Leandro Teachers Ass'n. v. Governing Bd. of San Leandro Unified Sch. Dist., 209 P.3d 73, 87 (2009). Therefore, it may be that the Leonard Law imposes even further on private colleges and universities than it first appears to. However, that is an issue that is outside of the scope of this Article.

[130] U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble . . . .").

[131] NAACP v. Alabama, 357 U.S. 449, 461 (1958).

[132] *See* Press Release, *supra* note 124 (explaining that universities should have the right to determine what should be taught and "who may be admitted to study" at their institutions); *see also* Kelly Sarabyn, *Free Speech at Private Universities*, 39 J.L. & EDUC. 145, 153–55 (2010) (describing that private universities have specific freedom of association rights).

[133] *Cf. NAACP*, 357 U.S. at 461–63 (emphasizing the importance of the "relationship between freedom to associate and privacy in one's associations"); *see* Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1599 (1998) (discussing Stanford University's challenge to the Leonard Law on First Amendment associational rights principles).

be admitted to study."[134] I believe that the Leonard Law is unconstitutional because it forces private colleges to act as if they are bound by the First Amendment's Free Speech Clause, to the detriment of their own First Amendment freedom of association.[135] For this reason, state statutes such as the Leonard Law should not be used to extend speech protections for SAPs.[136] Although it is tempting to force private colleges and universities to protect the free speech rights of their employees, governments should not violate one group's fundamental rights in order to expand the rights of other groups.

C. President Trump's Executive Order

President Trump recently issued an Executive Order apparently designed to safeguard free speech on campus. The Order does not appear to dramatically change federal law or policy regarding free speech on campus, though the changes it does make are concerning, because they, like the Leonard Law, appear to authorize federal government agencies to interfere with private colleges' freedom of association. Ultimately, I believe that the Order is a poor source of speech protection for SAPs.

1. Current State

In March of 2019, President Trump issued Executive Order Number 13,864, which the stated purpose of "Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities."[137] The Order does a number of things, such as requiring the Department of Education to report program-level graduate outcomes data like earnings, debt, and loan repayment rate.[138] Most germane to this Article, the Order requires agencies that issue research grants to colleges and universities—"the Departments of Defense, the Interior, Agriculture, Commerce, Labor, Health and Human Services, Transportation, Energy, and Education; the Environmental Protection Agency; the National Science Foundation; and the National Aeronautics and Space

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[134] Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

[135] *See id*. at 262 (emphasizing the need for the "exclusion of governmental intervention in the intellectual life of a university").

[136] There is the additional hurdle that the Leonard Law only protects the free speech rights of students. *See* CAL EDUC. CODE § 94367(a) (West, Westlaw through Ch. 870, 2019 Reg. Sess.) (prohibiting private colleges from disciplining students for off-campus speech).

[137] Exec. Order No. 13,864, 84 Fed. Reg. 11,401 (Mar. 26, 2019).

[138] *Id.* § 4(a)(ii).

Administration"—"to ensure institutions that receive Federal research or education grants promote free inquiry."[139]

Under the Order, "[i]t is the policy of the Federal Government to . . . encourage institutions [of higher education] to foster environments that promote open, intellectually engaging, and diverse debate."[140] In order to effect this policy, the Order directs grant-issuing agencies to ensure that colleges and universities which receive funding "compl[y] with all applicable Federal laws, regulations, and policies," including the First Amendment.[141] The Order also purports to apply to private colleges and universities, which are not bound by the First Amendment.[142] Specifically, it states that it is the policy of the federal government to "encourage" private institutions to "compl[y] with [their own] stated institutional policies regarding freedom of speech."[143]

In remarks delivered as he was signing the Order, President Trump predicted that it would bring a swift end to "speech codes, and safe spaces, and trigger warnings" because "billions and billions and billions of dollars" worth of funding was on the line.[144] Some conservative activists applauded the order, with one describing it as "historic."[145] Reactions from others, however, were more muted. As many commentators noted in the days after the President issued the Order, its provisions are fairly uncontroversial, because they do nothing to change existing federal law.[146] These predictions appear to be correct; at time of publication, more than a year after the order was signed, the Department of Education is the only federal agency to have proposed or enacted any regulations related to the free speech portion of the Order.[147] The proposed regulations make clear

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[139] *Id.* § 3(a)–(b). The Order makes clear that it does not apply to "funding associated with Federal student aid programs that cover tuition, fees, or stipends." *Id.* § 3(c).

[140] *Id.* § 2(a).

[141] *Id.* § 3(a).

[142] *Id.* § 2(a).

[143] *Id.*

[144] Brett Samuels, *Trump Signs Executive Order on Campus Free Speech*, HILL (Mar. 21, 2019, 4:16 PM), https://thehill.com/homenews/administration/435183-trump-signs-executive-order-aimed-at-protecting-free-speech-on [https://perma.cc/VW76TTKP].

[145] Andrew Kreighbaum, *Trump Signs Broad Executive Order*, INSIDE HIGHER ED (Mar. 22, 2019), https://www.insidehighered.com/news/2019/03/22/white-house-executive-order-prods-colleges-free-speech-program-level-data-and-risk [https://perma.cc/8C5Q2K9K].

[146] *See, e.g.*, *id.* (noting that the Order "essentially directs federal agencies to ensure college campuses are following requirements already in place").

[147] *See* Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program, 85 Fed. Reg. 3190, 3210 (Jan. 17, 2020) (to be codified at 34 C.F.R. pt. 609). The Department of Education has also indicated that it intends to revise some of its regulations to comply with the outcomes data portion of the Order. Program Integrity: Gainful Employment, 84 Fed. Reg. 31,392, 31,394 (July 1, 2019) (to be codified at 34 C.F.R. pts. 600, 668).

that the Department will not find a public institution to have violated the First Amendment or a private institution to have violated its own free speech policies unless a state or federal court has entered a final judgment to that effect.

However, some people saw the Order as potentially dangerous. For instance, Senator Lamar Alexander, Chairman of the Senate Education Committee, agreed with President Trump that "colleges should punish hecklers who veto free speech, and stop coddling students to protect them from disagreeable points of view."[148] Nonetheless, Senator Alexander felt strongly that the elected branches of government should not be in the business of "creating speech codes to define what you can say on campus" because "legislators and agencies [should not] try to rewrite the Constitution."[149]

2. Potential

For my part, I echo the concerns of Senator Alexander and others who are concerned about the federal government conditioning funding to colleges and universities on whether the schools are protecting speech in a manner the then in-office administration approves of. To my mind, the Order's encouragement to grant-issuing departments and agencies to evaluate whether private schools are following the school's own free expression policies suffers from many of the same defects as the Leonard Law.[150] The government should not be in the business of deciding the terms by which a private organization chooses to associate. When the government does so it violates the organization's First Amendment freedom of association.[151] The Department of Education's proposed rule mitigates these concerns somewhat by making clear that the Department will find that a private university is acting in violation of its own speech policies only if a court rules accordingly.[152] It is still concerning, however, that the Order seemingly gives the Department and other federal departments and agencies the authority to make these determinations of their own accord. Our First Amendment freedoms should not be based on a government agency's choice to exercise less than its full authority. Our freedom would be far safer if the agency never had the authority in the first place.

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148 Press Release, Lamar Alexander, Chairman of the Senate Education Committee, Alexander Statement on President Trump's Higher Education Executive Order (Mar. 21, 2019) (available at https://www.help.senate.gov/chair/newsroom/press/alexander-statement-on-president-trumps-higher-education-executive-order [https://perma.cc/6A6ZFRYN]).

149 *Id.*

150 *See supra* notes 128–136 and accompanying text.

151 NAACP v. Alabama, 357 U.S. 449, 461–62 (1958).

152 85 Fed. Reg. at 3210.

Private colleges and universities that violate the freedom of expression commit a moral wrong.[153] As I discuss below in Part II.C.2., they certainly violate academic culture. But they do not violate the law. If private colleges are acting lawfully, they should be the ones to define the terms by which they choose to associate, even if they blatantly violate their own free expression policies. Those polices are their own, to interpret or disregard as they wish. Grant-issuing agencies can and should consider whether colleges will be able to put their grants to good use, and the climate of free expression on a college campus can impact that analysis. However, it is inappropriate and unlawful for the government to interfere with a private university's internal policies when those policies are merely distasteful, and not illegal.[154] Moreover, even if you are comfortable with President Trump's administration making these kinds of decisions, ask yourself: would you be as comfortable with President Elizabeth Warren's administration exercising the same powers?

Therefore, I do not think that President Trump's free speech Order is a good source of speech protection for SAPs. The portions of the Order directed at public colleges and universities do not meaningfully alter already-existing federal law protecting free speech on campus.[155] The Order could drastically increase speech protections for SAPs at private colleges if the grant-issuing agencies were to determine that the colleges were violating SAPs' rights under the schools' free expression policies. However, this would be inappropriate and illegal.[156] As I said above when discussing the Leonard Law, governments should not violate one group's rights in order to protect another's.

D. Academic Culture

American colleges and universities have a robust tradition of protecting academic freedom.[157] Post-secondary schools in the United States universally recognize that they are best able to produce and disseminate knowledge when they protect professors' rights to free expression, even when some people find what a professor says deeply

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[153] *See* JOHN STUART MILL, ON LIBERTY 23–24 (1859), https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/mill/liberty.pdf [https://perma.cc/H6FNJ4VR] (describing the "mischief of denying a hearing to opinions" because society "in [its] own judgment, ha[s] condemned them").

[154] Benjamin Wermund, *Trump's Free Speech Order Leaves Some Big Questions*, POLITICO (Mar. 22, 2019, 10:00 AM), https://www.politico.com/newsletters/morning-education/2019/03/22/trumps-free-speech-order-leaves-some-big-questions-414244.

[155] Kreighbaum, *supra* note 145.

[156] *See supra* notes 135–136 and accompanying text.

[157] *See* CHEMERINSKY & GILLMAN, *supra* note 9, at 74–77 (tracing the history of the Free Speech Movement, which began at the University of California, Berkley in the 1960s).

offensive.[158] As I explain in this Section, this academic culture of protecting freedom of expression is deeply engrained at both public schools (which are legally obligated to protect free speech) and private schools (which are not). For this reason, I argue that academic culture is the best source of speech protection for SAPs.

1. Current State

American colleges and universities have a robust culture of protecting academic freedom.[159] This culture began to develop in the late nineteenth century, and became widespread by the mid-twentieth century.[160] Today, "universities . . . advertise themselves as committed to the pursuit of truth rather than to the recitation of dogma."[161] This commitment is so strong that it includes protection for many kinds of speech, including speech that reflects poorly on the school. These protections often go far beyond those afforded by the First Amendment, which allows schools to punish faculty for speech that is unrelated to their teaching.[162] While Universities could in theory punish faculty for speech—particularly so-called "extramural speech" that occurs outside of the strict scope of their academic duties—both public and private universities have long refused to punish faculty for the things they say, even when faculty speech causes widespread (and justified) outrage.[163]

This is because colleges have come to recognize that "[i]t is for the individual members of the University community [to] . . . openly and

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[158] WHITTINGTON, *supra* note 9, at 162.

[159] *See* CHEMERINSKY & GILLMAN, *supra* note 9, at 74–76 (noting the Free Speech Movement's insistence that public and private campuses "protect the freedom of the members of the academic community to use campus grounds for the broad expression of ideas, even if those ideas are expressed in ways that run contrary to the norms of professional conduct").

[160] *See id.* at 53–62 (tracing the development of academic freedom on American college campuses).

[161] WHITTINGTON, *supra* note 9, at 162.

[162] *See* Perry v. Sindermann, 408 U.S. 593, 598 (1972) (holding that a teacher's testimony before legislative committees may be a constitutionally protected, impermissible basis for terminating his employment).

[163] *See, e.g.*, Hank Reichman, *Amy Wax, Academic Freedom, "Official" Positions, and the "Fitness" Standard*, ACADEME BLOG (July 29, 2019), https://academeblog.org/2019/07/29/amy-wax-academic-freedom-official-positions-and-the-fitness-standard [https://perma.cc/C9X284CH] (detailing the reaction by the University of Pennsylvania administration to controversial speech by one of its own faculty members); Keith E. Whittington, *Academic Freedom, Even for Amy Wax*, ACADEME BLOG (July 28, 2019), https://academeblog.org/2019/07/28/academic-freedom-even-for-amy-wax [https://perma.cc/A925GBAF] (describing academic freedom which should be afforded all university faculty, even those that are controversial). Of course, universities can—and do—exercise their own speech rights when they disagree with something that a professor has said. *See* Reichman, *supra*.

vigorously contest[] the ideas that they oppose."[164] Many colleges enact their commitment to this ideal by issuing academic freedom statements or policies.[165] These statements show that the school "values free expression" and "hold . . . institution[s] accountable for protecting the free expression rights of faculty and students."[166] Over the last five years, more than fifty-five colleges and universities, including Princeton University, Georgetown University, and the University of North Carolina at Chapel Hill, have adopted the "Chicago Statement," a free speech policy statement written by the Committee on Freedom of Expression at the University of Chicago in 2015 and specifically designed for the modern era.[167]

Unfortunately, the same academic culture of robust speech protection for virtually all forms of speech on campus does not extend to SAPs. One need look no further than the controversies surrounding the Christakises at Yale or Scott Savage at Ohio State to see that this is the case. The Christakises merely suggested that students, not administrators, should take primary responsibility for creating a campus culture of respect.[168] Savage's case is more extreme, but taking him at his word, his goal was simply to get students to question the status quo.[169] Both acts fall squarely within the ambit of the "pursuit of truth" that is supposed to be protected by academic culture.[170] Yet the intense controversy caused by the email and the book suggestion ultimately led to the Christakises and Savage resigning from their posts.[171] If universities are to fully perform their "noble and important mission" of pursuing the truth,[172] they must change their culture to protect SAP speech directed towards teaching students.

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[164] UNIVERSITY OF CHICAGO COMMITTEE ON FREEDOM OF EXPRESSION, REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION, U. CHI., (Jan. 2015), https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf [https://perma.cc/96AFGYGV].

[165] *See* LUKIANOFF & HAIDT, *supra* note 9, at 255–56 (recommending that colleges renew their commitment to free speech by adopting academic freedom statements similar to that affirmed by the University of Chicago).

[166] *Adopting the Chicago Statement*, FIRE, https://www.thefire.org/get-involved/student-network/take-action/adopting-the-chicago-statement [https://perma.cc/R77UEYE6] (last visited Feb. 16, 2020).

[167] *Id*.

[168] Friedersdorf, *supra* note 27.

[169] Savage v. Gee, 716 F. Supp. 2d 709, 711 (S.D. Ohio 2010), *aff'd*, 665 F.3d 732 (6th Cir. 2012) ("[I]f we are decided that we want to engage our students in the kind of exchange of ideas on which the 'secular' university of [sic] founded, then let's choose something that confronts the accepted wisdom of Ohio State University!").

[170] WHITTINGTON, *supra* note 9, at 162.

[171] Friedersdorf, *supra* note 27; *Savage*, 716 F. Supp. 2d. at 714.

[172] WHITTINGTON, *supra* note 9, at 179.

2. Potential

As with the First Amendment, I believe that SAPs performing a teaching role should be entitled to the campus culture of academic freedom that benefits faculty members performing a teaching role. I do not wish to belabor the point of why I think this is a good idea, so instead I will turn to how to make it happen. The good news is—and this is one of the primary advantages of using a shift in academic culture as a means of expanding SAP speech protection—it should be relatively simple to do. This is because SAPs already "have deep influence over campus politics" and "call the shots outside the classroom."[173] Too, at least some college faculty already recognize that SAP speech should be protected when SAPs are teaching students. Remember that during the Halloween email controversy at Yale, it was a group of professors who declared themselves "deeply troubled that th[e Christakises'] modest attempt to ask people to consider the issue of self-monitoring vs. bureaucratic supervision ha[d] been misinterpreted, and in some cases recklessly distorted, as support for racist speech; and hence as justification for demanding the resignation of our colleagues from their posts at [the school]."[174] Moreover, SAPs already do many of the same things that faculty members do to improve their teaching, such as holding conferences on best practices and new developments in their field.[175]

The challenge, then, is not to radically alter the culture of academic freedom that pervades college campuses. It is simply to ensure that all the relevant stakeholders recognize that SAPs perform teaching duties, and that when they do, they too are entitled to academic freedom. Colleges and universities could easily do this by amending their academic freedom policies to include instances in which SAPs perform a teaching role. These changes would be a powerful speech protection for SAPs, because they would apply at public and private schools with equal force. When made at public schools, they would help ensure that the schools themselves are able to establish their own norms, rather than having rules forced on them by outside groups such as courts or legislatures.[176] At both public and private schools, such changes would be simple to make and would

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[173] Abrams, *supra* note 46.

[174] Friedersdorf, *supra* note 27.

[175] *E.g.*, *College Inclusion Summit*, NASPA, https://www.naspa.org/events/college-inclusion-summit [https://perma.cc/RPL3FX8K] (last accessed Apr. 30, 2020).

[176] There is great benefit to allowing communities to establish their own norms. *See* Noah C. Chauvin, *Unifying Establishment Clause Purpose, Standing, and Standards*, 50 U. MEM. L. REV. (forthcoming 2020), http://ssrn.com/abstract=3385189 (outlining a proposed new standard for courts to apply when deciding Establishment Clause cases which would consider whether the plaintiff's establishment caused divisiveness in the community).

enshrine a campus culture that protects the speech of all those who teach college and university students.

CONCLUSION

SAPs do important work on college and university campuses. They welcome students to campus; ensure that students have safe, quiet, and comfortable residences in which to live and study; support students who are struggling; and punish students who violate campus rules.[177] They help to guarantee a campus environment in which all students can live, learn, and grow. In order to achieve this mission, they undertake duties that fall into two broad categories: enforcing college policy and teaching students. However, SAP speech related to teaching students is severely under-protected. The federal Constitution, state laws, President Trump's recent executive order, and norms of academic freedom all can be used to protect SAPs' free speech rights, though only the Constitution and academic culture should be. The most important of these protections is the culture of academic freedom because it applies to both public and private schools and provides more robust protections than positive law does.

[177] *See supra* Part I.A.

APPENDIX

In total, sixteen states have enacted laws specifically protecting freedom of expression on the campuses of public colleges and universities. Those laws are reflected in the chart below. For the sake of brevity, the laws are not reproduced in their entirety. Rather, I have tried to quote language that conveys the spirit of what the laws seek to accomplish. To that end, most of the quotes come from the "purpose" sections of the various statutes.

Jurisdiction[178]	**Campus Free Speech Law**[179]
Alabama*	2019 Ala. Acts 396 *Freedom of expression is critically important during the education experience of students, and each public institution of higher education should ensure free, robust, and uninhibited debate and deliberation by students.*
Arizona	ARIZ. REV. STAT. ANN. § 15-1864 (2019) *A university or community college shall not restrict a student's right to speak, including verbal speech, holding a sign or distributing fliers or other materials, in a public forum, but may impose reasonable time, place and manner restrictions*

[178] Jurisdictions with an asterisk added a campus free speech law in 2019.
[179] To dispense with formatting concerns, all quoted language is in italics.

Jurisdiction	**Campus Free Speech Law**
Arkansas*	ARK. CODE ANN. § 6-60-1002(7) (2019) *State-supported institutions of higher education should strive to ensure the fullest degree of intellectual and academic freedom and free expression, and it is not the proper role of state-supported institutions of higher education to shield individuals from speech that is protected by the First Amendment to the United States Constitution, including without limitation ideas and opinions the individuals may find unwelcome, uncollegial, disagreeable, or even deeply offensive.*
Colorado	COLO. REV. STAT. § 23-5-144 (2019) *[I]t is a matter of statewide interest to protect the rights of students to exercise their freedom of speech on the campuses of public institutions of higher education, while recognizing the right of those institutions of higher education to enact reasonable time, place, and manner restrictions that preserve their ability to fulfill their educational missions.*
Florida	FLA. STAT. § 1004.097 (2019) *A public institution of higher education may not designate any area of campus as a free-speech zone or otherwise create policies restricting expressive activities to a particular outdoor area of campus, except [in very limited circumstances].*

Jurisdiction	Campus Free Speech Law
Georgia	GA. CODE ANN. § 20-3-48(a)(1)–(2) (2019) *The board of regents shall adopt regulations and policies relevant to free speech and expression on the campuses of state institutions of higher education that . . . assure that freedom of speech or of the press is protected for all persons [and] foster the discovery, improvement, transmission, and dissemination of knowledge by means of research, teaching, discussion, and debate of different ideological positions*
Iowa*	IOWA CODE § 261H.2(1) (2019) *[T]he primary function of an institution of higher education is the discovery, improvement, transmission, and dissemination of knowledge by means of research, teaching, discussion, and debate. . . . [T]o fulfill this function, the institution must strive to ensure the fullest degree of intellectual freedom and free expression allowed under the first amendment to the Constitution of the United States.*
Kentucky*	KY. REV. STAT. ANN. §164.348(2)(a) (West 2019) *Consistent with its obligations to respect the rights secured by the Constitutions of the United States and the Commonwealth of Kentucky, a governing board of a public postsecondary education institution shall adopt policies to ensure that [t]he institution protects the fundamental and constitutional right of all students and faculty to freedom of expression.*

Jurisdiction	Campus Free Speech Law
Louisiana	LA. STAT. ANN. § 17:3399.32(A) (2019) *Expressive activities at public postsecondary education institutions by students, administrators, faculty members, staff members, and invited guests are protected.*
Missouri	MO. REV. STAT. § 173.1550(3) (2019) *Any person who wishes to engage in noncommercial expressive activity on campus shall be permitted to do so freely, as long as the person's conduct is not unlawful and does not materially and substantially disrupt the functioning of the institution subject to [limited time, place, and manner restrictions].*
North Carolina	N.C. GEN. STAT. § 116-300(1) (2019) *The primary function of each [state university] is the discovery, improvement, transmission, and dissemination of knowledge by means of research, teaching, discussion, and debate. To fulfill this function, the [university] must strive to ensure the fullest degree of intellectual freedom and free expression.*

Jurisdiction	**Campus Free Speech Law**
Oklahoma*	OKLA. STAT. tit. 70, § 2120(D)(1) (2019) *Any person who wishes to engage in noncommercial expressive activity on campus shall be permitted to do so freely, as long as the person's conduct is not unlawful and does not materially and substantially disrupt the functioning of the public institutions of higher education, subject only to [limited time, place, and manner restrictions].*
South Dakota*	S.D. CODIFIED LAWS § 13-53-52 (2019) *A public institution of higher education, its faculty, administrators, and other employees, may not discriminate against any student or student organization based on the content or viewpoint of their expressive activity.*
Tennessee	TENN. CODE ANN. § 49-7-2405(a)(1)–(2) (2019) *Students have a fundamental constitutional right to free speech; [state] institution[s] shall be committed to giving students the broadest possible latitude to speak, write, listen, challenge, learn, and discuss any issue, subject to [limited time, place, and manner restrictions].*

Jurisdiction	**Campus Free Speech Law**
Utah	UTAH CODE ANN. § 53B-27-203(3)(a)–(b) (2019) *Subject to [limited time, place, and manner restrictions], an institution may not prohibit a member of the institution's community or the public from spontaneously and contemporaneously assembling in an outdoor area of the institution's campus; or a person from freely engaging in noncommercial expressive activity in an outdoor area of the institution's campus if the person's conduct is lawful.*
Virginia	VA. CODE ANN. § 23.1-401 (2016) *No public institution of higher education shall impose restrictions on the time, place, and manner of student speech that . . . occurs in the outdoor areas of the institution's campus and . . . is protected by the First Amendment to the United States Constitution unless the restrictions . . . are reasonable [time, place, and manner restrictions].*

DEFENSE AGAINST THE DARK ARTS: JUSTICE JACKSON, JUSTICE KENNEDY AND THE NO-COMPELLED-SPEECH DOCTRINE

Richard F. Duncan[*]

"The one thing that doesn't abide by majority rule is a person's conscience." -Atticus Finch[1]

"Your statute cannot condemn me to death for such silence, for neither your statute nor any laws in the world punish people except for words or deeds, surely not for keeping silence." -Sir Thomas More[2]

"The possibility of enforcing not only complete obedience to the will of the State, but complete uniformity of opinion on all subjects, now existed for the first time." -George Orwell[3]

INTRODUCTION

According to Justice Anthony M. Kennedy, "The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."[4] If this is so, and I believe it is, then the greatest threat to freedom, the darkest of the dark arts of government, occurs when the law compels persons to speak and thus commandeers their intellectual autonomy.[5] Only a vibrant First Amendment is an adequate defense against this darkest of the dark arts.[6]

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[1] HARPER LEE, TO KILL A MOCKINGBIRD 120 (HarperCollins, 1st Perennial Classics ed. 2002) (1960).

[2] CHRISTOPHER HOLLIS, ST. THOMAS MORE 228 (Burns & Oates, rev. ed. 1961) (1934).

[3] GEORGE ORWELL, 1984 206 (Penguin Group 1977) (1949). "Nothing was your own except the few cubic centimeters inside your skull." *Id*. at 27.

[4] Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002).

[5] As expressed by Justice Kennedy, "governments are most dangerous when they try to tell people what to think." HELEN J. KNOWLES, THE TIE GOES TO FREEDOM 87 (updated ed. 2019).

[6] In the magical world of Harry Potter, "Defense Against the Dark Arts" is the class taught at Hogwarts to teach students how to defend themselves against the dark forces. J.K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE 66–67 (First Am. ed., Arthur A. Levine Books 1998) (1997). Harry's first Defense Against the Dark Arts teacher was Professor Quirrell and his first Dark Arts textbook was *Dark Forces: A Guide to Self-Protection* by Quentin Trimble. *Id.* at 67, 70.

This Article traces the Supreme Court's First Amendment jurisprudence protecting speaker autonomy and the "right not to speak" from its origins in the flag salute cases to the present. In particular, I focus on two magnificent judicial opinions defending this fundamental free speech right, the majority opinion of Justice Jackson in *West Virginia State Board of Education v. Barnette*[7] and the concurring opinion of Justice Kennedy in *National Institute of Family & Life Advocates v. Becerra (NIFLA)*.[8] These two eloquent and powerful opinions are true landmarks of liberty and strong shields against an authoritarian government's tyrannical attempts to coerce ideological orthodoxy by compelling individuals to say things they wish not to say. In Justice Kennedy's case, his concurring opinion in *NIFLA* was issued near the end of his final term on the Supreme Court, and thus it represents an exclamation point on his wonderful legacy of protecting freedom of thought and freedom of speech.[9] Although these opinions are separated by seventy-five years, they share a common understanding of the importance of the First Amendment for the protection of intellectual autonomy from authoritarian officials and compelled ideological conformity.

I. THE FLAG SALUTE CASES: JUSTICE JACKSON'S ELOQUENT RESPONSE TO JUSTICE FRANKFURTER

A. Justice Frankfurter and the First Flag Salute Case

In 1898, New York became the first state to enact a mandatory flag salute law.[10] However, the flag salute movement soon took off like a rocket's red glare, led by a diverse assortment of groups, including the Daughters of the American Revolution, the Ku Klux Klan, and the

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7 319 U.S. 624 (1943).

8 138 S. Ct. 2361, 2378 (2018) (Kennedy, J., concurring).

9 David French, *In Defense of Free Speech, Justice Thomas Wielded the Scalpel, but Justice Kennedy Brought the Hammer*, NAT'L REV. (June 26, 2018), https://www.nationalreview.com/corner/in-defense-of-free-speech-justice-thomas-wielded-the-scalpel-but-justice-kennedy-brought-the-hammer/ ("Justice Kennedy's concurrence . . . was a short but astonishing opinion, one that—along with his opinion in *Masterpiece Cakeshop*—suggests that his judicial legacy will now include two of the more powerful court statements for people of faith in recent Supreme Court jurisprudence.").

10 Winston Bowman, *The Flag Salute Cases*, 2017 FED. JUD. CTR. 2.

American Legion.[11] By 1943, when *Barnette* was decided, all forty-eight states had adopted some version of compulsory flag salute.[12]

Onto this field strode the Jehovah's Witnesses, a religious denomination that took very seriously the Biblical command in Exodus 20:3–5 about not bowing down before any "graven image."[13] Indeed, as Winston Bowman noted, in Nazi Germany "Jehovah's Witnesses had refused to engage in the Nazi salute on the grounds that it reflected a form of worship for a secular power."[14] As a result, "they suffered atrocious persecution" under the Nazi regime and thousands died in concentration camps for the crime of following their religious consciences.[15]

In America, although Jehovah's Witnesses were not executed or placed in concentration camps, they did experience a level of persecution when they enrolled their children in public schools.[16] The two landmark Supreme Court cases, *Minersville School District v. Gobitis*[17] and *Barnette,*[18] each involved schoolchildren[19]—William and Lillian Gobitas in

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[11] *Id.* The Daughters of the American Revolution and the Ku Klux Klan supported the movement in order to "encourage patriotism as a bulwark against communism." *Id.* The American Legion, on the other hand, made mandatory flag salutes its "signal issue," all in the cause of advancing its goal of "one hundred percent Americanism." *Id.*

[12] Bowman, *supra* note 10, at 2. Even in jurisdictions without a flag salute law, many "schools and teachers often required students to participate in such a ritual as a matter of course." *Id.*

[13] *Id.* at 4. See *Exodus* 20:3–5 (King James Version), for a provision of the full text of the pertinent Biblical command:

> Thou shalt have no other gods before me. Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth. Thou shalt not bow down thyself to them, nor serve them: for I the Lord thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me . . . .

[14] Bowman, *supra* note 10, at 2–3.

[15] *Id.* at 3.

[16] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 630 (1943) ("Children of this faith have been expelled from school and are threatened with exclusion for no other cause. Officials threaten to send them to reformatories maintained for criminally inclined juveniles."). In fact, "[a]ttempts have been made in many states to repress or regulate [Jehovah's Witnesses] by legislation," but Jehovah's Witnesses have "uniformly resisted" such oppression. Edward F. Waite, *The Debt of Constitutional Law to Jehovah's Witnesses*, 28 MINN. L. REV. 209, 223 (1944). Robert Ferguson marked this resistance when he observed that, in the period between 1938 and 1944 alone, Jehovah's Witnesses were parties in thirty-one cases. Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L., & HUMAN. 201, 203 (1990). Those cases resulted in "sixteen civil liberties opinions from the Supreme Court." *Id.*

[17] 310 U.S. 586 (1940).

[18] 319 U.S. at 624.

[19] In both *Gobitis* and *Barnette*, the case captions misspelled the family names of the parties. Bowman, *supra* note 10, at 19. In the former, the family name is Gobitas with an "a" not an "i," and in the latter, it is Barnett without an "e" at the end. *Id.*

Gobitis, and Gathie and Marie Barnett in *Barnette*—who were Jehovah's Witnesses disciplined for refusing to salute the flag.[20]

In *Gobitis*, the children "were expelled from the public schools of Minersville, Pennsylvania, for refusing to salute the national flag as part of a daily school exercise."[21] As a result of their expulsion, the Gobitas children were deprived of a free public education and their parents were required to bear the financial burden of paying for a private school education.[22] Because the Gobitas family believed, in accordance with their Jehovah's Witness faith, that they were forbidden by Biblical commands from bowing down before graven images, such as the flag,[23] the family "sought to enjoin the authorities from continuing to exact participation in the flag-salute ceremony as a condition of . . . attendance at the Minersville school."[24] Since *Gobitis* was decided in the early days of incorporation of the Bill of Rights through the Due Process Clause of the Fourteenth Amendment, the Court described their claim as asking it to determine whether their free exercise of religion was protected in this case by "the Fourteenth [Amendment] through its absorption of the First."[25] Thus, the question presented in *Gobitis* was not whether a compelled affirmation of belief violated the Free Speech Clause and the rights of all dissenters to refuse to participate, but rather whether the Gobitas children were entitled to a religious liberty exemption from the pledge requirement under the Free Exercise Clause (as "absorbed" by the Fourteenth Amendment).[26]

Justice Frankfurter, writing for the majority in an eight to one decision, viewed the case as one in which a person's "religious duty [comes] into conflict with the secular interests of his fellow-men."[27] Thus, the issue before the Court was this: "When does the constitutional guarantee compel exemption from doing what society thinks necessary for the promotion of some great common end, or from a penalty for conduct which appears dangerous to the general good?"[28]

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[20] *See id.* at 4–5, 19 (discussing the Gobitas and Barnett children's punishment—expulsion and daily suspension, respectively—for refusing to salute the flag).

[21] 310 U.S. at 591. The flag salute ceremony required the placing of the right hand on the breast and reciting the pledge in unison: "I pledge allegiance to my flag, and to the Republic for which it stands; one nation indivisible, with liberty and justice for all." *Id.* Finally, "[w]hile the words are spoken, teachers and pupils extend their right hands in salute to the flag." *Id.*

[22] *Id.* at 592.

[23] *Id.*; *see also id.* at 592 n.1 (explaining that Jehovah Witnesses rely on Exodus 20:3–5 to explain why they refuse to salute the flag).

[24] *Id.* at 592.

[25] *Id.* at 593.

[26] *Id.*

[27] *Id.*

[28] *Id.*

Because the case before the *Gobitis* Court involved the curriculum of a public school, the power of the government to "train[] children in patriotic impulses by these compulsions" was at its zenith.[29] As Justice Frankfurter put it so clearly, "the courtroom is not the arena for debating issues of educational policy," the Supreme Court is not "the school board for the country" and, as such, "[t]hat authority has not been given to this Court, nor should we assume it."[30]

The Court held that the mandatory pledge requirement did not violate the free exercise rights of religious dissenters.[31] Although the "[g]overnment may not interfere with organized or individual expression of belief or disbelief," the Constitution does not "compel exemption from doing what society thinks necessary for the promotion of some great common end."[32] In other words, although the right to *believe* that bowing down before graven images violates the commands of God is protected by the Constitution, the right to act upon that belief is not protected from "a general law not aimed at the promotion or restriction of religious beliefs."[33] Therefore, it was perfectly constitutional for the school authorities to expel children who refused to salute the flag based upon their sincerely held religious beliefs.[34] Their remedy was not constitutional protection in the courts, but rather the political right to seek changes in the law "before legislative assemblies."[35]

Perhaps what is most remarkable about the *Gobitis* decision is how the Court seemed to believe the case was easy to decide. In the eyes of Justice Frankfurter and the majority, requiring schoolchildren to recite the Pledge was a matter of national unity and national cohesion, and "[n]ational unity is the basis of national security."[36] Indeed, echoing President Lincoln, the Court said the case created an existential dilemma

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[29] *Id.* at 598.

[30] *Id.* For a recent analysis of freedom of expression in public schools, see generally JUSTIN DRIVER, THE SCHOOLHOUSE GATE 72–140 (2018). Although students have a constitutional right to freedom of expression on public school campuses, school authorities have substantial power to govern student speech "that is lewd, school-sponsored, or pro-drug." *Id.* at 125; *see also* Richard W. Garnett, *Can There Really Be "Free Speech" In Public Schools?*, 12 LEWIS & CLARK L. REV. 45, 47–48, 55 (2008) (discussing the power of public schools "to regulate speech in the service of their educational mission"). A school requirement regarding the recital of the Pledge of Allegiance is, of course, a school-sponsored activity designed to teach students the meaning of the flag. *See* Mark Strasser, *Establishing the Pledge: On Coercion, Endorsement, and the Marsh Wild Card*, 40 IND. L. REV. 529, 533 (2007) ("Rather than support religion, the salute and pledge 'are directed to a justifiable end in the conduct of education in the public schools.'" (quoting Nicholls v. Lynn, 7 N.E.2d 577, 580 (Mass. 1937)).

[31] *Gobitis*, 310 U.S. at 599–600.

[32] *Id.* at 593.

[33] *Id.*

[34] *Id.* at 599.

[35] *Id.* at 600.

[36] *Id.* at 595.

for our Nation—"Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence."[37] Justice Frankfurter essentially concluded that with the survival of the Republic at stake, the problems of a few schoolchildren who were Jehovah's Witnesses "don't amount to a hill of beans in this crazy world."[38]

Justice Stone issued a powerful dissenting opinion in *Gobitis*, one based upon the constitutional primacy "of freedom of the human mind and spirit."[39] As he put it so eloquently, "The very essence of . . . liberty" protected by the Constitution "is the freedom of the individual from compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion."[40] Therefore, these constitutional guaranties, "withhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions, whatever may be the legislative view of the desirability of such compulsion."[41] The state must resort to "other ways to teach loyalty and patriotism" and the importance of the flag as a source of national unity.[42] Moreover, in contrast to the majority's extreme deference to state legislatures and local school boards, Justice Stone emphasized "the importance of a searching judicial inquiry" rather than surrendering "the constitutional protection of the liberty of small minorities to the popular will."[43] Although Stone stood alone against Frankfurter's majority of eight, his powerful and persuasive dissent was soon to be vindicated.

Gobitis was decided on June 3, 1940,[44] at a time when "French and British troops were desperately being evacuated from Dunkirk."[45] Indeed, *Gobitis* was decided at a time when Hitler's "German forces were occupying Norway and Denmark, and were about to invade the Low Countries and France."[46] The reaction to the decision by toxically "patriotic" Americans was shameful. Jehovah's Witnesses were attacked,

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[37] *Id.* at 596 (quoting President Lincoln).

[38] *Id.* at 599–600; CASABLANCA (Warner Bros. Pictures Inc. 1942). To explain why the war effort is more important than personal preferences, Humphrey Bogart's character, Rick Blaine, said: "Ilsa, I'm no good at being noble, but it doesn't take much to see that the problems of three little people don't amount to a hill of beans in this crazy world. Someday you'll understand that." CASABLANCA (Warner Bros. Pictures Inc. 1942).

[39] 310 U.S. at 604 (Stone, J., dissenting).

[40] *Id.*

[41] *Id.*

[42] *Id.* at 603–04.

[43] *Id.* at 606.

[44] *Id.* at 586.

[45] Vincent Blasi & Seana V. Shiffrin, *The Story of* West Virginia State Board of Education v. Barnette*: The Pledge of Allegiance and the Freedom of Thought*, *in* FIRST AMENDMENT STORIES 99, 109 (Richard W. Garnett & Andrew Koppelman eds., 2012).

[46] WILLIAM M. WIECEK, 12 THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953, at 221 (Stanley N. Katz, ed. 2006). This led some courthouse jokers to refer to Justice Frankfurter's majority opinion in *Gobitis* as "Felix's Fall-of-France opinion." *Id.* at 222.

their property was vandalized, and some were even "tarred and feathered."[47] Shamefully, "in August 1940, Albert Walkenhorst was lured from his home in Norfolk, Nebraska, by a group of vigilantes posing as fellow Witnesses and castrated."[48]

B. Justice Jackson and the Second Flag Salute Case

Less than three years after *Gobitis* poisoned the First Amendment, it was explicitly overruled by *Barnette*.[49] "*Barnette*," says Professor (now Judge) Jay Bybee, "was an antidote, the '*anti-Gobitis*'—what *Brown v. Board of Education* was to *Plessy*, or the Fourteenth Amendment was to *Dred Scott*."[50] *Barnette's* overruling of *Gobitis* is also remarkable because of its "daring switch of rationale" and the eloquent yet vague prose of Justice Jackson in his landmark majority opinion.[51] Indeed, as Vincent Blasi and Seana Shiffrin observe, "Seldom has a case outcome seemed so obviously correct as that in *Barnette* and yet so difficult to justify."[52] *Barnette* is certainly canonical, a towering landmark of First Amendment jurisprudence.[53]

A great deal had happened in the short time between *Gobitis* and *Barnette*. The United States had entered the war against Japan and Nazi Germany.[54] Two members of the *Gobitis* Court, Chief Justice Hughes and Justice McReynolds, had retired, and two new Roosevelt nominees, Justice Jackson and Justice Rutledge, had been confirmed.[55] Remarkably, "three members of the *Gobitis* majority, Justices Black, Douglas, and Murphy," publicly announced that they "had changed their minds about

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[47] Blasi & Shiffrin, *supra* note 45, at 109–10.

[48] *Id.* at 110.

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

[50] Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 TUL. L. REV. 251, 254 (2000).

> Seldom in its history has a constitutional controversy generated such antipathy within the Court, such widespread civic violence directly attributable to a judicial decision, such anticipatory public recanting by individual justices, such a daring switch of rationale, [and] such memorable and pointed prose in a majority opinion . . . .

Blasi & Shiffrin, *supra* note 45, at 99–100.

[51] Blasi & Shiffrin, *supra* note 45, at 99–100.

[52] *Id.* at 100.

[53] *See* Paul Horwitz, *A Close Reading of* Barnette*, In Honor of Vincent Blasi*, 13 FIU L. REV. 689, 694–95 (2019) ("*Barnette* is one of the key opinions in the canon of First Amendment Law. . . . Between them, the four opinions in *Barnette* read like a syllabus of the major issues in First Amendment Law between 1943 and 2018.").

[54] Blasi & Shiffrin, *supra* note 45, at 112.

[55] *Id.* at 112–13.

the constitutional questions presented by compulsory flag ceremonies in public schools."[56]

Shortly after the Court's decision in *Gobitis*, the West Virginia legislature amended its laws to require all schools to teach history and civics in a manner designed to foster "the ideals, principles and spirit of Americanism."[57] In order to carry out the purpose of this law, the West Virginia Board of Education adopted a resolution on January 9, 1942, requiring all teachers and pupils to salute the flag.[58] The Board also decreed that refusal to salute the flag shall "be regarded as an act of insubordination, and shall be dealt with accordingly."[59] The penalty for refusing to salute the flag was expulsion from school, which carried with it the risk of truancy and criminal sanctions for both the "delinquent" child and his parents.[60]

In *Barnette*, after children from three Jehovah's Witness' families were expelled for refusing to salute the flag, attorneys for the Barnetts and other families brought a class action in federal court seeking to enjoin enforcement of the flag salute policy.[61] After the plaintiffs prevailed before a three-judge panel in the district court, the state appealed directly to the United States Supreme Court.[62] Justice Jackson, writing for a 6-3 majority, affirmed the district court's injunction against enforcement of the flag salute law and explicitly overruled *Gobitis*.[63] Justice Jackson's opinion in the case is iconic and still reverberates in the jurisprudence of the First Amendment. Indeed, in the words of Professor Paul Horwitz, Jackson's opinion in *Barnette* "is great because it is rich, fascinating, eloquent, sweeping, and powerful."[64]

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[56] *Id.* at 113; Jones v. Opelika, 316 U.S. 584, 623–24 (1942) (Black, Douglas, and Murphy, JJ., dissenting) ("Since we joined in the opinion in the *Gobitis* case, we think this is an appropriate occasion to state that we now believe that it also was wrongly decided.").

[57] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 625 (1943).

[58] *Id.* at 626.

[59] *Id.*

[60] *Id.* at 629. If convicted, the parents were "subject to [a] fine not exceeding $50 and jail term not exceeding thirty days." *Id.* Children who were expelled for refusing to salute the flag were also subject to being sent "to reformatories maintained for criminally inclined juveniles." *Id.* at 630.

[61] *Id.* at 629; Blasi & Shiffrin, *supra* note 45, at 113. In order to avoid prosecution for truancy, Gathie and Marie Barnett, the daughters of the lead plaintiff in *Barnette*, would "travel to school each morning" only to be "sent home for refusing to salute the flag." Bowman, *supra* note 10, at 19.

[62] Barnette v. W. Va. State Bd. of Educ., 47 F. Supp. 251, 255 (S.D. W. Va. 1942) (granting Barnett's injunction against the school board); *Barnette*, 319 U.S. at 630 (reviewing the state Board of Education's direct appeal of the lower district court's decision).

[63] *Barnette*, 319 U.S. at 642.

[64] Horwitz, *supra* note 53, at 695. Horwitz goes on to say that the opinion "is not great because [its] passages are clear or clearly right, but because they *feel* clearly right." *Id.* at 696.

Although the *Barnette* majority explicitly overruled *Gobitis*, Justice Jackson made clear that the decision was not based upon religious liberty,[65] but rather upon "intellectual individualism"[66] and the free speech right of the individual to resist "[c]ompulsory unification of opinion."[67] For the first time, the Supreme Court recognized that freedom of speech protects both the right to speak and the right to refrain from speaking: "To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."[68]

The Court's move from religious freedom to free speech was very significant because rather than focus on whether a few religious dissenters were entitled to a free exercise exemption from the flag salute requirement, the issue before the Court became whether the states even have "power . . . to impose the flag salute discipline upon school children in general."[69] If the state lacked power to compel the flag salute, the requirement would be categorically unconstitutional without any balancing or weighing of competing interests. Remarkably, "[t]his re-conception of the central constitutional issues at stake came largely at the Court's own initiative," because the briefs in support of the children and their families "had focused almost exclusively on freedom of religion."[70]

Justice Jackson framed the question presented in the case brilliantly so as to imply a clear answer to the issue: "The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. We examine rather than assume existence of this power . . . ."[71] Rather than viewing the case as posing an existential threat to the survival of the Republic, as Justice Frankfurter maintained in *Gobitis*,[72] Justice Jackson observed "that the strength of government to maintain itself" was not threatened by a First Amendment protecting a "handful of children" from being expelled for refusing to

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[65] *Barnette*, 319 U.S. at 634 ("Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held."); *see also id.* at 635 (noting that *Gobitis* "only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule").

[66] *Id.* at 641–42.

[67] *Id.* at 641.

[68] *Id.* at 634.

[69] *Id.* at 635.

[70] Blasi & Shiffrin, *supra* note 45, at 115.

[71] *Barnette*, 319 U.S. at 635–36.

[72] *See supra* notes 36–38 and accompanying text.

participate in the flag salute.[73] Indeed, ordered liberty under a Bill of Rights "tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support."[74]

Thus, the issue for Justice Jackson and the majority was not a choice between weak and strong government, but rather between "individual freedom of mind" and a government-mandated "uniformity for which history indicates a disappointing and disastrous end."[75] Indeed, the Court acknowledged explicitly that an important purpose of freedom of speech under the First Amendment is to nip authoritarian government in the bud by denying tyrants—including "village tyrants"[76]—the power to "coerce uniformity of sentiment" by compelling flag salutes or other affirmations of belief.[77] Responding to "the very heart of the *Gobitis* opinion" and its recognition of the grave importance of national unity,[78] Jackson composed an eloquent indictment of authoritarian government that still stirs the souls of lovers of liberty today:

> As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.[79]

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[73] *Barnette*, 319 U.S. at 636.

[74] *Id.*

[75] *Id.* at 637.

[76] *Id.* at 638; *see also id.* at 641 ("We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent."). No such tyrant "who acts under the color of law is beyond reach of the Constitution." *Id.* at 638.

[77] *Id.* at 640.

[78] *Id.* Justice Jackson affirmed the importance of national unity but observed that the problem with a mandatory flag salute policy "is whether under our Constitution compulsion as here employed is a permissible means for its achievement." *Id.*

[79] *Id.* at 641.

To illustrate how authoritarian government compels speech from its citizens, Justice Jackson specifically listed three historical examples of such tyranny: first, he noted the persecution of early Christians for refusing "to participate in ceremonies before the statue of the emperor;"[80] second, he recounted "[t]he story of William Tell's sentence to shoot an apple off his son's head for refusal to salute a bailiff's hat;"[81] and finally, he spoke of William Penn and the Quakers who "suffered punishment rather than uncover their heads in deference to any civil authority."[82] Even a symbol as widely revered as our Nation's flag can mean different things to different people.[83] Thus, for the government to compel schoolchildren to salute the flag is tyrannical and even worse than compelled silence because it invades the private space of one's mind and beliefs.[84] As Professor Robert George said: "Ordinary authoritarians are content to forbid people from saying things they know or believe to be true. Totalitarians insist on forcing people to say things they know or believe to be untrue."[85]

And protection against these tyrannical features of authoritarianism and totalitarianism—the constitutional shelter for those who seek to dissent from government-imposed flag salutes and affirmations of belief—was created by Justice Jackson's immortal "fixed star" passage in *Barnette*:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.
>
> We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit

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80 *Id.* at 633 n.13.

81 *Id.*

82 *Id.*

83 *Id.* at 632–33 ("A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn."). For example, in July of 2019, Nike cancelled the release of a sneaker featuring a Betsy Ross 13-star flag design after Colin Kaepernick, a former NFL quarterback and political activist, "privately criticized the design to Nike." Tiffany Hsu et al., *Nike Drops 'Betsy Ross Flag' Sneaker After Kaepernick Criticizes It*, N.Y. TIMES (July 2, 2019), https://www.nytimes.com/2019/07/02/business/betsy-ross-shoe-kaepernick-nike.html?searchResultPosition=1.

84 *Barnette*, 319 U.S. at 633–34 ("It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.").

85 Robert P. George (@RobertPGeorge), FACEBOOK (Aug. 2, 2017), https://www.facebook.com/RobertPGeorge/posts/10155417655377906.

> which it is the purpose of the First Amendment to our Constitution to reserve from all official control.[86]

Government-compelled affirmations of belief and speech must be nipped in the bud lest they lead to ever more authoritarian or totalitarian inquisitions.[87] As Justice Jackson put it, "the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings."[88] Thus, in *Barnette* the Free Speech Clause became a strong defense for individual liberty against the dark arts of totalitarian and authoritarian laws compelling speech.[89]

Justice Black and Justice Douglas, who were part of the *Gobitis* majority upholding the Minersville flag salute policy,[90] wrote a brief but important concurring opinion to explain the "reasons for [their] change of view."[91] "Love of country," they declared, "must spring from willing hearts and free minds" and a law that compels affirmations of belief "when enforced against conscientious objectors . . . is a handy implement for disguised religious persecution."[92] Although the *Barnette* Court's holding protects a general right under the Free Speech Clause to speaker autonomy, the concurrence demonstrates how free speech for everyone necessarily entails freedom for each one.[93] The Free Speech Clause protects secular conscientious objectors and religious conscientious objectors; it protects one component of religious liberty by protecting free speech for all.[94]

Justice Frankfurter issued a dissent which has been described as a "combined jeremiad and lamentation from a constitutional prophet wounded by the jurisprudential heresies of his colleagues on the bench."[95]

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[86] 319 U.S. at 642.

[87] *See* Richard Primus, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L.J. 423, 437–39 (1996) (discussing how the *Barnette* decision was largely influenced by anti-Nazism and anti-Sovietism movements).

[88] *Barnette*, 319 U.S. at 641.

[89] *Id.* at 641–42.

[90] *See supra* note 56 and accompanying text.

[91] *Barnette*, 319 U.S. at 643 (Black & Douglas, JJ., concurring).

[92] *Id.* at 644.

[93] *Compare id.* at 642 (majority opinion) (explaining how the First Amendment is designed to prevent the government from invading "the sphere of intellect and spirit"), *with id.* at 643–44 (Black & Douglas, JJ., concurring) ("These laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men.").

[94] *Id.* at 634–35, 638–39 (majority opinion) ("While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual."); *id.* at 644 (Black and Douglas, JJ., concurring) (describing how the enforcement of a ceremony against conscientious objectors "is a handy implement for disguised religious persecution" and "is inconsistent with our Constitution's plan and purpose").

[95] Blasi & Shiffrin, *supra* note 45, at 119.

Another way of understanding the duel between Justice Frankfurter and Justice Jackson is to view it as a collision between excessive judicial restraint and well-focused judicial engagement. Justice Frankfurter asserted that the "only and very narrow function" of judicial review under the First Amendment is "to determine whether within the broad grant of authority vested in legislatures they have exercised a judgment for which reasonable justification can be offered."[96] Protection of free speech is not a question of constitutional law for the courts to protect, but one of politics to be decided by "the ballot" and "the processes of democratic government."[97] For Justice Jackson, however, courts must engage and protect explicit constitutional liberties: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[98] Liberties explicitly protected by the Constitution, such as "free speech" and "freedom of worship," are "fundamental rights [that] may not be submitted to a vote" and that "depend on the outcome of no elections."[99] Justice Jackson's landmark opinion in *Barnette* has aged well and survived the test of time and history.

C. Barnette's *Doctrine: No Compelled Expression of Beliefs, Creeds, or Statements of Values*

Although some commentators believe that the doctrine of *Barnette* is "surprisingly difficult to defend" because some of its lyrical language "threatens to be overbroad,"[100] the essential doctrine of the opinion is reasonably clear and has been liquidated and settled by subsequent Supreme Court decisions.[101] "Although it was once possible to read *Barnette* as only prohibiting government from compelling affirmations of belief, such as the Pledge of Allegiance, it soon became clear that the compelled speech doctrine also forbids government from compelling the

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[96] *Barnette*, 319 U.S. at 649 (Frankfurter, J., dissenting).

[97] *Id.* at 647; *see also id.* at 667 ("And even though legislation relates to civil liberties, our duty of deference to those who have the responsibility for making the laws is no less relevant or less exacting. . . . To strike down a law like this is to deny a power to all government.").

[98] *Id.* at 638 (majority opinion).

[99] *Id.*

[100] Blasi & Shiffrin, *supra* note 45, at 121.

[101] *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 7 (2019) (citing *NLRB v. Canning*, 134 S. Ct. 2550, 2560 (2014)) (addressing the Supreme Court's acceptance of James Madison's view that the Constitution's meaning would likely need to be liquidated and settled over time).

dissemination of unwanted expression."[102] Thus, under the Free Speech Clause, government may not compel a person to express or disseminate any belief, creed, or statement of values, whether it is the government's own message or the message of a third-party.[103] Clearly, the government has power to express its own opinions, or to endorse the opinions of a third party, however, it may not compel a person to become an echo chamber for such opinions.[104] Although the competing sides of various issues may use the political process to seek legislation adopting their opinions into law, "*Barnette* suggests one limit: one cannot insist that the victory of one side, of one creed or value, be memorialized by compelling the defeated side to literally give voice to its submission."[105]

Moreover, the right to resist compelled expression does not require any conscientious objection to the compelled dogma. One cannot be compelled to express any idea, even one he or she might agree with.[106] Nor is it necessary to demonstrate that one's objection is based upon fear of being publicly associated with a creed against one's will.[107] None of these things matter. The purpose of the *Barnette* doctrine is to nip authoritarian and totalitarian government in the bud by protecting freedom of the mind, those "few cubic centimeters inside your skull,"[108] from being controlled by laws or government policies compelling expression. Justice Jackson's opinion in *Barnette* is revered because it speaks to the hearts of those who love liberty. It deserves all of the honor that has been showered upon it.

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[102] Richard F. Duncan, *A Piece of Cake or Religious Expression:* Masterpiece Cakeshop *and the First Amendment*, NEB. L. REV. 6 (Jan. 7, 2019), https://lawreview.unl.edu/piece-cake-or-religious-expression-masterpiece-cakeshop-and-first-amendment.

[103] *Id.* at 6–8; *see also* Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 368–70 (2018) (discussing how the government may not compel people to say things they wish not to say).

[104] Horwitz, *supra* note 53, at 724 ("[G]overnment is free . . . to offer various pronouncements that constitute an orthodoxy or 'officially preferred "right position."' What it *cannot* do is 'compel citizens to affirm such opinions.'").

[105] *Id.* at 723.

[106] *Id.* at 724.

[107] Justice Frankfurter's dissent asserts that nothing in the compelled flag salute policy restricted the right of dissenting schoolchildren and their parents from publicly disavowing their support for any objectionable meaning contained in the flag salute. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 664 (1943) (Frankfurter, J., dissenting) ("All channels of affirmative free expression are open to both children and parents."). But, of course, that would effectively compel them to express both the ideas contained in the flag salute and their opposition to those ideas. It would compound the compelled speech burden and the violation of the sanctity of control over one's mind, one's thoughts, and one's beliefs by requiring multiple statements of belief and disbelief.

[108] ORWELL, *supra* note 3, at 27. Or, to revisit Justice Jackson's words, the First Amendment protects "the sphere of intellect and spirit" from being invaded by governmental authorities. *Barnette*, 319 U.S. at 642.

D. Some of Barnette's *Progeny: Herein of Creeds on License Plates and Compelled Expression in Parades*

In 1977, the Supreme Court decided *Wooley v. Maynard* to strike down a law that demonstrates that even states that proclaim their love of liberty can become authoritarian about their libertarianism.[109] Although the "fighting faiths" of an era do not always age well,[110] in their time they seem to be irrefutable and therefore universal. Such was the case in New Hampshire with its fighting truth, "Live Free or Die."[111]

The State of New Hampshire was so sure about the universal truth of its state motto that it required this homage to freedom to be embossed on all noncommercial license plates and, under another law, made it a misdemeanor to knowingly obscure "the figures or letters on any number plate."[112] George Maynard and his wife Maxine, the appellees in the case, were Jehovah's Witnesses who considered the motto "repugnant to their moral, religious, and political beliefs."[113] In order to avoid displaying this ideological message on their license plates, Mr. and Mrs. Maynard covered the motto with tape and soon found themselves in conflict with the law.[114] Ironically, despite its motto to "Live Free or Die," New Hampshire repeatedly prosecuted Mr. Maynard for obscuring the motto on his license plate.[115] He actually served a brief sentence in jail for acting upon, rather than displaying, the "Live Free or Die" creed.[116]

The Supreme Court of the United States, in a majority opinion written by Chief Justice Burger, held that New Hampshire had violated the First Amendment by compelling "an individual to participate in the dissemination of an ideological message by displaying it on his private property."[117] It did not matter that Maynard was not required to actually speak any words, affirm any beliefs, or create or compose any expressive message. It was enough that the state had required him to act as a "mobile billboard for the state's ideological motto . . . [a]s a condition to driving an automobile—a virtual necessity for most Americans."[118] Moreover, the Court focused on an often-missed First Amendment problem in compelled speech cases—almost inevitably, these cases involve the state compelling

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[109] 430 U.S. 705, 716–17 (1977).

[110] As Justice Holmes once observed, "time has upset many fighting faiths." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[111] *Wooley*, 430 U.S. at 706–07.

[112] *Id.* at 707.

[113] *Id.*

[114] *Id.* at 707–08.

[115] Duncan, *supra* note 102, at 6–7 (discussing how Maynard was prosecuted for covering up New Hampshire's libertarian credo).

[116] *Wooley*, 430 U.S. at 707–08.

[117] *Id.* at 713.

[118] *Id.* at 715.

not just speech, but a particular viewpoint, a free speech violation at the core of the First Amendment.[119] As the Court explained: "The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable."[120]

Focusing on the First Amendment's protection of "individual freedom of [the] mind,"[121] the Court stated the "no compelled speech" rule in clear and unqualified language:

> We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.[122]

The significance of *Wooley* is that it makes clear that the landmark doctrine of *Barnette* protects an individual's intellectual autonomy not merely from compelled affirmations of belief, but also from attempts by the state to compel an individual to speak or even to help disseminate any religious, political, or ideological creed.

The Supreme Court has also made clear that the First Amendment protects one private individual from being compelled by law to express, convey, or help disseminate the political, ideological, or social ideas of another private individual. Moreover, this doctrine applies even if the compelled third-party expression arises in the context of a public accommodations law that treats private expression as a public accommodation.[123] In *Hurley*, the Court was tasked with deciding the reach of the no-compelled-speech doctrine in a case involving a sexual orientation discrimination complaint against the organizers of the Boston St. Patrick's Day parade.[124]

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[119] *Id.* (discussing how *Barnette* dealt with a state measure that forced an individual to adopt a certain viewpoint).

[120] *Id*. Although a content-based restriction of speech is a grievous First Amendment problem, viewpoint-based discrimination by government is a "more blatant" and "egregious form of content discrimination." Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995). Thus, when the government compels a private individual to express a particular ideological message or creed, as in *Barnette* and *Wooley*, it is an egregious viewpoint-based wrong under the First Amendment.

[121] *Wooley*, 430 U.S. at 714 (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

[122] *Id.* (citations omitted).

[123] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573–74 (1995). *See* Duncan, *supra* note 102, at 7–8.

[124] *Hurley*, 515 U.S. at 559.

The case arose when GLIB, a group "of gay, lesbian, and bisexual descendants of the Irish immigrants," wished to march in the Boston St. Patrick's Day Parade in order "to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals."[125] When the private sponsors of the parade, John J. "Wacko" Hurley and the South Boston Allied War Veterans Council, refused to allow GLIB to march as a group in the parade, GLIB sued to enforce the Massachusetts Public Accommodation law, which prohibits discrimination on the basis of sexual orientation "in any place of public accommodation, resort or amusement."[126] The state trial court held that the St. Patrick's Day Parade was a place of public accommodation under the law and that the Council's decision to ban GLIB because of "its values and its message" was illegal discrimination on the basis of sexual orientation.[127]

Moreover, in a wonderful exercise of authoritarianism, the trial judge stated that to deny GLIB the right to march in the parade was not only illegal, but also inconsistent with "a proper celebration" of St. Patrick's Day, which, according to the judge, "requires diversity and inclusiveness."[128] Perhaps there is no better example of Justice Jackson's iconic authoritarian official, the "village tyrant," than this presumptuous trial judge telling the private organizer of a holiday parade which values and ideas are required for a "proper celebration" of the holiday.

Before reaching the compelled speech issue in the case, the Supreme Court had to decide two preliminary matters. First, was the St. Patrick's Day Parade a type of expression protected by the First Amendment, or was it, as the state courts had concluded, "nonexpressive conduct" outside the protection of the Free Speech Clause?[129] Second, was the Massachusetts public accommodation law a content-neutral prohibition of discrimination in the marketplace for goods and recreational services or, as applied to the private citizens promoting the parade, did it operate as a state-compelled expression of an ideological message?[130] The Court answered both questions on the side of freedom of speech.

First, it held that the St. Patrick's Day Parade is a "form of expression"[131] even if it is not designed to express any particularized message about politics or ideology other than to march in celebration of

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[125] *Id.* at 561.

[126] *Id.*

[127] *Id.* at 561–63. Remarkably, the trial judge said that rejection of the values and message of an LGBT group constitutes discrimination on the basis of the sexual orientation of the group's members. *Id.* at 562. Apparently, discrimination against the message is, without more, discrimination against the person. *Id.*

[128] *Id.* at 562.

[129] *Id.* at 567–68.

[130] *Id.* at 572 (noting that "on its face" the Massachusetts public accommodations law did not "target speech or discriminate on the basis of its content").

[131] *Id.* at 568.

St. Patrick and Irish-American heritage.[132] As the unanimous majority opinion put it, the "protected expression that inheres in a parade is not limited to its banners and songs" or its intent to express any particular message.[133] Like the abstract art of a painter such as Jackson Pollock, a parade celebrating a holiday is expression protected by the First Amendment even if it lacks "a narrow, succinctly articulable message."[134]

As to the second issue, the Court stated that the Massachusetts public accommodations law, although facially targeting only discriminatory conduct—not speech—"has been applied in a peculiar way,"[135] because the "state courts' application of the statute had the effect of declaring the [parade] sponsor's speech itself to be the public accommodation."[136] Thus, Justice Souter's unanimous opinion held that the state court order violated "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."[137]

The Court emphasized that the sponsors' objection to GLIB was not the sexual orientation of its members, who were not as individuals barred from marching in the parade, but rather "to the admission of GLIB as its own parade unit carrying its own banner."[138] In other words, the objection was to GLIB's message, not to its members as individual persons. As a result, the state courts had ordered the petitioners in effect "to alter the expressive content of their parade."[139]

Justice Souter, writing for a unanimous Supreme Court, held that the state court's "mandate violates the First Amendment"[140] and compared the idea of speaker autonomy—the right of "a private speaker to shape its expression by speaking on one subject while remaining silent on another"—to that of a composer of music who selects which notes to include and which to exclude from his musical score.[141] Thus, the constitutional ideal of intellectual autonomy for speakers, artists, and parade organizers, which originated in *Barnette*, now had the support of a unanimous Supreme Court.

Hurley also illustrates some additional free speech concerns that typically arise from speech mandates. First, these mandates often involve viewpoint discrimination, because they compel the speaker to express

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[132] *Id.* at 573–75.
[133] *Id.* at 569.
[134] *Id.*
[135] *Id.* at 572.
[136] *Id.* at 573.
[137] *Id.*
[138] *Id.* at 572.
[139] *Id.* at 572–73.
[140] *Id.* at 559.
[141] *Id.* at 574.

either the government's viewpoint, as in *Wooley*,[142] or the viewpoint of a third party, as in *Hurley*. For example, the mandate in *Hurley*, which required the sponsors of the parade to allow GLIB to march in support of gay pride,[143] interfered with their right "not to propound *a particular point of view*."[144]

Moreover, the law operated as an unconstitutional condition, because it required the sponsors of the parade to choose between two First Amendment rights, the right to speak and the right not to speak.[145] Massachusetts required the sponsors to choose between their right to parade in support of their own expression, and their right to refrain from fostering the expression of GLIB.[146] They could have "one constitutional right or the other, but not both;" "[t]he First Amendment does not permit government to put a speaker to that odious choice."[147]

II. JUSTICE KENNEDY GOES OUT LIKE A LION

A. Justice Kennedy's Last Hurrah: Authoritarianism and "Forward Thinking"

Although some of Justice Kennedy's jurisprudence has been criticized as little more than bad poetry, or in the biting words of Justice Scalia, as echoing "the mystical aphorisms of the fortune cookie,"[148] Kennedy has built a considerable jurisprudential legacy protecting freedom of speech under the First Amendment.[149] Even in cases in which a majority voted to uphold a First Amendment claim, Kennedy's passionate concern for freedom of speech, particularly his strong objections to laws restricting speech on the basis of its content or viewpoint, often led him to write

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[142] *See supra* notes 109–122 and accompanying text.

[143] *Hurley*, 515 U.S. at 561.

[144] *Id.* at 575 (emphasis added).

[145] *See id.* at 579 (stating that the law "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one").

[146] *Id.*

[147] *See* Duncan, *supra* note 102, at 13; *see also* Volokh, *supra* note 103, at 361 (government may not compel a speaker to include unwanted speech as a condition to expressing the speaker's own "speech product").

[148] Obergefell v. Hodges, 135 S. Ct. 2584, 2630 n.22 (2015) (Scalia, J., dissenting).

[149] *See, e.g.*, Ashutosh Bhagwat & Matthew Struhar, *Justice Kennedy's Free Speech Jurisprudence: A Quantitative and Qualitative Analysis*, 44 MCGEORGE L. REV. 167, 167 (2013) (describing Justice Kennedy's reputation as a free speech advocate); *see generally* KNOWLES, *supra* note 5, at 53–87 (discussing Justice Kennedy's free speech legacy); FRANK J. COLUCCI, JUSTICE KENNEDY'S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY 75–101 (2009) (same).

concurring opinions calling for "even greater protection" for freedom of expression.[150]

The Supreme Court's October Term 2017–2018 featured three compelled speech cases.[151] Justice Kennedy was in the majority of all three. He wrote the majority opinion in one of them,[152] joined the majority in a second,[153] and joined the majority and wrote a powerful concurring opinion in the third.[154]

In *Masterpiece Cakeshop*, the compelled speech issue concerned a Christian wedding cake artist, Jack Phillips, who considered his custom cake creations to be "artistic expression celebrating the beauty of marriage as God designed marriage."[155] Therefore, although he was happy to serve all customers, without regard to sexual orientation, he could not in good conscience create wedding cakes designed to celebrate same-sex marriages.[156] The state of Colorado enforced its public accommodations law against Mr. Phillips and ordered him to "cease and desist from discriminating against . . . same-sex couples by refusing to sell them wedding cakes or any product [he] would sell to heterosexual couples."[157] In other words, Colorado required Phillips to choose between his right as an artist to create custom wedding cakes celebrating opposite-sex marriage and his right *not* to create wedding cakes celebrating same-sex marriage.[158]

Because the no-compelled-speech doctrine was already well-established, the primary issue facing the Court under the Free Speech Clause was whether custom wedding cakes are artistic expression

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[150] *See* Int'l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 693 (1992) (Kennedy, J., concurring) (departing from the majority's reasoning, Justice Kennedy defined public forum more expansively, thereby shielding more areas from speech regulations); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 124 (1991) (Kennedy, J., concurring) (maintaining that content-discriminatory statutes should be *per se* unconstitutional); KNOWLES, *supra* note 5, at 67 (observing that during his years on the Supreme Court "Kennedy has staked out a lonely but brave position vociferously objecting to content-based regulations of speech" by writing separately even when the majority voted to uphold free speech rights).

[151] *October Term 2017*, SCOTUSBLOG, https://www.scotusblog.com/case-files/terms/ot2017/ (last visited Feb. 22, 2020); Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018); Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31 (AFSCME), 138 S. Ct. 2448 (2018); Nat'l Inst. Of Family & Life Advocates v. Becerra (NIFLA), 138 S. Ct. 2361 (2018).

[152] *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

[153] *Janus*, 138 S. Ct. at 2459.

[154] *NIFLA*, 138 S. Ct. at 2378 (Kennedy, J., concurring).

[155] Duncan, *supra* note 102, at 2.

[156] *Id.* at 3.

[157] *Masterpiece Cakeshop*, 138 S. Ct. at 1726 (citation omitted).

[158] *See* Duncan, *supra* note 102, at 13 (noting the unconstitutional choice forced between the right to speak and the right to not speak).

protected by the doctrine.[159] In other words, are custom wedding cakes more like pizza or breadsticks served in an Italian restaurant, or like a sculpture or oil painting created by a fine artist.[160] *Masterpiece Cakeshop* was particularly difficult for Justice Kennedy because it involved a "clash" between free speech and religious liberty on one side and gay rights and marriage equality on the other.[161] Perhaps because of this clashing of interests, Justice Kennedy's majority opinion in *Masterpiece Cakeshop* did not decide the compelled speech issue. Instead, the Court held that Colorado had violated the Free Exercise Clause because the state did not treat Phillips with "the religious neutrality that the Constitution requires."[162]

Although Justice Kennedy did not decide the compelled speech issue in *Masterpiece Cakeshop,* his opinion did contain some powerful dicta in support of Phillips' free speech claim. Speaking for the Court, Justice Kennedy observed that although the free speech issue in this case "is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech,"[163] Phillips' claim "is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning."[164] Moreover, "if a baker refuse[s] to design a special cake with words or images celebrating the marriage," these additional details "might make a difference."[165] These insights might well shed a great deal of light on future cases involving commercial artists and compelled artistic expression.

Justice Kennedy joined Justice Alito's majority opinion in a second important compelled speech case, *Janus v. American Federation of State, County & Municipal Employees, Council 31*,[166] in which the Court struck down a state law requiring public employees "to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities."[167] This, said the Court,

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159 *Id.* at 9, 13.

160 *Id.*

161 *See* Zachary S. Price, *Symmetric Constitutionalism: An Essay on* Masterpiece Cakeshop *and the Post-Kennedy Supreme Court*, 70 HASTINGS L.J. 1273, 1291 (2019) (noting the political conflict between traditional principles and civil rights equality). Some scholars believe the religious liberty holding in *Masterpiece Cakeshop* was a very narrow one. *Id.* I believe it is not necessarily a narrow holding. *See* Duncan, *supra* note 102, at 10–11, 23–24 (noting both the free speech and free exercise implications of the holding).

162 *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

163 *Id.* at 1723.

164 *Id.*

165 *Id.*

166 138 S. Ct. 2448, 2448, 2459 (2018).

167 *Id.* at 2459–60.

violates the Free Speech Clause because it compels dissenting workers "to subsidize private speech on matters of substantial public concern."[168]

The force of the no-compelled-speech doctrine as a defense against authoritarian government was strong in *Janus*. Justice Alito, speaking for Chief Justice Roberts and Justices Kennedy, Thomas, and Gorsuch observed that when government compels speech, it inflicts even more damage than when it merely restricts speech.[169] This is so because it is "always demeaning" to compel "free and independent individuals to endorse ideas they find objectionable."[170] Invoking Thomas Jefferson, the *Janus* Court forcefully observed that to compel an individual to betray his personal convictions by subsidizing the ideas of another "is sinful and tyrannical."[171]

Justice Kennedy's inspirational manifesto on the no-compelled-speech doctrine as a shield against authoritarian government, an opinion cementing his legacy as one of the greatest defenders of freedom of speech in Supreme Court history, was issued as a concurring opinion in *NIFLA*.[172] In *NIFLA*, the state of California required pro-life crisis pregnancy centers to provide certain "government-drafted" notices[173] to their clients and in their advertisements. For example, licensed pro-life clinics were required to "notify women that California provides free or low-cost services, including abortions" and to provide a phone number to learn more about those services.[174] Justice Thomas, writing for a majority that included Justice Kennedy, held that this compelled expression was an unconstitutional "content-based regulation of speech."[175] But the real fireworks were provided by Justice Kennedy in a concurring opinion joined by Chief Justice Roberts and Justices Alito and Gorsuch.

Justice Kennedy made clear that he joined the majority opinion "in all respects," and was writing a separate opinion only to make an even stronger case against California's compelled speech law.[176] Essentially, he wrote to underscore two points. First, that California was guilty of something more serious than a content-based regulation of speech; rather, the California law constituted "viewpoint discrimination" and served as "a paradigmatic example of the serious threat presented when government

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[168] *Id.* at 2460.

[169] *Id.* at 2459, 2464.

[170] *Id.* at 2464.

[171] *Id.*

[172] Nat'l Inst. of Family & Life Advocates v. Becerra (NIFLA), 138 S. Ct. 2361, 2378 (2018) (Kennedy, J., concurring).

[173] *Id.* at 2369 (majority opinion).

[174] *Id.* at 2368.

[175] *Id.* at 2367, 2371.

[176] *Id.* at 2378 (Kennedy, J., concurring).

seeks to impose its own message in the place of individual speech."[177] Second, Justice Kennedy wrote an eloquent and powerful denunciation of compelled speech as a deplorable and tyrannical characteristic of authoritarian government.

Justice Kennedy described the compelled speech law as one in which California had required pro-life crisis pregnancy centers to disseminate the state's message "advertising abortions" and thereby "to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts."[178] But what is even more noteworthy is Kennedy's response to the self-congratulatory statement by the California Legislature that "the Act was part of California's legacy of 'forward thinking.'"[179] Justice Kennedy observed that it is not "forward thinking" to compel ideological uniformity and continued:

> It is forward thinking to begin by reading the First Amendment as ratified in 1791; to understand the history of authoritarian government as the Founders then knew it; to confirm that history since then shows how relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for the generations to come. Governments must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief. This law imperils those liberties.[180]

These words of Justice Kennedy, echoing the eloquent opinion of Justice Jackson in *Barnette*,[181] are indeed inspirational words to share with our children when we endeavor to teach them about the blessings of liberty and the fundamental importance of both the right to speak and the

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[177] *Id.* at 2379.

[178] *Id.*

[179] *Id.*

[180] *Id.* Justice Kennedy also saw the specter of authoritarianism in his plurality opinion in the "stolen valor" case:

> Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth.

United States v. Alvarez, 567 U.S. 709, 723 (2012). Justice Kennedy's reference to Oceania and its Ministry of Truth is, of course, to the description of Thought Police and thought crimes in George Orwell's greatest novel, 1984. *Id.*

[181] *See* W. Va. State Bd. of Educ. V. Barnette, 319 U.S. 624, 641–42 (1943) (asserting that the government does not have the ability to coerce speech).

right not to be compelled to speak. The no-compelled-speech doctrine is deeply-rooted in the Court's free speech jurisprudence and serves as a powerful defense against "authoritarian regimes" and their dark arts.[182]

B. Compelled Speech in the Post-Kennedy Era: The Telescope Media Case

On August 23, 2019, the United States Court of Appeals for the Eighth Circuit decided an important compelled speech case[183] concerning a videography business, same-sex marriage, and the following question presented: "Carl and Angel Larsen wish to make wedding videos. Can Minnesota require them to produce videos of same-sex weddings, even if the message would conflict with their own beliefs?"[184] This case concerned Carl and Angel Larsen, a couple who own and operate Telescope Media Group, a business through which the Larsens produce and make films using "their 'unique skill[s] to identify and tell compelling stories through video.'"[185] The Larsens insist that they "gladly work with all people—regardless of their race, sexual orientation, sex, religious beliefs, or any other classification,"[186] however, because of their religious conscience and their desire to honor God, they are unwilling to produce or make films expressing messages that contradict biblical truths about abortion, racial equality, sexual morality, or marriage.[187] Therefore, although they wish to make films promoting marriage as a "sacrificial covenant between one man and one woman," they cannot in good conscience produce videos that promote or celebrate same-sex marriage.[188] Clearly, the Larsens' objection is to the message expressed by a video celebrating a same-sex marriage, not to the identity of the customers who wish to commission the video.

Under Minnesota's public accommodations law, however, the Larsens were required "to produce both opposite-sex and same-sex-wedding videos, or none at all."[189] Moreover, at oral argument in the case, the state of Minnesota made clear that the Larsens must be willing to "depict same- and opposite-sex weddings in an equally 'positive' light" or be guilty of unlawful discrimination on the basis of sexual orientation.[190] Minnesota thus viewed its public accommodation laws as requiring wedding videographers to express a positive viewpoint about same-sex marriage without regard to the filmmakers' deeply-held

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182 *Id.* at 642.
183 Telescope Media Grp. V. Lucero, 936 F.3d 740 (8th Cir. 2019).
184 *Id.* at 747.
185 *Id.*
186 *Id.* at 748.
187 *Id.*
188 *Id.*
189 *Id.*
190 *Id.* at 748–49.

religious and ideological views about the definition and the good of marriage.[191] Moreover, in addition to civil remedies, violation of Minnesota's antidiscrimination law is a crime punishable by fines and jail.[192]

The district court granted Defendants' motion to dismiss;[193] however the Eighth Circuit reversed by a two to one vote.[194] The primary free speech issue before the court was whether Minnesota's public accommodation laws, as applied to a wedding videographer who objected to making videos expressing a positive view of same-sex marriage, constituted merely the regulation of conduct and not speech.[195] Does the law primarily regulate the conduct of the Larsens' commercial wedding service, or does it compel the Larsens to "speak favorably about same-sex marriage if they choose to speak favorably about opposite-sex marriage."[196]

The majority in *Telescope Media*, in a powerful and persuasive opinion by Judge Stras, concluded that, "Speech is not conduct just because the government says it is."[197] The court made clear that wedding videography is "a form of speech that is entitled to First Amendment protection"[198] and that it makes no "difference that the Larsens are expressing their views" about the meaning and sanctity of marriage "through a for-profit enterprise."[199] The court found that Minnesota's threatened enforcement of the public accommodation laws against the Larsens "is at odds with the 'cardinal constitutional command' against compelled speech."[200] Moreover, since the law "compels the Larsens to speak favorably about same-sex marriage if they choose to speak favorably about opposite-sex marriage[,] . . . [i]t operates as a content-based regulation of their speech."[201]

Actually, since it compels positive speech about same-sex marriage, it arguably constitutes a viewpoint-based speech mandate—if the Larsens make videos expressing their actual views about the sanctity of traditional marriage, they are compelled by law to contradict their own beliefs and

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191 *Id.* at 748.

192 *See* Telescope Media Grp. V. Lindsey, 271 F. Supp. 3d 1090, 1098 & n.4 (D. Minn. 2017) (noting that violation of the statute is a misdemeanor, which is punishable by jail time of up to ninety days and/or a fine of up to $1,000), *aff'd in part, rev'd in part and remanded sub nom.*, 936 F.3d 740 (8th Cir. 2019).

193 *Telescope Media Grp.*Lindsey, 271 F. Supp. 3d at 1097.*Id.* at 63.

194 *Telescope Media Grp.*, 936 F.3d at 762.

195 *Id.* at 752.

196 *Id.*

197 *Id.* at 747, 752.

198 *Id.* at 750.

199 *Id.* at 751.

200 *Id.* at 752 (quoting *Janus v. Am. Fed'n of State, County & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018)).

201 *Id.* at 752.

express an equally-positive viewpoint about same-sex marriage. In other words, the law requires the Larsens to speak about marriage with a forked tongue. Thus, as in *Hurley*,[202] although on their face Minnesota's public accommodation laws are content-neutral regulations of conduct, as applied to the Larsens' wedding videos these laws are content- or even viewpoint-based speech mandates that violate the no-compelled-speech doctrine of *Barnette, Wooley, Hurley, NIFLA*, and many other cases. As Justice Kennedy made so clear in his *NIFLA* concurrence, it is not "forward thinking" to compel ideological uniformity about the equal goodness of opposite-sex and same-sex marriage.[203] The First Amendment is a powerful defense against authoritarian government and its relentless attempts to "force persons to express a message contrary to their deepest convictions."[204]

CONCLUDING THOUGHTS: WHY THE NO-COMPELLED-SPEECH DOCTRINE MATTERS

> *"There was truth and there was untruth, and if you clung to the truth even against the whole world, you were not mad."*
> *-George Orwell*[205]

Starting in *Barnette* and most recently in *Janus* and *NIFLA*, the Supreme Court has strongly declared that government may not "coerce uniformity of sentiment"[206] on issues of public concern by compelling expression of beliefs, creeds, or statements of values. This doctrine is of fundamental importance in any society that believes, in the words of Justice Kennedy quoted near the beginning of this article, that "The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."[207] Therefore, free men and free women must have autonomy over their speech, over that which they choose to say and that which they choose not to say.

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[202] Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., Inc., 515 U.S. 557, 561 (1995); *see also supra* notes 121–138 and accompanying text.

[203] Nat'l Inst. of Family & Life Advocates v. Becerra (NIFLA), 138 S. Ct. 2361, 2378 (2018) (Kennedy, J., concurring); *see also supra* notes 178–182 and accompanying text.

[204] *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring).

[205] ORWELL, *supra* note 3, at 217.

[206] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943); *see also* Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2460 (2018) (concluding that non-members cannot be compelled to support the speech of union members); *NIFLA*, 138 S. Ct. at 2371 (holding that forcing pro-life crisis pregnancy centers to advertise for state-subsidized abortions was improper).

[207] Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002).

Alexander Solzhenitsyn, a dissident imprisoned for his activism by the totalitarian regime of the former Soviet Union,[208] has captured the essence of the right not to speak as being based upon each individual's conscience and commitment to the truth as he or she understands it.[209] In an essay entitled *Live Not By Lies*, Solzhenitsyn said "let us refuse to say that which we do not think,"[210] and went on to explain that "an honest man[,] worthy of [the] respect both by [his] children and [his] contemporaries . . . [w]ill not depict, foster or broadcast a single idea which he can only see is false or a distortion of the truth whether it be in painting, sculpture, photography, technical science, or music."[211] As Orwell explained in 1984, his seminal novel of life in fictional Oceania under a totalitarian regime that used extreme coercion to mandate uniformity of opinion, if an individual "clung to the truth" as he understood it, he might against all odds maintain his human dignity and his sanity.[212] Solzhenitsyn put it even more clearly: "And the simplest and most accessible key to our self-neglected liberation lies right here: Personal non-participation in lies. Though lies conceal everything, though lies embrace everything, but not with any help from me."[213]

Although our society in no way resembles the tyrannical totalitarianism of 1984's Oceana, we nevertheless frequently encounter "village tyrants" who use the law to compel citizens to speak, publish or create expression adopting the favored message of the state or a third person, or to attend "rallies or lectures espousing the right views."[214] According to Kelly Sarabyn, such coercive methods are deployed "in order

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[208] CHARLES E. ZIEGLER, THE HISTORY OF RUSSIA 102 (2d ed. 2009) (revealing that Solzhenitsyn was imprisoned for eight years and exiled for three years simply for making derogatory comments about Stalin in his personal correspondence to his family); The Editors of Encyclopaedia Britannica, *Aleksandr Isayevich Solzhenitsyn*, ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/biography/Aleksandr-Solzhenitsyn (last visited Mar. 17, 2020) (explaining how Solzhenitsyn endured prison, labor camps, and exile for his politically critical works).

[209] *See* Alexander Solzhenitsyn, *Live Not By Lies*, ORTHODOXY TODAY http://www.orthodoxytoday.org/articles/SolhenitsynLies.htm (last visited Mar. 2, 2020) (noting that to liberate themselves, people should refuse to believe the lies the government tells them).

[210] *Id.*

[211] *Id.*

> Solzhenitsyn penned this essay in 1974 and it circulated among Moscow's intellectuals at the time. It is dated Feb. 12, the same day that secret police broke into his apartment and arrested him. The next day he was exiled to West Germany. The essay is a call to moral courage and serves as light to all who value truth.

Id. (emphasis omitted).

[212] ORWELL, *supra* note 3, at 217; *see generally* Duncan, *supra* note 102, at 5.

[213] Solzhenitsyn, *supra* note 209.

[214] *See* Kelly Sarabyn, *Prescribing Orthodoxy*, 8 CARDOZO PUB. L., POL. & ETHICS J. 367, 373 (2010) (noting methods by which government can compel psychological agreement).

to change citizens' ideological beliefs."[215] These are the petty tyrants and the authoritarian tactics that Justice Jackson and Justice Kennedy warned of in *Barnette* and *NIFLA*. And the no-compelled-speech doctrine is a powerful defense against our village tyrants and their dark arts.

The no-compelled-speech doctrine is thus best understood as a fundamental human right—a legal, political, and moral entitlement—that protects "sovereignty of the mind"[216] and individual autonomy over "the few cubic centimeters inside your skull"[217] from attempts by government to promote orthodoxy by compelling speech on matters of public concern.[218] Moreover, the doctrine recognizes that speech compelled by government is almost always content-based, or even worse, viewpoint-based.[219] This is even the case when a general, facially-neutral law prohibiting some form of conduct is applied to regulate speakers or artists. In other words, when government applies a law to compel a speaker to speak or create a particular message, as in *Hurley*, the restriction compels the content or viewpoint expressed by that particular message.[220]

Perhaps the best dramatic example of authoritarian government and compelled speech is found in Robert Bolt's wonderful play about Sir Thomas More, *A Man For All Seasons*.[221] In the play, King Henry has commanded Thomas More to sign a statement effectively blessing the King's divorce and remarriage.[222] As a faithful Catholic, More cannot sign.[223] His conscience requires silence.[224] In this remarkable excerpt from the play, two of the King's officials, Thomas Cromwell and Richard Rich, discuss the King's motives for refusing to allow More to keep his silence:

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[215] *Id.*

[216] Horwitz, *supra* note 53, at 727. Professor Horwitz describes Justice Jackson's opinion in *Barnette* as recognizing "a kind of paean to the sovereignty of the mind—in a legal sense, a political sense, and perhaps a larger sense altogether." *Id*.

[217] ORWELL, *supra* note 3, at 27.

[218] Horwitz, *supra* note 53, at 727.

[219] A content-based law would be one that compels an individual to say whatever he wishes about a particular subject, for example, on the subject of abortion. A viewpoint-based law would be one that compels an individual to express a particular viewpoint on a subject, for example to express a view in favor of abortion as in *NIFLA*. *See supra* notes 177–178 and accompanying text. It should be obvious that most instances of compelled speech are viewpoint-based.

[220] *See supra* notes 142–144 and accompanying text.

[221] ROBERT BOLT, A MAN FOR ALL SEASONS: A PLAY IN TWO ACTS (1st ed., Vintage Int'l 1990) (1962).

[222] *Id.* at vii–x, xii–xiii.

[223] *Id.* at xiii.

[224] *Id.* at xii, 132–33 (explaining that More could not agree to sign because he would be going against his conscience; and even if he did sign, his agreement would not make the king's action right).

> **Cromwell** The King's a man of conscience and he wants either Sir Thomas More to bless his marriage or Sir Thomas More destroyed.
>
> **Rich** They seem odd alternatives, Secretary.
>
> **Cromwell** Do they? That's because you're not a man of conscience. If the King destroys a man, that's proof to the King that it must have been a bad man, the kind of man a man of conscience *ought* to destroy–and of course a bad man's blessing's not worth having. So either will do.[225]

Cromwell's point, of course, captures the essence of authoritarian government and the importance of the no-compelled-speech doctrine as understood by Justice Jackson and Justice Kennedy. If the King succeeds in compelling More's blessing for his divorce and remarriage, he has won the blessing of a good man, a man whose blessing justifies the King's conduct.[226] But if More refuses to bless the marriage, he will be treated as an outlaw, as a bad man whose opinions are worthless.[227] The King wins either way. And liberty loses either way.

Compelled speech about political and religious beliefs—whether concerning patriotism and the flag,[228] the relative value of life versus liberty,[229] gay pride and St. Patrick's day,[230] the definition of marriage,[231] or the morality of abortion[232]—is always a threat to freedom of thought and the dignity of individuals who wish to remain silent about certain subjects or viewpoints.

Looking back on *Barnette*, *Wooley*, *Masterpiece,* and *NIFLA*, it is difficult not to admire the courage of the dissenters who risked their education, their livelihood, and their liberty to defend freedom of thought, speech, and religious conscience against the tyranny of speech mandates. Many, but not all, of the compelled speech cases concerned Jehovah's Witnesses or other religious minorities resisting attempts by authoritarian officials to impose some notion of official orthodoxy of

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[225] *Id.* at 119 (stage directions omitted).

[226] *Id.*

[227] *Id.*

[228] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 626 (1943).

[229] Wooley v. Maynard, 430 U.S. 705, 710 (1977).

[230] Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., Inc., 515 U.S. 557, 561 (1995).

[231] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1724 (2018).

[232] Nat'l Inst. of Family & Life Advocates v. Becerra (NIFLA), 138 S. Ct. 2361, 2368 (2018).

thought and speech on dissenting citizens.[233] Sarah Berringer Gordon wrote eloquently concerning Justice Jackson's warning about orthodoxy leading to the "unanimity of the graveyard" and focused specifically on the role of religious dissenters in this line of cases: "Religious dissenters, when seen from this perspective, are like the canary in the coal mine: When they begin to suffer and die, everyone should be worried that the atmosphere has been polluted by tyranny."[234]

The no-compelled-speech doctrine is designed to nip tyranny and authoritarianism in the bud when petty and not-so-petty tyrants use law to compel free men and women "to say that which [they] do not think."[235] From Justice Jackson in *Barnette* to Justice Kennedy in *NIFLA*, the Court has employed the Free Speech Clause as a powerful shield protecting freedom of thought and speaker autonomy against authoritarian laws compelling speech. Under the no-compelled-speech doctrine, no schoolchild, no automobile owner, no parade organizer, no artist, and no individual may be compelled to say that which they do not think.

We owe a great debt to Justice Jackson, Justice Kennedy, and many other jurists who have faithfully nurtured this fundamental First Amendment protection against village tyrants and authoritarian speech mandates. But the decision in *NIFLA* was five to four.[236] To paraphrase Benjamin Franklin, the no-compelled-speech doctrine is a fundamental First Amendment right only "if we can keep it."[237]

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[233] *E.g.*, *Barnette*, 319 U.S. at 629 (Jehovah's Witnesses); *Wooley*, 430 U.S. at 707 (Jehovah's Witnesses); *Masterpiece Cakeshop*, 138 S. Ct. at 1724 (Christian cake artist); *NIFLA*, 138 S. Ct. at 2368 (mostly Christian crisis pregnancy centers).

[234] Sarah Berringer Gordon, *What We Owe Jehovah's Witnesses*, AM. HIST., April 2011, at 41.

[235] *See supra* notes 206–211 and accompanying text.

[236] *NIFLA*, 138 S. Ct. at 2367.

[237] When Benjamin Franklin was asked by a passerby on the streets of Philadelphia what kind of government had been established by the Constitutional Convention, he responded: "A republic*, if you can keep it*." NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 8 (2019).

HOW TO OVERTURN *EMPLOYMENT DIVISION V. SMITH*: A HISTORICAL APPROACH

*Ian Huyett**

INTRODUCTION

In January 2019, the Supreme Court declined to hear the case of Joseph Kennedy, a public school football coach who was fired for engaging in silent, public prayer after football games.[1] The coach had argued that his termination violated the Speech Clause of the First Amendment[2]—a claim that the Supreme Court declined to review.[3]

In a concurring opinion, however, Justice Alito appeared to encourage Coach Kennedy to try his hand at a different constitutional provision: the Free Exercise Clause.[4] Observing that Kennedy's petition had relied solely on the Speech Clause, Justice Alito explained that this "may be due to certain decisions of this Court."[5] In other words, the coach can be forgiven for citing the wrong clause, as the Court itself "may" have compelled him to do so.[6]

As anyone familiar with free exercise law will know, Justice Alito is understating the case. Any non-lawyer—looking at the Constitution with the *Kennedy* case in mind—would naturally expect Coach Kennedy to focus on the right to the free exercise of religion. That the coach did not do so is plainly and solely due to one infamous Supreme Court decision: *Employment Division, Department of Human Resources of Oregon v. Smith*.[7]

Written in 1990 by Justice Scalia, the *Smith* opinion effectively announced the complete nullification of substantive free exercise rights.[8]

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1 Kennedy v. Bremerton Sch. Dist., 869 F.3d 813, 816 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 634, 635 (2019).

2 *Kennedy*, 139 S. Ct. at 635 (Alito, J., concurring).

3 *Id.* at 636.

4 *See id.* at 637 ("While the petition now before us is based solely on the Free Speech Clause of the First Amendment, petitioner still has live claims under the Free Exercise Clause of the First Amendment and Title VII of the Civil Rights Act of 1964.").

5 *Id.*

6 *Id.*

7 *See* 494 U.S. 872, 890 (1990) (holding that the Free Exercise Clause does not require religious-practice exemptions for nondiscriminatory laws).

8 *Id.* at 885, 890.

In short, the Rehnquist Court held that—so long as a law does not specifically target a religious group—the Free Exercise Clause places no limits at all on what the government can do.[9] While acknowledging that this law would disadvantage the very people who most need free exercise protection—unpopular religious groups[10]—Justice Scalia offered a simple answer to this concern: Americans should simply trust in "the political process" to protect religious liberty.[11]

Fortunately, Justice Alito's recent concurring opinion in the *Kennedy* denial—an opinion joined by Justices Thomas, Gorsuch, and Kavanaugh—appeared to confront *Smith* directly.[12] *Smith*, the opinion observed, has "drastically cut back on the protection provided by the Free Exercise Clause."[13] Appearing almost to wink at Justice Kennedy, Justice Alito suggested that the Court could not yet restore the Clause's power because "we have not been asked to revisit [*Smith*]."[14]

The idea of revisiting *Smith* is not a recent one;[15] nor is it a distinctly conservative ambition.[16] In fact, Justice Alito's concurring opinion is only the latest sign that the time has come for *Smith* to be challenged and overruled.

Over the last decade, justices on both sides of the Roberts Court have demonstrated a growing willingness to give the Free Exercise Clause substantive power:[17] a trend that stands in stark contrast with *Smith*.[18] Additionally, the Court's references to *Smith* have become visibly—and fittingly—awkward and halting.[19] I believe that the time has come for

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[9] *Id.* at 884–85, 890.

[10] *Id.* at 890.

[11] *See id.*

("It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.").

[12] *See* Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (Alito, J., concurring) (explaining that the decision in *Smith* seemed to cut back on Free Exercise Clause protections).

[13] *Id.*

[14] *Id.*

[15] *See* Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief That Was Never Filed*, 8 J.L. & RELIGION 99, 99–100 (1990) (explaining that as early as 1990 people were calling for the Court to revisit its decision in *Smith*).

[16] *See infra* notes 297, 339–341 and accompanying text.

[17] *See infra* notes 297, 339–341 and accompanying text.

[18] *See* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1990) (holding that nondiscriminatory religious practice exemptions are not required by the Free Exercise Clause).

[19] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012) (making a brief half-hearted attempt to distinguish *Smith* and logically contradicting it); *see also Kennedy*, 139 S. Ct. at 637 (mentioning *Smith* briefly but then

Free Exercise advocates to push for an explicit reversal of *Smith*—and that such a decision would not only be joined by Chief Justice Roberts, but likely by Justice Kagan as well.[20]

In this Article, I demonstrate that *Smith* rested on a deep internal contradiction and that it was contrary to the original intent of the Free Exercise Clause (the "Clause"), to the Clause's text, to decades of precedent, and to the nature of the judicial process.[21] On none of these fronts does *Smith* truly speak in its own defense: its reasoning amounts to little more than the Rehnquist Court's subjective intuitions about what kind of religious liberty protection it found appropriate.[22] Put differently, either *Smith* did not mean what it said, or else it simply vitiated a provision of the Bill of Rights which the Court did not like—circumventing and usurping the exclusive right of Congress to amend the Constitution.[23]

In order to understand the nature of the Free Exercise Clause, we need to grasp its historical context and development. *Smith*, in particular, cannot be fully understood except in the context of the anti-Mormon decisions of the late 19th century.[24] In summary, the Clause has had a cyclical life history since its adoption in 1791.[25] It has long oscillated between states of life—by which I mean that it possessed substantive power in the courts—and death—that is, being treated as a mere unenforceable sentiment.

By giving the Clause real power without explicitly overruling *Smith*, the Roberts Court has now affected to maintain a state of uncertain entanglement between both states. Logic and history, however, call for the Clause's restoration to the fullness of its power. Studying the Clause illuminates legal arguments and a general strategy which may persuade the Court to do so.

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refusing to discuss it); Holt v. Hobbs, 574 U.S. 352, 356–58, 360–61 (2015) (reflecting the Court's post-*Smith* reliance on RFRA and application of RLUIPA in order to afford greater religious exercise protections); Linda Greenhouse, *Reading Hobby Lobby in Context*, N.Y. Times (July 9, 2014), https://www.nytimes.com/2014/07/10/opinion/linda-greenhouse-reading-hobby-lobby-in-context.html (explaining how the Supreme Court's decisions in *Burwell v. Hobby Lobby* and *Holt v. Hobbs* would have been different if the standard in *Smith* had been applied instead of the pre-*Smith* standard under RFRA).

[20] *See infra* notes 339–341 and accompanying text.

[21] *See infra* notes 337–338 and accompanying text.

[22] *See infra* note 342 and accompanying text.

[23] *See infra* note 342 and accompanying text.

[24] *See infra* Part III.

[25] Verna C. Sanchez, *All Roads Are Good: Beyond the Lexicon of Christianity in Free Exercise Jurisprudence*, 8 HASTINGS WOMEN'S L.J. 31, 58 (1997).

I. THE CALL FOR FREE EXERCISE PROTECTION

When casual observers of American religious liberty think of the Clause's early history, they are likely to think of Thomas Jefferson's 1802 letter to the Danbury Baptists ("*Danbury*").[26] When this association is subject to even mild critical examination, however, it becomes suspicious.

Danbury was a short letter of about two paragraphs written several years after the Bill of Rights was adopted in 1791.[27] Jefferson was also not the leading proponent of the Clause—James Madison was.[28] Our tendency to pass over Madison is particularly striking, for in 1785, Madison himself wrote an in-depth essay on the topic of religious liberty—*Memorial and Remonstrance against Religious Assessments* ("*Memorial*").[29] This odd omission is no oversight. As we will soon see, our subconscious link between the Clause and *Danbury* comes from the politically calculated—and even cynical—beginnings of the now-established approach to the Clause.[30]

Madison's writings on religious liberty clearly display the influence of John Locke.[31] In his famous *A Letter Concerning Toleration*, Locke argued for religious liberty by beginning with the central and cosmic importance of religious questions.[32] "Every man has an immortal soul, capable of eternal happiness or misery," Locke asserted.[33] It follows that the highest obligation upon mankind is to seek out and satisfy our ultimate, or "religious," duties, for "there is nothing in this world that is of any consideration in comparison with eternity."[34] Put differently, Locke's advocacy of religious liberty was the complete opposite of the modern idea that religion should be kept private because it is, in Simone Weil's words, merely "a matter of choice, opinion, taste, almost of caprice, something like . . . that of a tie."[35]

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[26] Letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephram Robbins, & Stephen S. Nelson, a Comm. of the Danbury Baptist Ass'n, in the State of Conn., *reprinted in* JEFFERSON: POLITICAL WRITINGS 396–97 (Joyce Appleby & Terence Ball eds., 1999).

[27] *Id.*; U.S. CONST. amends. I–X.

[28] *See* Kenneth W. Starr, *The Establishment Clause*, 41 OKLA. L. REV. 477, 485 (1988) (explaining that James Madison drafted the first ten amendments).

[29] JAMES MADISON, RELIGIOUS FREEDOM: A MEMORIAL AND REMONSTRANCE 5 (1819).

[30] *See infra* notes 81–90 and accompanying text.

[31] Marc M. Arkin, *"The Intractable Principle:" David Hume, James Madison, Religion, and the Tenth Federalist*, 39 AM. J. LEGAL HIST. 148, 173 n.139 (1995) (suggesting that Madison's *Memorial* reflects the influence of John Locke).

[32] John Locke, *A Letter Concerning Toleration*, *reprinted in* GREAT BOOKS OF THE WESTERN WORLD 1, 15 (Robert Maynard Hutchins ed., William Benton 1952).

[33] *Id.* at 15.

[34] *Id.* at 15–16.

[35] SIMONE WEIL, THE NEED FOR ROOTS: PRELUDE TO A DECLARATION OF DUTIES TOWARD MANKIND 126 (Arthur Wills trans., Putnam 1952).

From the cosmic centrality of religion, why did Locke conclude that religious liberty should be protected? In brief, Locke argued that the danger of a government's imposition of religious falsehood far outweighed any danger that might follow from its failure to impose religious truth.[36] Governments routinely exert control over a plurality of communities.[37] A government that gets religion wrong, then, might forcibly impose falsehood on every community under it power—including those that would otherwise have discovered and lived out the truth.[38]

On the other hand, when a government lacks the structural power to meddle in religion, there at least remains the possibility that a minority community—a kind of spiritual elite—will endure as a shining example of religious truth.[39] As Locke asked rhetorically: "What power can be given to the magistrate for the suppression of an idolatrous Church, which may not in time and place be made use of to the ruin of an orthodox one? For . . . the religion [or, we might add, the secularism] of every prince is orthodox to himself."[40]

In his *Memorial*, Madison proceeded in exactly the same way, urging that religion is central and that it therefore overrides all lesser human obligations.[41] Just as we enter into contracts while reserving our duties to our government, Madison proclaimed, "much more must every man, who becomes a member of any particular civil society, do it with a saving of his allegiance to the Universal Sovereign."[42] The architect of the First Amendment then reached a bold conclusion: "in matters of religion, no man's right is abridged by the institution of civil society; . . . religion is wholly exempt from its cognizance."[43]

Given the centrality of religion, why did Madison not conclude that the government should discern and enforce religious truth? Madison's answer to this question is a virtual paraphrase of Locke. "Who does not see," he asked rhetorically, "that the same authority, which can establish

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[36] *See* Locke, *supra* note 32, at 13–15 (vesting governments with power to control religion increases the threat of religious persecution; whereas removing such power from governments not only removes such threat but may even promote the recognition of religious truth).

[37] *Id.* at 13.

[38] *See id.* at 13–14 (explaining that if a government uses laws to enforce whatever religion it believes to be true, then every citizen will be forced into that religion regardless of its truth).

[39] *See id.* at 13 (telling the hypothetical story of how a small number of Christians arrive in a foreign pagan land and, because the government does not control religion and allows them to remain there, they are able to grow in numbers until the once-pagan society develops a Christian majority).

[40] *Id.*

[41] *See* MADISON, *supra* note 29, at 6 (claiming that man's duty to God takes precedent to the claims of society).

[42] *Id.*

[43] *Id.*

Christianity, in exclusion of all other religions, may establish, with the same ease, any particular sect of Christians, in exclusion of all other Sects?"[44]

As an aside, it is notable that both Locke and Madison's arguments presupposed the truth of Christianity.[45] Both men, then, would likely be even more devoted to religious liberty if they lived today—when the dominant perspective is not Presbyterianism or Baptism but, increasingly, a generalized hostility to traditional religion.[46] In its recent *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* decision, for example, the Supreme Court noted with alarm that a member of the Colorado Civil Rights Commission compared "[the Christian petitioner's] invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust."[47]

A separate question concerns the *kind* of religious liberty that Madison wanted. This question is particularly pertinent today, as there now exists a notion—advanced by Justice Scalia in *Smith*—that religious liberty protects little more than one's private thoughts.[48] Put differently, the Free Exercise Clause would stop the government from seeking to inculcate its own religious views, but it would not protect—for example—one's right to participate in the religious ceremonies of his choosing.[49]

If *Memorial* were given its rightful place in free exercise law, Scalia's ahistorical view would be dethroned.[50] A citizen's right to "the free exercise of his religion," Madison wrote, "is held by the same tenure with all our other rights. . . . [I]t is enumerated with equal solemnity, or rather with studied emphasis."[51] Madison's view is clear: he did not intend Free Exercise protection to be a vague aspirational sentiment, left to the

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[44] *Id.* at 7.

[45] *See* Locke, *supra* note 32, at 1, 1 nn.1, 3 (referring to Jesus Christ as both Saviour and Lord); *see also* MADISON, *supra* note 29, at 5, 7–8 (opposing a bill that would give the state power to favor one Christian sect over another but underscoring throughout that a Christian's duty to the Creator must be discharged by conviction not force).

[46] *See generally* Ian Huyett, *Christianity, Ethics, and Politics in the Age of Isabella Chow*, 74 WASH. & LEE L. REV. ONLINE 619 (2018), https://scholarlycommons.law.wlu.edu/wlulr-online/vol74/iss2/17 (discussing how Christians live in an increasingly hostile political climate and encouraging them to boldly respond).

[47] 138 S. Ct. 1719, 1721 (2018).

[48] Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 879 (1990) ("'Laws,' we said, 'are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.'" (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1879))).

[49] *See id.* at 878 (explaining that the government must not make laws specifically targeting any religion, but it can make laws that inadvertently affect one's right to participate in certain religious practices).

[50] *See* MADISON, *supra* note 29, at 12 (claiming that the religious rights the Free Exercise Clause protects are just as important as all other Constitutional rights).

[51] *Id.*

momentary whims of legislators,[52] but a concrete right as stable as any other.[53]

II. DRAFTS OF THE FREE EXERCISE CLAUSE

Madison's first draft of the First Amendment—proposed in June 1789—read as follows:

> The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.[54]

It is notable that this initial draft includes what we would today call "Establishment Clause" protection and, separately, what might be called "Free Exercise" protection.[55] The requirement that no "national religion be established" would prevent the government from demanding that Americans convert to Daoism or allowing only Muslims to vote.[56] Yet it would not, by itself, prevent Congress from passing a law declaring Judaism illegal. This is the province of "free exercise" protection.

Additionally, the government could not ban kosher foods or the Mishneh Torah while claiming that it has not banned Judaism *per se*. The draft explicitly protects "worship" and adds the phrase "in any manner."[57] The ultimate text of our First Amendment, while adopting different words, preserved Madison's distinction between Establishment and Exercise Clause protection, ensuring that the actual practice of religion—not its mere silent contemplation—would be protected from governmental interference.[58]

Importantly, in 1789, Congress considered drafts that blocked the establishment of a state church but which lacked clear protection for religious exercise.[59] One read simply that, "Congress shall make no laws

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[52] *Compare id.* at 6 (declaring that no man's right to freedom of religion should be abridged by the government because that could lead to the majority trespassing on the rights of the minority), *with Smith*, 494 U.S. at 890 ("It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself . . . .").

[53] MADISON, *supra* note 29, at 5.

[54] 1 ANNALS OF CONG. 434 (1789) (Joseph Gales ed., 1834).

[55] *Id.*; U.S. CONST. amend. I.

[56] 1 ANNALS OF CONG. 434 (1789) (Joseph Gales ed., 1834).

[57] *Id.*

[58] U.S. CONST. amend. I.

[59] *See* NEIL H. COGAN, THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES & ORIGINS 1–11 (2d ed. 2015) (outlining the various drafts of the First Amendment

touching religion or the rights of conscience."[60] Another stated that, ""Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society."[61] That Congress rejected these more anemic proposals—returning to Madison's original two-horned approach—is evidence of Congress's intent: it sought to clearly protect the actual exercise of religion from meddling by the state.[62]

On September 25, the Senate accepted the text of our First Amendment, beginning "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[63]

III. THE ANTI-MORMON CASES

In the late 19th century, the Free Exercise Clause was—for the first but not the last time—completely eviscerated.[64] Over an eleven-year period, a team of Supreme Court justices, led largely by appointees of Ulysses S. Grant, stripped the Clause of all power.[65] The Court's endgame was to systematically disenfranchise Mormons[66]—then a widely-hated religious minority.[67]

As these justices saw it, the Clause allowed the government to outlaw religious practices it disfavored,[68] as well as to shut down churches,[69] to confiscate their property,[70] and even to prohibit American citizens from

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from Madison's first proposal on June 8, 1789, to the agreed resolution of the House and Senate on September 25, 1789, and showing that various motions omitted references to free exercise).

[60] *Id.* at 2.

[61] *Id.* at 4.

[62] *See* Carl H. Esbeck, *Religion and the First Amendment: Some Causes of the Recent Confusion*, 42 WM. & MARY L. REV. 883, 886 (2001) (explaining that Congress, through the enactment of the Free Exercise Clause, sought to restrict the government from involvement in religion).

[63] COGAN, *supra* note 59, at 11.

[64] *See* Reynolds v. United States, 98 U.S. 145, 168 (1879) (upholding laws prohibiting polygamy in opposition to Mormon beliefs).

[65] *See* Edwin B. Firmage, *Free Exercise of Religion in Nineteenth Century America: The Mormon Cases*, 7 J.L. & RELIGION 281, 290–95 (1989) (describing the cases decided from 1878 through 1889 that continued to rule against the Mormon's free exercise of religion).

[66] *Id.* at 286.

[67] *See id.* at 284–85 (describing the persecution Mormons endured at the hands of American citizens, and the unwillingness of any political leaders, judges, or law enforcement agents to help them).

[68] *See id.* at 289 (explaining that the court determined the First Amendment did not bar outlawing religiously inspired conduct).

[69] Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 7 (1990).

[70] *Id.*

voting on the basis of their religious beliefs.[71] The echoes of these decisions have continued to affect American law to this day—most notably through the jurisprudence of Justice Scalia.[72]

The anti-Mormon cases began with and emanated from Chief Justice Morrison Waite's opinion in *Reynolds v. United States*.[73] *Reynolds* concerned a defendant who engaged in polygyny, or marriage to multiple women, in emulation of Joseph Smith's practice of plural marriage—then seen by Mormons as a religious duty.[74] After the defendant's jury trial for "bigamy," the trial judge urged the jury to find the defendant guilty, saying that:

> I think it not improper, in the discharge of your duties in this case, that you should consider what are to be the consequences to the innocent victims of this delusion . . . . These are to be the sufferers; and as jurors fail to do their duty, and as these cases come up in the Territory of Utah, just so do these victims multiply and spread themselves over the land.[75]

The jury was happy to oblige the trial judge, and the defendant was sentenced to two years of imprisonment with hard labor and a fine of $500—equivalent to over $12,000 today.[76]

On *certiorari*, Chief Justice Waite had before him a curious task. On the one hand, Waite apparently desired to construct an opinion that would accord with the anti-Mormon sentiment which had buoyed the case to the Court's doorsteps.[77] On the other hand, Waite had to grapple with the challenging text of the Free Exercise Clause, as well as strong evidence that its original intent had been to protect disfavored religious minorities—in other words, Mormons—and their practices.[78]

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[71] *See* Davis v. Beason, 133 U.S. 333, 333, 335, 348 (1890) (upholding a statute that denied the right to vote to anyone who engaged in polygamy or belonged to any organization that encouraged polygamy).

[72] *See* Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 385, 386 (2000) (explaining how Justice Scalia narrowly interprets the Free Exercise Clause and generally approaches Free Exercise cases restrictively).

[73] 98 U.S. 145, 153 (1879).

[74] *Id.* at 161.

[75] *Id.* at 167–68.

[76] *Id.* at 150–51; *U.S. Inflation Rate, $500 from 1879 to 2020*, OFFICIAL DATA, https://www.officialdata.org/us/inflation/1879?amount=500 (last visited Mar. 1, 2020).

[77] *See* C. Peter Magrath, *Chief Justice Waite and the "Twin Relic":* Reynolds v. United States, 18 VAND. L. REV. 507, 519–20, 525 (1965) (describing the anti-Mormon atmosphere of the United States at the time *Reynolds* was decided as well as Chief Justice Waite's own hostility towards Mormons).

[78] *See id.* at 525 (explaining that Justice Waite also looked at the meaning of religious freedom under the First Amendment when deciding Reynolds).

In fact, Justice Waite knew that James Madison had drafted the Free Exercise Clause, that Madison had also authored the powerful *Memorial*, and that the *Memorial* had been "widely circulated and signed."[79] The *Memorial*, which stated that the right of "free exercise" is held "by the same tenure with all our other rights," is difficult to reconcile with consenting adults being criminally punished for practicing it.[80] How, then, did Justice Waite square this circle?

The answer to this question should have an air of familiarity. In a clever bit of judicial gymnastics, Justice Waite selectively chose to interpret the Free Exercise Clause, not through the *Memorial*, but through a much shorter, more ambiguous, and less relevant document: Thomas Jefferson's now-famous *Danbury*.[81] Justice Waite deferred to Jefferson as "an acknowledged leader of the advocates of the measure"[82]—Justice Waite apparently had too much integrity to write "*the* acknowledged leader"—and provided a now-famous quote from the already-terse *Danbury*:

> Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions . . . .[83]

As we have just noted, this statement was written several years after the Clause was adopted, by a man not the Clause's author.[84] Yet the Chief Justice bizarrely takes Jefferson's words to be "an authoritative declaration of the scope and effect of the [Free Exercise Clause]."[85] Not satisfied with aggrandizing this cherry-picked quotation, Waite then puts his own spin on Jefferson's words: in the Bill of Rights, Waite says, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions."[86]

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[79] *Reynolds*, 98 U.S. at 163–64.

[80] *Compare* MADISON, *supra* note 29, at 12 (declaring free exercise of religion to be of the same importance as all other human rights), *with Reynolds*, 98 U.S. at 150–51, 168 (upholding the conviction of a man found guilty of violating a statute for exercising his Mormon religious beliefs).

[81] *See Reynolds*, 98 U.S. at 164 (highlighting Justice Waite's argument that Thomas Jefferson's letter to the Danbury Baptist Association was an authoritative declaration of the meaning of the First Amendment).

[82] *Id.* at 164; *see also id.* ("[Mr. Jefferson's letter] may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured.").

[83] *Id.*

[84] *See supra* notes 26–28 and accompanying text.

[85] *Reynolds*, 98 U.S. at 164.

[86] *Id.*

For Waite to take *Danbury* as the authoritative commentary on the Free Exercise Clause is bizarre enough.[87] That Waite then proceeded to invert Jefferson's emphasis, however, is revealing. The whole point of Jefferson's original statement—"actions only, and not opinions"—was to emphasize that opinions are beyond the scope of the government's authority.[88] Jefferson nowhere suggested that the government had *carte blanche* power to regulate any religious action it disfavored.[89] Waite, however, takes the words "actions only" to mean *all* actions, and hence infers that the Clause protects "mere opinion"—*i.e.*, nothing.[90] A longer paper than this one might explore the irony of citing Thomas Jefferson to support criminalizing conduct engaged in by consenting adults.[91] Suffice it to say that Chief Justice Waite did not engage in a good faith analysis of the original intent of the Clause.[92]

Notably, according to Waite's reasoning, the opinion could have stopped at finding that polygyny was an action and thus unprotected. Yet Waite went a step further and specifically condemned polygyny, writing that it is "almost exclusively a feature of the life of Asiatic and of African people."[93]

Reynolds was the first in a series of anti-Mormon decisions spanning the next eleven years. The unifying theme of these opinions is transparent, *ad hoc* rationalization of the justices' desire to uphold anti-Mormon discrimination.[94] In *Davis v. Beason*—authored by Justice Stephen Field of *Pennoyer v. Neff*[95] fame—the Court upheld an Idaho law

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[87] *See* James J. Knicely, *"First Principles" and the Misplacement of the "Wall of Separation": Too Late in the Day for a Cure?*, 52 DRAKE L. REV. 171, 179–80 (2004) (explaining that Jefferson was in Paris during the debate over and subsequent adoption of the Free Exercise Clause—thus he is perhaps not the most authoritative source on the matter).

[88] *See* Jefferson, *supra* note 26, at 396–97 (claiming that opinions and belief are matters of religion which lie solely between man and God and legislative powers of government cannot reach them).

[89] *See id.* (explaining that there should be a high wall of separation between the church and State so government has no authority to regulate religion).

[90] *See Reynolds*, 98 U.S. at 164 (holding that Congress remains free to prohibit any action, but opinion is protected by the Free Exercise Clause).

[91] *See, e.g.*, Thomas Jefferson, *Extract from Thomas Jefferson's* Notes on the State of Virginia, MONTICELLO, http://tjrs.monticello.org/letter/2260 (last visited Feb. 16, 2020)

> ("The rights of conscience we never submitted, we could not submit. We are answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbour to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg.").

[92] *See id.* (explaining that even Jefferson desired to protect all actions that did not cause injury to others, not merely opinions).

[93] *Reynolds*, 98 U.S. at 164.

[94] *See* Magrath, *supra* note 77, at 520 (discussing the span of cases following *Reynolds* in which the Supreme Court repeatedly assaulted the Mormon religion).

[95] 95 U.S. 714, 719 (1878).

which made it categorically illegal for Mormons to vote.[96] Importantly, the Idaho law made no distinction between individual Mormons who engaged in polygyny and those who did not.[97] *Davis* thus put the lie to the anti-Mormon Court's apparent concern with separating "actions" from "mere opinion."[98] Although *Davis* claimed to be an extension of *Reynolds*, the Court's cases did not maintain any genuine test or principle aside from the demolition of all legal obstacles to the marginalization of Mormons.[99]

The culmination of the anti-Mormon cases, *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, concerned a virtual federal prohibition on Mormonism.[100] Under an 1887 Act, Congress had proclaimed that all Utah laws "incorporating the Church of Jesus Christ of Latter-Day Saints . . . are hereby disapproved and annulled"; it then directed the Attorney General of the United States to "forfeit and escheat to the United States" the property of the church.[101] That this act was questionable on federalism and Bill of Attainder grounds is beyond the scope of this paper. Suffice it to say that the free exercise question before the Supreme Court was the only one the Court had not answered: whether the Clause prevents the state from openly singling out and exterminating a church. It should go without saying that, if the Clause had the substantive power to prohibit a single governmental action, it should have been this one.[102]

The result should, by now, be unsurprising. In response to the church's argument that its property "was held for the purpose of religious and charitable uses," the Court reasoned that—while the church indeed existed for religious and charitable purposes—"the religious and charitable uses [which are] intended . . . are the inculcation and spread of the doctrines and usages of the Mormon Church[,]" a church that believes

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[96] Davis v. Beason, 133 U.S. 333, 333, 341, 348 (1890).

[97] *See id.* at 333 (stating that persons who commit the crime of polygamy as well as persons who are just members of any organization that teaches or encourages its members to commit the crime of bigamy are not allowed to vote).

[98] *Compare Reynolds*, 98 U.S. at 164 (emphasizing that opinions are protected by the Free Exercise Clause), *with Davis*, 133 U.S. at 333, 344, 348 (upholding a statute that restricted voting rights on the basis of not only criminal acts but also mere opinion or belief).

[99] *See Davis*, 133 U.S. at 341, 343–44 (citing *Reynolds* as pertinent but ignoring its application by holding that a law penalizing all Mormons, regardless of their actual participation in bigamy, is justified because "[f]ew crimes are more pernicious to the best interests of society and receive more general or more deserved punishment").

[100] 136 U.S. 1, 7 (1890).

[101] *Id.*

[102] *See* David R. Dow, *How Many Spouses Does the Constitution Allow One to Have?*, 20 CONST. COMMENTARY 571, 577–78 (2004) (recognizing that the consequence of the Supreme Court's decision in *Late Corp.* was to dissolve the Mormon Church); Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299, 300–01, 308–09 (1986) (explaining that the Free Exercise Clause was meant to give an absolute freedom but the Court only takes the Clause seriously when it protects the free exercise of religion as it relates to speech and assembly actions).

in polygyny.[103] The Court then launched into a fuming invective against Mormonism and polygyny which it is telling to quote at length:

> It is a matter of public notoriety that [the church's] emissaries are engaged in many countries in propagating this nefarious doctrine [of polygyny], and urging its converts to join the community in Utah. The existence of such a propaganda is a blot on our civilization. The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism.
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> . . . .
>
> It is unnecessary here to refer to the past history of the sect, to their defiance of the government authorities, to their attempt to establish an independent community, to their efforts to drive from the territory all who were not connected with them in communion and sympathy. The tale is one of patience on the part of the American government and people, and of contempt of authority and resistance to law on the part of the Mormons.[104]

To anyone with even a cursory awareness of Mormon history, the *hutzpah* of this final sentence is impressive. In 1838, Missouri's governor had ordered that Mormons "be treated as enemies and . . . be exterminated or driven from the state."[105] The same year, seventeen Mormons were massacred at Haun's Mill, including a 10-year-old boy who was shot execution-style in the head.[106] Joseph Smith himself was murdered by an angry mob while in police custody.[107] Even more ironic is the Court's boasting of "patience on the part of the American government" while legitimizing a bill of attainder annihilating the Mormon church.[108]

Whatever one's view of Mormon theology, the anti-Mormon cases should be viewed as a betrayal of the Constitution by any honest person, but especially by any American who believes—with Madison—in "allegiance to the Universal Sovereign."[109] *Reynolds* and its successors cut down every semblance of protection for the free exercise of religion, leaving other groups just as exposed as the Mormons they targeted.[110]

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[103] *Late Corp.*, 136 U.S. at 48.
[104] *Id.* at 48–49.
[105] *A Chronology of the Life of Joseph Smith*, 46 BYU STUD. 2, 100 (2007).
[106] JOHN G. TURNER, BRIGHAM YOUNG: PIONEER PROPHET 60 (2012).
[107] *Id.* at 107.
[108] *Late Corp.*, 136 U.S. at 49.
[109] MADISON, *supra* note 29, at 6.
[110] *See supra* notes 64–65 and accompanying text.

These cases deserve to be ranked alongside *Buck v. Bell*[111] and *Korematsu v. United States*[112] as injustices which should never be allowed to befall any minority again.[113]

Fortunately, under the Roberts Court's decisions, these miscarriages of justice could not reoccur today. Thanks to *Masterpiece Cakeshop*, we now know that the Free Exercise Clause affords a petitioner "an adjudication in which religious hostility on the part of the State itself would not be a factor."[114] In *Late Corporation*, in contrast, "religious hostility"[115] was the *stated basis* for both the congressional act in question and the Supreme Court decision upholding it.[116]

This poses a particular problem for *Smith* because the anti-Mormon cases constituted the essential precedential basis for Justice Scalia's legal conclusion.[117] We have already begun to raise the question of whether Scalia's opinion can be reconciled with the original intent of the Clause. A second question now presents itself: whether *Smith* can be sustained despite resting entirely on case law which contradicts the central theme of *Masterpiece Cakeshop*.[118]

IV. JEHOVAH'S WITNESSES

The Supreme Court did not wait for Chief Justice John Roberts before it began to repair the damage done by Chief Justice Morrison Waite. Beginning in the 1940s, Justice William O. Douglas led a successful crusade to revivify the Clause and return free exercise protection to its

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[111] 274 U.S. 200 (1927).

[112] 323 U.S. 214 (1944).

[113] *See Buck*, 274 U.S. at 207 (holding that the state could sterilize inmates determined to be feeble minded to prevent the birth of degenerate offspring); *Korematsu*, 323 U.S. at 224 (upholding an order demanding that individuals of Japanese descent leave their homes in California due to the ongoing war).

[114] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1724 (2018).

[115] *Id.* at 1724.

[116] *See* Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 45–46 (1990) (reflecting the government's disagreement with the Mormon church's doctrine of polygamy—despite the practice thereof by only a minority of members—as the driving force for the congressional act dissolving the church and seizing its property); *id.* at 48–49 (betraying the Court's religious hostility against the Mormon Church when the Court held that "[t]he organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism [and] contrary to the spirit of Christianity").

[117] *See* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 885 (1990) (concluding that the sounder approach in applying the Free Exercise Clause is the approach applied in *Reynolds*).

[118] *See Masterpiece Cakeshop*, 138 S. Ct. at 1724 (holding that the State violated the Free Exercise Clause by displaying an impermissible hostility toward the defendant's sincere religious beliefs).

substantive Madisonian roots.[119] Justice Douglas's notorious eccentricity apparently served him well on this front; Justice Douglas saw clearly that the Clause either protects disfavored religious practices or nothing at all.[120]

Justice Douglas's campaign scored a significant victory in *Murdock v. Pennsylvania*.[121] This case concerned itinerant Jehovah's Witnesses—it is typical for Free Exercise cases to concern controversial groups—traveling through the Keystone State.[122] Trekking from home to home, these wandering evangelists distributed religious literature in exchange for small contributions, though they also distributed the literature for free.[123] This caused the Witnesses to run afoul of a state law requiring all home-to-home salesmen to obtain a license by paying a licensing tax.[124]

From the outset, Justice Douglas's majority opinion made it clear that it was a radical departure from the anti-Mormon decisions.[125] Had Justice Douglas simply applied *Reynolds*, he would have stopped at noting that home-to-home evangelism is an "action" rather than an "opinion."[126] Instead, Justice Douglas began by inquiring into the religious history and nature of the action.[127] Quoting from Acts, Justice Douglas cited the fact that the Apostle Paul evangelized by traveling from home to home.[128] This fact, Justice Douglas seemed to suggest, showed that Jehovah's Witnesses' form of evangelism is rooted in an authentic religious tradition.[129]

Justice Douglas then cited historical evidence demonstrating that the distribution of religious tracts is a well-established part of the traditional domain of religion—"an age-old form of missionary evangelism—as old as

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[119] *See* Murdock v. Pennsylvania, 319 U.S. 105, 114, 117 (1943) (overruling restricting precedent to protect petitioners' free exercise of religion).

[120] *See id.* at 116 (explaining that the community may not suppress views because they are unpopular, and to deny a minority the right to exercise their faith is to repudiate the Bill of Rights itself).

[121] *See id.* at 117 (broadening free exercise rights by allowing evangelists to distribute religious literature unrestricted from previous unconstitutional restraints).

[122] *Id.* at 106.

[123] *Id.* at 107.

[124] *Id.* at 106–07.

[125] *See id.* at 108–110 (starting his opinion with the conclusion that the law was unconstitutional because it violated the Free Exercise Clause and emphasizing that, unlike the anti-Mormon decisions of *Reynolds* and *Davis*, the issue in this case did not question the integrity of religious conduct).

[126] *See* Reynolds v. United States, 98 U.S. 145, 164 (1879) (holding that Congress has legislative power over an individual's faith and religious worship if such worship is exemplified by an action versus an opinion).

[127] *See Murdock*, 319 U.S. at 108 (explaining that the action of spreading religious literature is thought to originate from Jesus's command in the Bible to go into all the world and spread the gospel).

[128] *Id.* at 108 ("They claim to follow the example of Paul, teaching 'publickly, and from house to house.'").

[129] *Id.* at 109.

the history of printing press."[130] Justice Douglas concluded that the practice of distributing tracts from home to home is a "form of religious activity [which has] the same high estate under the First Amendment as . . . worship in the churches and preaching from the pulpits."[131] *Murdock* is therefore a decisive return to Madison's conviction that the right of free exercise is held by the "same tenure with all our other rights."[132]

Murdock does not grant categorical protection to religious rites, ceremonies, or other actions:[133] the opinion protects home-to-home evangelism only after establishing its religious history and centrality: the state "may not prohibit the distribution of handbills in the pursuit of a clearly religious activity."[134] Even this limited protection for certain "clearly religious activity,"[135] however, is plainly incompatible with *Reynolds*' assertion that the Clause protects "mere opinion" rather than activity.[136] *Murdock* therefore detonates the basic premise of the anti-Mormon cases.

V. CONTRADICTION BETWEEN MURDOCK AND REYNOLDS

Did *Murdock* overturn *Reynolds* and *Davis*? The Court seemed to suggest that it did not. Not all conduct can be made a religious rite, Justice Douglas wrote—and *Reynolds* and *Davis* correctly declined to protect Mormon polygyny.[137] Justice Douglas's opinion, however, fails to engage directly with the reasoning in the anti-Mormon opinions.[138] The anti-Mormon decisions were not based on the idea that polygyny fell outside some limited subset of protected actions: instead, they took it as their premise that *no* actions are protected.[139] In contrast, *Murdock* states that traditional and central activities—including "worship in the

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[130] *Id*. at 108.

[131] *Id*. at 109.

[132] MADISON, *supra* note 29, at 12.

[133] *See Murdock*, 319 U.S. at 110 ("We only hold that spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types.").

[134] *Id.* at 111 (quoting Jamison v. Texas, 318 U.S. 413, 417 (1943)).

[135] *Id.* at 111.

[136] Reynolds v. United States, 98 U.S. 145, 164 (1879).

[137] *Murdock*, 319 U.S. at 109–10.

[138] *See id.* at 110 (mentioning only briefly that the anti-Mormon opinions were not being overturned and then continuing to the holding).

[139] *See Reynolds*, 98 U.S. at 164 (holding that beliefs are protected, but actions are not); Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 46–49 (1890) (condoning government action that effectively shut down the Mormon Church even though the church had other religious practices beyond its polygamy doctrine and despite the fact that a majority of the members did not practice polygamy).

churches;" "distribution of religious literature;" and "personal visitations"—are accorded a "high estate under the First Amendment."[140] Needless to say, these physical activities are not the "mere opinion" *Reynolds* purported to leave under the protection of the Clause.[141]

A lawyer considering bringing a free exercise claim in the 1940s must have been at least somewhat vexed upon confronting two Supreme Court cases—both apparently good law—locked in fundamental logical conflict. Although the lawyer could cite *Murdock* for the proposition that core religious activities are protected, his opponent could retort that *Murdock* had reiterated the validity of *Reynolds*—a case which clearly asserted that no religious activities are protected.[142] It would have been possible, however, to propose a unifying interpretation of both cases: that is, the Court understood that it was preserving only the *results* of *Reynolds* and *Davis* while rejecting their essential rationale.

In fact, short of explicitly overturning *Reynolds*, Justice Douglas's opinion did everything possible to sound the death knell of the anti-Mormon cases. *Murdock* goes so far as to clarify that the Clause will protect a specific religious act even where the act is validly prohibited by a generally applicable law.[143] Put differently, the "constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books."[144] This is not to say, of course, that Jehovah's Witnesses would be exempt from generally applicable laws *in all contexts*—but "[i]t is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon."[145] Pennsylvania could require that door-to-door salesmen pay a licensing fee: it simply could not apply that law to Jehovah's Witnesses engaged in a core religious practice.[146]

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[140] *Murdock*, 319 U.S. at 109–10.

[141] *Reynolds*, 98 U.S. at 164.

[142] *See Murdock*, 319 U.S. at 109–10 (citing to the holding of *Reynolds*, which prohibited the practice of polygamy and signaled that future similar claims may deserve the same outcome); *Reynolds*, 98 U.S. at 166–67 (holding that it is irrelevant if an individual's belief is tethered to his religion because the Court will not place religious belief above the law).

[143] *See Murdock,* 319 U.S. at 110 ("Nor is there involved here any question as to the validity of a registration system for colporteurs and other solicitors. The cases present a single issue—the constitutionality of an ordinance which as construed and applied requires religious colporteurs to pay a license tax as a condition to the pursuit of their activities."); *id.* at 110–11 (quoting Jamison v. Texas 318 U.S. 413, 417 (1943)) (stating that the government can prohibit "the distribution of purely commercial leaflets" but not "the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite [some commercial activity, such as book sales or fund raising].").

[144] *Id.* at 111.

[145] *Id.* at 112.

[146] *Id.* at 110–11 (quoting *Jamison* 318 U.S. at 417).

The motive behind Justice Douglas's focus on this distinction lay in a powerful insight: Often, generally applicable laws are exactly the kinds of laws that majorities are likely to use to marginalize religious minorities.[147] It therefore makes little sense to end the analysis on the note that a statute does not advertise its malice towards the religious believers it affects.

VI. SEVENTH-DAY ADVENTISTS

Justice Douglas's most well-known development of this argument occurs twenty years later—in his concurring opinion in the famous *Sherbert v. Verner* decision.[148] Although the fame of *Sherbert* has eclipsed its predecessor, giving its name to the whole era of late-20th century free exercise cases, it appears to import its reasoning from *Murdock*, making Justice Douglas the intellectual grandfather of this line of decisions.[149]

Sherbert, once again, concerned a controversial religious group: Seventh-day Adventists.[150] The case centered on Adeil Sherbert, who was fired from her job because she would not work on Saturdays, the Sabbath of Seventh-day Adventism.[151] Upon applying for unemployment benefits, Sherbert was denied compensation on the grounds that her Sabbatarianism amounted to a disqualifying refusal to accept work.[152] At oral argument before the Supreme Court, the government urged that its policies were "secular in aim" and, therefore, that "if there is any resulting burden upon any exercise of religion as claimed by this appellant, that is an indirect burden which must be borne and which . . . is not constitutionally objectionable."[153]

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[147] *See id.* at 112, 113 (explaining that although a license tax could be generally applicable, imposing such a tax would destroy First Amendment protections because it would tax preachers for delivering sermons).

[148] *See* 374 U.S. 398, 411–12 (1963) (Douglas, J., concurring) (opining that the First Amendment prohibits the government from forcing individuals to surrender their religious scruples or conscience; thus, a Sabbatarian could not be compelled to follow the majority community's practice of working on a Saturday); Alfred G. Killilea, *Privileging Conscientious Dissent: Another Look at* Sherbert v. Verner, 16 J. CHURCH & ST. 197, 198 (1974) (noting *Sherbert* as an important decision in constitutional law).

[149] *See Sherbert*, 374 U.S. at 402 (stating that one of the reasons the Free Exercise Clause is protected against government regulation is due to rulings such as *Murdock*); *see* Killilea, *supra* note 148, at 198 (recognizing *Sherbert*'s momentous implications regarding freedom of conscience).

[150] *Sherbert*, 374 U.S. at 399.

[151] *Id.*

[152] *Id.* at 398–401 ("[A] claimant is ineligible for benefits '[i]f . . . he has failed, without good cause . . . to accept available suitable work when offered him by the employment office or the employer.'").

[153] Transcript of Oral Argument at 21, *Sherbert*, 374 U.S. 398 (1963) (No. 526).

The Court disagreed. Writing for the majority, Justice William Brennan incisively observed that:

> [Sherbert was forced] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.[154]

As already noted, the Court's reasoning in *Sherbert* is essentially an application or extension of its reasoning in *Murdock*.[155] The case's fame, however, may come from its development of the test which the government must overcome in order to infringe upon free exercise rights.[156] While *Murdock* had hinted at a specific test,[157] *Sherbert* gives one straightforwardly: the question is "whether some compelling state interest enforced in the eligibility provisions . . . justifies the substantial infringement of appellant's First Amendment right."[158] Put differently, the government must have a "paramount interest."[159]

The Court found that the government did not have any paramount interest in forcing Adeil Sherbert to work on Saturdays.[160] Interestingly, the state did attempt to proffer such an interest: a concern about "unscrupulous claimants feigning religious objections."[161] If Adeil Sherbert is allowed unemployment benefits, in other words, then the Court will have ushered in a cacophony of crazy free exercise claims.

This proffered "interest" is especially relevant to our own free exercise debate, for it is now a common legal argument against free exercise protection. Exempt one religious practice from the law, the argument goes, and you will open the courts to litigants who claim to be ministers of marijuana or to revere running red lights. To

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154 *Sherbert,* 374 U.S. at 404.

155 *See id.* at 402 (relying on cases like *Murdock* in support of extending Free Exercise protection against any government regulation imposed upon religious beliefs).

156 *See id.* at 402, 406 (listing examples of government regulations that have infringed upon individuals' First Amendment rights and creating the standard government regulations must satisfy in order to justify such infringement).

157 *See* Murdock v. Pennsylvania, 319 U.S. 105, 116 (1943) ("Furthermore, the present ordinance is not narrowly drawn to safeguard the people of the community in their homes against the evils of solicitations.").

158 *Sherbert,* 374 U.S. at 406.

159 *Id.* (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

160 *Id.* at 407.

161 *Id.*

take a prominent example, 2016 Libertarian Party nominee Gary Johnson—perhaps the first American presidential candidate to openly oppose the very idea of religious freedom[162]—argued that, if the government allowed a wedding photographer to decline to photograph a same-sex wedding, it would have to allow Mormons to "shoot somebody else because their freedom of religion says that God has spoken to them and that they can shoot somebody dead."[163]

Of course, in response to Gary Johnson's hypothetical, we might suggest that the government has at least a fairly compelling interest in preventing murder. More importantly, the *Sherbert* Court saw no reason to think that a petitioner would even get his foot in the door with any of the absurd hypothetical arguments that detractors of religious freedom conjure up.[164] Justice Brennan wrote that "there is no proof whatever to warrant such fears of malingering or deceit as those which the respondents now advance."[165] Even if there were evidence of this kind, he adds, "it is highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties."[166]

VII. THE HISTORICAL THREAT OF "GENERALLY APPLICABLE LAWS"

The ageless Justice William O. Douglas—speaking as forcefully in defense of the Clause two decades later as he had in *Murdock*—penned a persuasive and significant concurrence to *Sherbert*.[167] Still guiding the free exercise doctrines that he had cultivated in the 1940s, Justice Douglas pointed out that people of all faiths have "religious scruples" that compel them to take certain actions.[168] A Muslim must pray five times a day, a Sikh must carry a kirpan, and a Buddhist must not eat meat.[169] Of

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[162] Timothy P. Carney, *Gary Johnson: 'Religious Freedom, As a Category' Is a 'Black Hole'*, WASH. EXAMINER (July 28, 2016, 6:38 PM), https://www.washingtonexaminer.com/gary-johnson-religious-freedom-as-a-category-is-a-black-hole ("[I]if we pass a law that allows for discrimination on the basis of religion—literally, we're gonna open up a can of worms . . . . I just see religious freedom, as a category, as just being a black hole.").

[163] *Id.*

[164] *See Sherbert*, 374 U.S. at 407 ("[S]uch fears of malingering or deceit [are unwarranted.] Even if consideration of such evidence is not foreclosed by the prohibition against judicial inquiry into the truth or falsity of religious beliefs, . . . it is highly doubtful whether such evidence [amounts to] substantial infringement of religious liberties.").

[165] *Id.*

[166] *Id.*

[167] *Id.* at 410–11 (Douglas, J., concurring).

[168] *Id.*

[169] *See id.*

("Religious scruples of Moslems require them to attend a mosque on Friday and to pray five times daily. Religious scruples of a Sikh require him to carry a regular or a symbolic sword. Religious scruples of a Jehovah's Witness teach him

course, Justice Douglas does not conclude—with modern critics of the Clause—that religious freedom should therefore be abolished as unworkable. On the contrary: Justice Douglas says that these examples "show that many people hold beliefs alien to the majority of our society—beliefs that are protected by the First Amendment but which could easily be trod upon under the guise of 'police' or 'health' regulations reflecting the majority's views."[170]

In historical terms, Justice Douglas's concern is more than warranted. Generally applicable police regulations seem to be the favored—or at least the normal—method for persecuting unpopular religious minorities.[171] Most ancient Roman persecution of Christians, for example, was not cast in terms of the authorities' particular malice towards Christians, but as legal punishment for Christians' refusal to obey generally applicable laws.[172]

Before the execution of Polycarp, a student of the disciple John, Greek officials were bewildered at Polycarp's stubbornness.[173] As they saw things, Polycarp was not being called upon to renounce his faith.[174] Polycarp's life might have been spared if he had simply sworn upon Caesar and the gods of the state: practices expected of all Roman citizens.[175] From the imperial perspective, this would not have amounted to a renunciation of Polycarp's own religion. "What harm is there," Polycarp was asked "in

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> to be a colporteur, going from door to door, from town to town, distributing his religious pamphlet. Religious scruples of a Quaker compel him to refrain from swearing and to affirm, instead. Religious scruples of a Buddhist may require him to refrain from partaking of any flesh, even of fish.")

(internal citations omitted).

[170] *Id.* at 411.

[171] *See A Closer Look at How Religious Restrictions Have Risen Around the World,* PEW RES. CTR (July 15, 2019), https://www.pewforum.org/2019/07/15/a-closer-look-at-how-religious-restrictions-have-risen-around-the-world/ (describing restrictions placed on religious freedom, particularly the freedom of religious minorities, by government laws and policies).

[172] *See* Adolf Berger, *Encyclopedic Dictionary of Roman Law*, TRANSACTIONS AM. PHIL. SOC'Y 333, 388 (1953) (explaining that refusal to take part in praising other gods made Christians enemies of the State).

[173] 1 ANTE-NICENE FATHERS: THE WRITINGS OF THE FATHERS DOWN TO A.D. 325, at 41 (Alexander Roberts & James Donaldson eds., Hendrickson Publishers, Inc. 1995) (1885) [hereinafter ANTE-NICENE FATHERS].

[174] *See id.* at 40 (stating that Irenarch Herod and Nicetes attempted to persuade Polycarp that he was simply required to address Caesar as Lord Caesar and to sacrifice to him as with other similar ceremonies).

[175] *See id.* (discussing the varying punishments the proconsul threated upon Polycarp unless he repented).

saying, 'Lord Caesar,' and in sacrificing, with the other ceremonies observed on such occasions, and so make sure of safety?"[176]

In the early second century, the Roman author Celsus ended the first book-length attack on Christianity by calling for the systematic murder of Christians, including Christian children—who should not even be "permitted to live until marriageable age."[177] Yet Celsus claimed to have no particular antipathy towards Jesus of Nazareth *per se*: in fact, he did not deny that Jesus truly performed miracles.[178] Rather, Christians should be exterminated only "[i]f they persist in refusing to worship the various gods who preside over the day-to-day activities of life."[179] Anti-Christian persecutors generally did not see themselves as persecuting Christians because they were Christian, but because Christians transgressed the uniform behavioral standards of a civilized society.[180]

If Roman courts had applied United States' constitutional law as it stood in 1890, the official slaughter of Christians would not have violated the Free Exercise Clause as such.[181] The Romans sought to compel behavior abhorrent to the Christian faith but did not purport to regulate anyone's "mere opinion" that Christianity was abstractly true.[182]

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[176] *See id.* at 240–41 (stating, in addition, that Polycarp was also denounced as "the teacher of Asia, the father of the Christians, and the overthrower of our gods, he who has been teaching many not to sacrifice, or to worship the gods.").

[177] CELSUS, ON THE TRUE DOCTRINE: A DISCOURSE AGAINST THE CHRISTIANS 119 (R. Joseph Hoffman trans., Oxford Univ. Press 1987).

[178] Michael Bland Simmons, *Graeco-Roman Philosophical Opposition*, *in* 2 THE EARLY CHRISTIAN WORLD 840, 851–52 (Philip F. Esler ed., 2000) (ebook).

[179] CELSUS, *supra* note 177, at 122.

[180] *See id.* at 122 (supporting the notion that refusing to worship the various societally accepted gods was a uniform behavioral standard).

[181] *See* Frank J. Conklin & James M. Vaché, *The Establishment Clause and the Free Exercise Clause of the Washington Constitution—A Proposal to the Supreme Court*, 8 U. PUGET SOUND L. REV. 411, 429–30 (1985) (stating that unlike the current conception of separation of church and state, in 1890, the Free Exercise Clause guaranteed absolute freedom of belief, but "[i]f a substantial number of fellow citizens [were] annoyed by this belief," the courts could criminally prosecute adherents of such faith or even abolish a church altogether); G. E. M. de Ste. Croix, *Why Were the Early Christians Persecuted?*, 26 PAST & PRESENT 6, 9–10 (1963) (elucidating the time periods during which Christians were subjected to Roman courts and the particular charges that they faced).

[182] *Compare* ANTE-NICENE FATHERS, *supra* note 173, at 41 (illustrating, in the example of the martyrdom of Polycarp, the Roman perception that the worship of Caesar and uniformly accepted gods should not conflict with Christian practice and doctrine), *and* CELSUS, *supra* note 177, at 122 (describing the various religious, familial, and economic regulations under which Christians should be accountable within Roman society), *with* Reynolds v. United States, 98 U.S. 145, 164 (1879) (holding that Congress is not able to regulate pure religious opinion).

Christians were even free to think that worshipping Caesar and the official gods was abhorrent—so long as they did not defy the law.[183]

Of course, even to imagine some discrete distinction between thought and action is to misconceive the very essence of Christianity; "faith by itself, if it does not have works, is dead."[184] This underscores Justice Douglas's point: unpopular religious groups "could easily be trod upon" by general police powers precisely because any coherent worldview involves action as well as thought.[185] Perhaps more than any other single justice, William O. Douglas worked to ensure that these religious groups enjoyed the rights the Framers intended.[186]

Yet Justice Douglas's work, begun in 1943, would not survive the 20th century.[187] In 1990, the Free Exercise Clause encountered the most effective opponent it has ever had: a young justice named Antonin Scalia.

VIII. A SURPRISE ATTACK ON FREE EXERCISE

For a case that announced the *de facto* elimination of a constitutional right, *Smith* began innocuously enough. The case's two respondents were members of the Native American Church, a religious group that followed traditional tribal religious practices including ritual peyote use.[188] When the respondents' private employer learned that the respondents had used peyote outside of work, they were fired. The respondents applied for public unemployment benefits, but they were turned away because—like Adeil Sherbert—the Employment Division deemed their religious practice to be "misconduct."[189]

In 1990, when the case was brought before the United States Supreme Court, few could have predicted that it would herald the total death of the Clause's substantive power. The most likely result was that the Court would simply hold—as it had in other cases since *Sherbert*—that the government had a paramount interest in prohibiting

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[183] *See* CELSUS, *supra* note 177, at 122 (listing proposed legal punishments of Christians, given their persistent refusal to worship Caesar and the other official gods).

[184] *James* 2:17 (New King James Version).

[185] Sherbert v. Verner, 374 U.S. 398, 411 (1963) (Douglas, J., concurring).

[186] *See* M. Charles Wallfisch, *William O. Douglas and Religious Liberty*, 58 J. PRESBYTERIAN HIST. 193, 193, 195 (1980) (noting Justice Douglas's strong support of religion and discussing his opinions concerning the Establishment Clause and public schools); Zorach v. Clauson, 343 U.S. 306, 313–14 (1952) (stating that American institutions presuppose a belief in God and that both the unfettered freedom to hold religious beliefs as well as states' cooperation with religious groups represent admirable American traditions).

[187] *See* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1990) (holding that Oregon could, pursuant to the Free Exercise Clause, deny respondents' unemployment compensation for peyote use, which they used in conjunction with their religious beliefs).

[188] *Id.* at 874.

[189] *Id*.

the disputed conduct.[190] Justice Scalia, who was writing for the majority, could easily have held that the government had a paramount interest in prohibiting the use of controlled substances like peyote.[191]

The Oregon Employment Division itself only expected the Court to hold that the claimants failed the *Sherbert* test.[192] In keeping with *Murdock*, the Division's brief even argued that peyote use was neither a historical nor central practice in traditional American Indian religion.[193] Neither party had any notion that they were effectively arguing over whether the Free Exercise Clause should even exist. The Employment Division was quick to concede that "[u]nder settled free exercise principles, the [F]irst [A]mendment protects religious actions as well as religious beliefs" but noted that such "protection is not absolute."[194] Oregon simply wished to establish that drug use fell outside the set of protected actions.[195]

Scalia, however, had a more ambitious end in mind: gutting the Clause of all substantive legal meaning. First Amendment scholars have since emphasized that Scalia's theory of the Free Exercise Clause was never briefed or argued before it was made law.[196] S*mith,* then, did not simply kill the Free Exercise Clause—it assassinated it in a night attack.

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[190] *See id.* at 899 (O'Connor, J., concurring) (stating that consistent precedent looks at an "overriding governmental interest" or "the least restrictive means" of achieving it); Bowen v. Roy, 476 U.S. 693, 728 (1986) ("Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms . . . ."); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.").

[191] *See Smith*, 494 U.S. at 899 (O'Connor, J., concurring) (emphasizing that, in contrast to Justice Scalia's majority holding concerning a neutral law of general applicability, the viable test that should have been applied is to ask whether government regulation is the least restrictive means to achieve the respective state interest.).

[192] *See* Brief for Petitioners at 11–12, *Smith*, 494 U.S. 872 (No. 88-1213), 1989 WL 1126854, at **11–12 (discussing the fact that while the Constitution provides expansive protection for the right of religious belief and opinions, religious conduct has been regulated according to public interests important enough to be societally compelling).

[193] *See* Reply Brief for Petitioners at 9–10, *Smith*, 494 U.S. 872 (No. 88-1213), 1989 WL 1126854, at **9–10 ("There is no evidence of any extensive, indigenous use of peyote by Native Americans. Instead, peyote and its long tradition of religious use are primarily traceable to Mexico, where peyote and other psychoactive plants grow in abundance and have long been integrated into religious beliefs.").

[194] Brief for Petitioners, *supra* note 192, at 5.

[195] *See id.* ("Government cannot accommodate religious beliefs by exempting religiously motivated drug use from its regulations without seriously compromising its compelling interests.").

[196] *See* Brief of Christian Legal Soc'y et al. as Amici Curiae in Support of Petitioners at 35, Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n, (No. 16-111) (Sept. 7, 2017) ("As Justice Souter once explained, there are many reasons to reconsider this part of *Smith*, beginning with the fact that the rule there announced was neither briefed nor argued.").

IX. THE SMITH OPINION

After laying out the facts of the case, Scalia began his analysis with a statement of the law which—at least on its face—is strikingly false: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[197] The reader should, by now, be aware of the spurious nature of this assertion. The *Murdock* Court, for one, took it as a given that the law at issue was otherwise valid, saying that there was no question "as to the validity of a registration system for colporteurs and other solicitors."[198] Rather, the Court said that core religious conduct is judged by a categorically different standard than non-religious commercial activity.[199]

Scalia was not unfamiliar with these cases—in fact, he cited *Murdock*.[200] Yet Scalia was ready to explain *Murdock* and similar cases away, writing—a few pages later—that:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections . . . .[201]

In other words, says Scalia, the Free Exercise Clause is enforceable in Court only when some case presents a "hybrid situation" which violates multiple rights simultaneously.[202]

There are at least three essential problems with this explanation. The first is that it flatly contradicts, rather than clarifies, Scalia's statement that religion was "never" created as an exception to any valid law.[203] Observing that religious exceptions only under other clauses in the Bill of

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[197] *Smith*, 494 U.S. at 878–79.

[198] Murdock v. Pennsylvania, 319 U.S. 105, 110 (1943).

[199] *See id.* at 111 ("Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way. As we have said, the problem of drawing the line between a purely commercial activity and a religious one will at times be difficult.").

[200] *Smith*, 494 U.S. at 881.

[201] *Id.*

[202] *See id.* at 882 (holding that the case at bar did not present a hybrid situation, in which a free exercise claim was connected with a communicative activity, parental right, or freedom of association claim, that the court would recognize as an enforceable free exercise claim).

[203] *See id.* at 878–79 (stating that the Court has never held that an individual's religious beliefs excuses such individual from being bound under an otherwise valid law).

Rights is a logical negation—not a qualification—of the statement that the Court has "never held" that any religious exception exists.[204]

The second problem with the explanation is that it is a kind of historical fiction. In the cases that Scalia is explaining away, the Court certainly did not understand itself to be creating some mysterious "hybrid situation" requirement.[205] On the contrary, the *Murdock* Court affirmed that religious exercise has a "high estate under the First Amendment."[206] If the Free Exercise Clause has judicial meaning only in conjunction with some other enumerated right—if it has, in other words, no actual power—then its estate is nominal only.[207] Justice Scalia, not content to admit directly that he had just uprooted all free exercise jurisprudence since the 1940s, therefore invented an original test—one that the authors of prior decisions did not and could not imagine—and projected it back into history.

Thirdly, and most importantly, Justice Scalia's invention of this *hybrid situation* requirement is a misconception—so gross as to appear deliberate—of the way the Bill of Rights is meant to work.[208] The Ninth Amendment alone shows that the Framers were concerned that the Bill of Rights would be read as eliminating rights it did not enumerate.[209] *A fortiori*, it is unimaginable that the Framers would have felt that an *enumerated* right afforded *no protection* unless a party could satisfy a bizarre *hybrid situation* test.[210] Even before Justice Scalia had begun to explicitly overturn precedent, *Smith*'s reasoning was ahistorical and

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[204] *Id.* This is like saying that no mammal has ever laid an egg and that the platypus and echidna are the only mammals which have done so.

[205] *See id.* at 882 (distinguishing *West Virginia Board of Education v. Barnette, Roberts v. United States Jaycees*, and *Wooley v. Maynard* from the present case because *West Virginia Board of Education* and *Wooley*, while "decided exclusively upon free speech grounds, . . . also involved freedom of religion").

[206] Murdock v. Pennsylvania, 319 U.S. 105, 108–09 (1943).

[207] *See* Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 89–90 (1996) (highlighting that the Court's opinion in *Smith*, which was penned by Justice Scalia, concerned conjunctive rights and made it appear that only religiously targeted and non-neutral legislation will continue to be prohibited under the Free Exercise Clause).

[208] *Smith*, 494 U.S. at 892, 902–03 (O'Connor, J., concurring) (criticizing the majority opinion, stating that the majority's holding effectively denigrates the purpose of the Bill of Rights in protecting the enumerated rights of individuals).

[209] *See* U.S. CONST. amend. IX. (clarifying that the fact that a right is or is not enumerated in the Constitution should not be construed, by implication, to eliminate a right that would otherwise be maintained by the people).

[210] *See* MADISON, *supra* note 29 at 12 (stressing the importance of the First Amendment Free Exercise Clause and emphasizing that the rights protected by the Free Exercise Clause should be treated with equal protection with respect to other constitutionally protected rights).

contrived.[211] If a right is enumerated in the Constitution, it cannot be there for any reason except to ensure that it would have concrete power.[212]

After putting this novel spin on *Murdock*, Justice Scalia proceeded to re-center free exercise law on the anti-Mormon canon of the late 19th century.[213] Justice Scalia interprets these cases in light of language used by Justice Stevens in a 1982 concurring opinion, saying that where there is a "valid and neutral law of general applicability," no free exercise question arises.[214]

The implications of this statement are remarkable. On the one hand, the government could not pass a law directly banning Islam or Judaism—such a law would not be *neutral* towards religion.[215] Yet Scalia's language leaves little doubt that—without running afoul of the Free Exercise Clause—the government could mandate that all Americans eat pork. Provided the law will is neutral and of general applicability, no free exercise question will exist. Inevitably, Scalia announced that—although the Court had done so in the past—the Court would no longer apply *Sherbert* to such cases.[216] The fact that the Court had ever done so, he explained, was contrary to "constitutional tradition and common sense."[217]

Not content to nullify the *Sherbert* test, Justice Scalia then went on to clarify that the test would not apply even to "central" religious actions.[218] Justice Scalia's meaning here is clear: even *Murdock*—with its concern for the traditional and central nature of "clearly religious activity"—will no longer show its face in court.[219] It is as if Justice Scalia,

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[211] *See Smith*, 494 U.S. at 892 (O'Connor, J., concurring) (stating that the majority's categorical rule reflected a strained reading of the First Amendment and disregarded previous free exercise doctrine precedent involving generally applicable regulations burdening the religious expression or conduct).

[212] *See* MADISON, *supra* note 29, at 12 (stressing the importance of respecting both the rights provided under the First Amendment Free Exercise Clause and other Constitutionally protected rights).

[213] *See Smith*, 494 U.S. at 879 (quoting *Reynolds*, which concerned the issue of polygamy, and in which the Court repeated that "'Laws,' we said, 'are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.").

[214] *Id.* (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

[215] *See id.* at 881 (stating that the only types of cases where the First Amendment Free Exercise Clause would prohibit the uniform application of a neutral law of general applicability are cases of conjoined rights that possess constitutional protections).

[216] *See id.* at 884 (explaining that the *Sherbert* test would only be applied in the unemployment compensation context).

[217] *Id.* at 885.

[218] *Id.* at 886.

[219] *See* Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943) (holding that the distribution of handbills in the form of clearly religious activity may not be prohibited even if it promotes religious fundraising or the purchase of books because the activity invites better understanding of religion).

having razed the Free Exercise Clause to the ground, had now sowed the ground with salt.

Justice Sandra Day O'Connor authored a passionate and frustrated concurring opinion excoriating Justice Scalia's reasoning.[220] Justice Brennan—free exercise ally of the late Justice Douglas—predictably joined her.[221] A centerpiece of Justice Douglas's legacy, constructed over decades of service, had been suddenly undone by the arsonist Jacobinism of the young Justice Scalia—a justice who had been on the Court for only four years.

In a final insult, Justice Scalia opined that religious liberty could be adequately protected by the "political process."[222] Because our society believes in protecting religious belief, Justice Scalia wrote, it can be "expected to be solicitous of that value in its legislation as well."[223] In retrospect, the apparent naiveté of this statement requires no comment. It is worth asking, however, how anyone could read a single page of human history and conclude that governments are fond of accommodating unpopular religious minorities through the political process.

It is worth taking a moment to review the readily-apparent juridical faults in *Smith*. *Smith*'s conclusion was never tested by adversarial argument.[224] The decision lacked real precedential support outside of the anti-Mormon cases, which had been largely vitiated in the intervening decades; something Oregon itself understood.[225] *Smith* had no support

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[220] *See Smith*, 494 U.S. at 892 (O'Connor, J., concurring)
("The Court today extracts from our long history of free exercise precedents the single categorical rule that 'if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.' . . . Indeed, the Court holds that where the law is a generally applicable criminal prohibition, our usual free exercise jurisprudence does not even apply. To reach this sweeping result, however, the Court must not only give a strained reading of the First Amendment but must also disregard our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct." (citations omitted)).

[221] *See id.* at 891 (Brennan, J., concurring in part) ("Although Justice Brennan . . . join[s] Parts I and II of this opinion, [he does] not concur in the judgment.").

[222] *See id.* at 890 (stating that even though a value may not be protected from government interference under the Bill of Rights, it may be protected through the political process).

[223] *Id.*

[224] *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1113–14 (1990) (stating that neither party in *Smith* had requested the Court, whether in oral argument or in their briefs, to revisit the free exercise doctrine, and the Court had not requested briefing or argument on the matter).

[225] *See* Bradley P. Jacob, *Free Exercise in the "Lobbying Nineties"*, 84 NEB. L. REV. 795, 809–10 (2005) (explaining how many expected the *Smith* Court to adhere to the well-established compelling state interest and least restrictive means doctrine and asserting that the Court's new neutral law of general applicability approach "gave every indication of being a radical departure from established law"); Murdock v. Pennsylvania, 319 U.S. 105,

whatsoever in the text and intent of the First Amendment.[226] Justice Scalia, far from reasoning from a "textualist" or "originalist" standpoint,[227] did not dare attempt to synthesize the Clause itself with *Reynolds*.[228] It is no exaggeration to say that *Smith* simply ignores the wording and purpose of the Clause; in reading the decision, one could be forgiven for forgetting that the Clause itself even exists. Instead, the decision turns largely upon "common sense": in other words, upon the kind of protection which made sense to Justice Scalia and to the justices who joined his majority opinion, namely, Chief Justice Rehnquist and Justices White, Stevens, and Kennedy.[229]

In negative terms, the decision contradicted sixty years of precedent going back to *Murdock*, the Framers' intent in ratifying the Clause, and Madison's object in drafting it.[230] Justice Scalia's opinion was even contrary to bare textualism.[231] The Free Exercise Clause is, after all, not called the "Free Thought Clause." The Clause pointedly refers to "free exercise" of religion rather than to "mere religious belief," as *Reynolds* did.[232] If the Framers had intended only to protect silent thoughts—secretly entertained in the shadows of dark rooms—then they presumably would not have used the word "exercise" to describe the object of their protection.

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109 (1943) (departing from the *Reynolds* Court's understanding that the Clause protects opinion rather than action and holding that religious activity can be protected under the Clause); Sherbert v. Verner, 374 U.S. 398, 402 (1962) (extending Free Exercise protection to government regulations on religious activity); Brief for Petitioners, *supra* note 192, at 11–12 (recognizing that though religious conduct is subject to government regulation, religious conduct can be protected under the Free Exercise Clause).

226 *See Smith*, 494 U.S. at 891 (O'Connor, J., concurring) (asserting that the holding in *Smith* diverges from First Amendment precedent and undercuts a commitment to religious liberty).

227 *See* Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution"*, 72 IOWA L. REV 1177, 1180, 1187 (1987) (explaining the meaning of originalism and textualism).

228 *Compare* U.S. CONST. amend. I (barring Congress's ability to make laws that infringe on free exercise of religion), *with* Reynolds v. United States, 98 U.S. 145, 166 (1879) (recognizing that, at times, laws may interfere with religious practices).

229 *See Smith*, 494 U.S. at 885 (holding that it is common sense for the State to be allowed to regulate conduct that is socially detrimental, even if such conduct may coincide with a religious belief, under a more lenient standard of scrutiny).

230 *See id.* at 892–93 (O'Connor, J., concurring) (stating that the majority rule, as elucidated by Justice Scalia, is contrary to precedent and requires a warped reading of the First Amendment).

231 *See id.* at 893 (stating that conduct motivated by sincere religious belief should likely be protected by the First Amendment given the lack of distinction between religious belief and religious conduct in the First Amendment's text).

232 *Compare* U.S. CONST. amend. I (stating that Congress does not have the authority to make laws concerning the free exercise of religion), *with Reynolds*, 98 U.S. at 166 (stating that laws may, in certain circumstances, interfere with religious practices).

This is no mere hypothetical, for the Framers—as we have already seen—considered and rejected drafts of the First Amendment which lacked clear free exercise protection. At any rate, Justice Scalia's reasoning would not pass muster even as statutory analysis; courts interpreting statutes assume that the legislature carefully chose the words used in the statute.[233] *A fortiori*, the Supreme Court should be at least as faithful in interpreting the words of the Constitution.

X. THE ACLU'S DEFENSE OF *SMITH*

There is not space here for a full exploration of the immediate legislative reaction to *Smith*. Suffice it to say that there quickly arose a broad and bipartisan reaction to *Smith* which united the Christian Legal Society and the American Civil Liberties Union ("ACLU")—a coalition which will not arise again—and that this alliance succeeded in passing a federal law which was signed by Bill Clinton.[234] Even if this reaction had led to a safe and lasting victory, it would be somewhat beside the point: our concern here is the jurisprudence surrounding the Clause itself—not the contingent and reversible charity of legislators.

Two things about this reaction, however, are worth noting. First, in uniting against *Smith,* Congress understood itself to be restoring a constitutional right which the Court had destroyed.[235] That the fruit of Congress's efforts was titled the "Religious Freedom Restoration Act" reflected a recognition that, in the aftermath of *Smith,* the Clause was dead and needed to be restored to life.[236] Notably, one might have been a passionate member of this coalition while incidentally agreeing that peyote use was not protected by the Constitution. As already noted, Justice Scalia could have disposed of the petitioners' claim by finding that

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[233] *See* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) (stating that, when interpreting a statute, courts presume that legislatures mean what they say).

[234] *See* Peter Steinfels, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES (Nov. 17, 1993), https://www.nytimes.com/1993/11/17/us/clinton-signs-law-protecting-religious-practices.html?auth=link-dismiss-google1tap (explaining that President Clinton, with the support of a coalition of members across the political aisle, including the ACLU, passed the Religious Freedom Restoration Act in 1990). This coalition was possible only in the unique and unrecoverable climate of the 1990s. In retrospect, the traditionalist, conservative, political philosopher Russell Kirk can be forgiven for thinking that Bill Clinton would usher in an "Augustan Age" of American conservatism.

[235] *See* Jacob, *supra* note 225, at 817 (stating that Congress passed RFRA to provide a statutory right to the Free Exercise Clause in the wake of the decision in *Smith).*

[236] *See* Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103–141, 107 Stat. 1488; Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. Rev. 221, 221 (1993) (explaining that the Religious Freedom Restoration Act effectively enacted a much needed form of a statutory Free Exercise Clause after *Smith*).

the government had a compelling interest in regulating peyote use. Instead, he eliminated substantive free exercise rights.[237]

The second and more pertinent thing to observe is the reason that the coalition of the 1990s could not arise today—namely, that a former member of this coalition has now rejected the very concept of substantive free exercise rights.[238] Over the past decade, *Smith* has gained a surprising and powerful new ally: the ACLU.

As already noted, the ACLU was an early opponent of *Smith*.[239] Awkwardly, the ACLU still claims on its website that it rejects "the Supreme Court's notorious decision in *Employment Division v. Smith*."[240] In the recent *Masterpiece Cakeshop* case, however, ACLU attorney David Cole ended his oral argument by delivering a glowing encomium to *Smith*, casting the case as a dam holding back a river of social injustice.[241] It is important to quote Cole's words at length:

> Mr. Cole: Well, I think under this Court's doctrine in Employment Division versus Smith, the question would be[,] is it a generally applicable neutral law? And if it's a generally-applicable neutral law, there would not be a free exercise question at all. Right?
>
> And so . . . the reason for that, as Justice Scalia said [in] Employment Division versus Smith[,] is equally applicable here.
>
> Once you open this up, once you say generally applicable regulations of conduct have exceptions when someone raises a

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[237] *See* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 899 (1990) (O'Connor, J., concurring) (stating that the Court could have proceeded by asking whether the government regulation is the least restrictive means to achieve the particular state interest).

[238] *See* Transcript of Oral Argument at 94–95, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) [hereinafter *Masterpiece* Transcript of Oral Argument] (illustrating the support displayed by ACLU attorney Mr. Cole for generally applicable regulations on religious conduct).

[239] *See* Steinfels, *supra* note 234 (listing the ACLU as one of the several non-profit organizations that supported the enactment of the Religious Freedom Restoration Act as opposition to the ruling in *Smith*).

[240] *See Smith v. Employment Division*, ACLU OR., https://www.aclu-or.org/en/cases/smith-v-employment-division (last visited Feb. 1, 2020) (stating that the ACLU helped Mr. Smith stand up for his rights, and lamenting Smith's departure from the doctrine whereby the government must show a compelling state interest concerning infringement on religious freedom of expression). As late as June 20, 2019, the ACLU main website still published language stating that "the ACLU, along with almost every religious and civil rights group in America that has taken a position on the subject, rejects the Supreme Court's notorious decision of *Employment Division v. Smith*." *The ACLU and Freedom of Religion and Belief*, ACLU, https://www.aclu.org/other/aclu-and-freedom-religion-and-belief (last visited June 30, 2019).

[241] *See Masterpiece* Transcript of Oral Argument, *supra* note 238, at 94–96, (illustrating Mr. Cole's argument that every man or woman would be a standard to him- or herself if generally applicable regulations on conduct could be challenged and excused in the case of religious objections).

> religious objection . . . you're in a world in which every man is a law unto himself.
>
> . . . .
>
> . . . [T]hen we can have a world in which everybody who raises an objection -- otherwise we would live in a society in which businesses across this country could put signs up saying we serve whites only, music lessons for Muslims need not apply, passport photos not for disabled.
>
> Chief Justice Roberts: Thank you. Thank you, counsel.[242]

This argument should not be misunderstood as a simple instance of a lawyer citing binding law that favors his client. Cole did far more than point out that, under *Smith*, his opponent should have had no free exercise claim.[243] He went further and explicitly defended *Smith* in principle, painting it as a kind of Tartarus in which the Olympian Scalia had imprisoned the Titans of racism, Islamophobia, and ableism. Cole appeared to warn that overturning it would loose the seething forces of dark reaction, and sinister religious types "across this country" would, for some reason, deny services to disabled people.

Importantly, the ACLU has not merely changed its position on *what* substantive free exercise rights there are.[244] One can imagine the organization asserting that, while the Native American Church has a right to practice its traditional ceremonies, the Free Exercise Clause does not protect a wedding photographer from being forced to attend a ceremony against her will.[245] Yet this is not what Cole did. Instead—now that it is traditional Christians who frequently wish to invoke free exercise rights—the ACLU has changed its position on whether free exercise rights exist at all.

In essence, the ACLU has decided to tear down the fortress of religious liberty to prevent it from being used by the enemy. Someone who tears down a fortress, of course, should be willing never to garrison it

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[242] *Id.*

[243] *See id.* (displaying Mr. Cole's concern about discrimination against individuals in the name of a religious objection under pre-*Smith* Free Exercise Clause precedent).

[244] *Compare* ACLU OR., *supra* note 240 (elucidating ACLU's disagreement with the ruling in *Smith*), *with* Brief in Opposition at 18–19, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) (emphasizing ACLU's recognition of the validity of *Smith* and support of the application of *Smith* to Jack Phillips in the *Masterpiece Cakeshop* decision).

[245] *See generally,* Ian Huyett, *Christian Businesses are not Bigoted*, Guest Post in *How we were all misled about Arizona's "anti-gay" bill*, LIBERTARIAN REPUBLIC (Feb. 27, 2014), https://thelibertarianrepublic.com/misled-arizonas-bill/ (discussing the case of Elaine Huguenin, a Christian wedding photographer who became part of a controversy when she declined to provide services in a same-sex wedding ceremony).

again. This scorched-earth commitment to *Smith* therefore reveals an important dimension of the ACLU's worldview. When one sees the future as an inevitable reflection of himself—as cultural progressives often do—then it may be expected that he will leave his own freedom unprotected. On the other hand, if the future turns out not to be linear, but cyclical, then he may one day regret having destroyed the defenses that could have sheltered him.[246]

XI. FREE EXERCISE AFTER *SMITH*

To a limited extent, the Court was forced to walk back *Smith* almost immediately. At the same time *Smith* was being litigated, the city of Hilaleah, Florida, was in the process of trying to ban animal sacrifice rituals conducted by the followers of Santeria, an Afro-Caribbean sect combining elements of Catholicism and animistic spirit-worship that was organized as the Church of the Lukumi Babalu Aye.[247]

Although Hilaleah had arguably crafted a "generally applicable law"[248] that did not single out Santeria by name, Justice Kennedy—who had joined the majority in *Smith*[249]—wrote for the *Lukumi* majority that there are "many ways of demonstrating that the object of or purpose of a law is the suppression of religion or religious conduct."[250]

Though Justice Kennedy reaffirmed that there could be no free exercise inquiry into a neutral law, he rejected the idea that an inquiry into the neutrality of the law must end with the law's text.[251] Notably, the law's neutrality was in some doubt to begin with: its terms appeared carefully crafted to exempt kosher slaughter, for example.[252] At a city council meeting convened to discuss Santeria worship, a city councilman had implied that because Santeria was illegal in Cuba—the councilman's

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[246] *Cf.* A MAN FOR ALL SEASONS (Columbia Pictures 1966) (portraying Sir Thomas More stating that one should not "cut a great road through the law to get after the devil," for, "when the last law was down and the devil turned 'round on you, where would you hide, what with the laws all being flat? . . . If you cut them down . . . do you really think you could stand uprightin the winds that would blow then?").

[247] Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520, 524, 526 (1993).

[248] Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 884, 886 (1990).

[249] *See id.* 494 U.S. at 873 (stating that Justice Kennedy joined the majority in the decision). This was not the first time that Justice Kennedy supported granting the government broad power and was then forced to limit that power when the government abused it. *See, e.g.*, Missouri v. Seibert, 124 S. Ct. 2601, 2614 (2004) (Kennedy, J., concurring) (stating that Justice Kennedy concurred in the judgment of the plurality opinion that *Miranda* warnings given mid-interrogation were ineffective, despite Justice Kennedy's support for *Oregon v. Elstad*, 470 U.S. 298, which appeared to authorize mid-interrogation Miranda warnings).

[250] *Lukumi*, 508 U.S. at 533.

[251] *Id.* at 534.

[252] *Id*. at 536.

country of origin—it should likewise be illegal in the United States.[253] The Court therefore invalidated the law on free exercise grounds.[254]

Despite its intriguing fact pattern, *Lukumi* is, for at least two reasons, unlikely to be of much future use. In the first place, it appears to have been the city's *tolerance* for religion which, ironically, most undermined the contested statute. Had the city been more determined in its hatred of Santeria—and so been willing to throw religious Jews under the bus as well—it would have fared far better under Justice Kennedy's analysis. Twenty five years later, today's authoritarian secularists may be more willing to make analogous sacrifices.[255] Secondly, we can assume that government officials who wish to persecute religious groups will soon learn, especially in the aftermath of *Masterpiece Cakeshop*, not to ventilate their malice towards their religious enemies during public hearings.[256] In short, the dispositive facts in *Lukumi* are unlikely to reoccur.[257]

More importantly, in two subsequent cases—*Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*[258] and *Masterpiece Cakeshop*—the Court has applied substantive free exercise protection where there was little question that the underlying law was generally applicable and neutral, making it unnecessary to cite *Lukumi*.[259]

As much as *Masterpiece Cakeshop* exceeds *Hosanna-Tabor* in fame, however, the latter actually exceeds the former in terms of substantive significance. This is not to say that *Masterpiece Cakeshop* does not have ongoing significance for free exercise advocates. Rather, where *Masterpiece Cakeshop* concerned the partisan application of a neutral law, *Hosanna-Tabor* invalidated—on explicit free exercise grounds—the neutral application of a neutral law.[260]

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[253] *Id.* at 541.

[254] *Id.* at 524.

[255] *See* David Bernstein, *The ACLU's Shameful Role in Promoting Antisemitism*, REASON: THE VOLOKH CONSPIRACY (Mar. 11, 2019, 9:32 AM), https://reason.com/2019/03/11/the-aclus-shameful-role-in-promoting-ant/ (indicating that when referring to anti-BDS laws seeking to address boycotts on businesses with Israeli-affiliated personnel or institutions, ACLU members have called such measures "loyalty oaths" to Israel).

[256] *See Lukumi*, 508 U.S. at 541 (detailing the Court's evaluation of various Councilpersons' comments concerning the Santeria religion which led the Court to see the regulation as violative of *Smith*).

[257] *Id.*

[258] 565 U.S. 171 (2012).

[259] *See Hosanna-Tabor*, 565 U.S. at 190 (holding that, as far as the religion clause of the First Amendment is concerned, a ministerial exception can be read into a neutrally applicable law); Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723–24 (2018) (countenancing a baker's refusal to make a cake on the basis of his genuine religious conviction, regardless of the generally applicable law of Colorado).

[260] *See Hosanna-Tabor*, 565 U.S. at 190 (invalidating the general application of a neutral law and recognizing a ministerial exception under the First Amendment).

In *Hosanna-Tabor*, a Missouri Synod Lutheran church fired an employee for pursuing a legal claim against the church.[261] The employee's conduct violated the biblical passage, 1 Corinthians 6, which explicitly prohibits one Christian from suing another in a secular court.[262] The church's decision to terminate the employee, in turn, violated a legal prohibition against firing an employee for pursuing a legal action.[263]

It was undisputed that this law was generally applicable—and was not passed with the intention of targeting Christian churches or other religious groups.[264] The Court nonetheless held this neutral law unconstitutional as applied to a church.[265] Of the two cases just mentioned, *Hosanna-Tabor* is therefore the most direct in its contravention of *Smith*.

XII. SCALIA AND CHESTERTON'S FENCE

In terms of understanding *Smith*, the Court's opinion in *Hosanna-Tabor* may be less significant than the oral argument that preceded the decision. In one particularly interesting exchange with Leondra R. Kruger—then representing President Obama's Department of Justice[266]—Justice Scalia appeared to realize with horror that nullifying the Free Exercise Clause endangered Christian churches as well as traditional Native American worship.[267]

The facts of the case do not need to be fully understood in order to grasp the significance of Justice Scalia's outburst. Suffice it to say that, when Chief Justice Roberts sought to find out if the DOJ thought that the Free Exercise Clause had any application to the case, the following exchange took place:

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[261] *Id.* at 179.

[262] *See 1 Corinthians* 6:1–11 (New King James Version) (strongly emphasizing the need for Christians to settle disputes amongst themselves rather than to seek alternative external adjudicative forums).

[263] *See Hosanna-Tabor*, 565 U.S. at 179–80 (indicating that the Americans with Disabilities Act of 1990 (ADA) prohibited employer retaliation against employees who charge their employees with violations of the ADA and further stating that the EEOC brought retaliatory dismissal charges against the church for its actions against Perich).

[264] *Id.* at 190.

[265] *Id.* at 196.

[266] *Associate Justice Leondra R. Kruger*, CAL. CTS: JUD. BRANCH CAL., https://www.courts.ca.gov/33016.htm (last visited Feb. 2, 2020). Kruger now serves on the Supreme Court of California. *Id.*

[267] *See* Transcript of Oral Argument at 27–28, *Hosanna-Tabor*, 565 U.S. 171 (No. 10-553) [hereinafter *Hosanna-Tabor* Transcript of Oral Argument] (illustrating Justice Scalia's surprise regarding Kruger's evaluation of the application of the Free Exercise Clause and the Establishment Clause).

> Chief Justice Roberts: Is there anything special about the fact that the people involved in this case are part of a religious organization?
>
> Ms. Kruger: We think that the . . . analysis is one that the Court has . . . elaborated in other cases involving similar claims to autonomy, noninterference --
>
> Chief Justice Roberts: Is that a "no"? You say it's similar to other cases. Expressive associations -- a group of people who are interested in labor rights have expressive associations. Is the issue we are talking about here in the view of the United States any different than any other group of people who get together for an expressive right?
>
> Ms. Kruger: We think the basic contours of the inquiry are not different. We think how the inquiry plays out in particular cases may be[.][268]

Suddenly, Justice Scalia interjected. "That's extraordinary," he gasped quietly, as if Kruger had just stabbed him.[269] This non-question wrong-footed Kruger. A second of splitting silence gripped the courtroom. Kruger's tone jumped in protest. "I . . . Well, I—" she began.[270] Justice Scalia, however, talked over her like a robed steamroller. "We're talking here about the *Free Exercise Clause*," he moaned, "and about the Establishment Clause, and you say they have *no special application*?"[271]

Kruger then suggested that religious organizations can be adequately protected under ordinary freedom of association analysis[272]—but Justice Scalia correctly pointed out that "there's nothing in the Constitution that explicitly prohibits the government from mucking around in a labor organization."[273] Although freedom of association does protect all kinds of organizations, "there, black on white in the text of the Constitution are special protections for religion. *And you say that makes no difference*."[274]

What is really "extraordinary," of course, is that Justice Scalia was surprised and appalled by a straightforward application of his own

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[268] *Id.* at 27–28.
[269] *Id.* at 28.
[270] *Id.*
[271] *Id.* (emphasis added).
[272] *Id.* at 28–29.
[273] *Id.* at 29.
[274] *Id.* (emphasis added).

argument.[275] In *Smith*, Justice Scalia had insisted that the Clause had no power at all except in a "hybrid situation" in which it was already redundant; he also made a point of clarifying that *Sherbert* would not even be applied to "central" religious activities.[276] Listening to Justice Scalia recoil in horror before this juridical mirror, one almost wonders if Justice Scalia even read his *Smith* opinion. Assuming he did, he apparently did not anticipate that his demolition of the Clause would have any negative consequences for churches and was surprised when his own reasoning—consistently applied—was used to browbeat Missouri Synod Lutherans rather than American Indians.

Locke and Madison, of course, both foresaw that governmental power over religious exercise would inevitably be used against Christians.[277] That is, in fact, why we have a Free Exercise Clause in the first place. Justice Scalia was—to put it mildly—less prescient.

Justice Scalia's surprise brings to mind a famous illustration of G.K. Chesterton's, sometimes known as "Chesterton's Fence."[278] Chesterton imagined two social reformers approaching a fence across a road.[279] The "more modern type of reformer" says "I don't see the use of this; let us clear it away."[280] The second reformer then cautions the first that, if he doesn't see the use of the fence, he has no business clearing it away. [281] Chesterton explains that—assuming the fence was not put up by sleepwalkers—it was put there for some reason. Thus:

> If [the reformer] knows how it arose, and what purpose it was supposed to serve, he may really be able to say that they were bad purposes, or that they have since become bad purposes, or that they are purposes which no longer served. But if he simply stares at the thing as a senseless monstrosity that has somehow sprung up in his path, it is he and not the traditionalist who is suffering from an illusion.[282]

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[275] *See id.* at 28 (indicating Justice Scalia's surprise regarding the implications of his ruling in *Smith* concerning the validity of neutral laws of generally applicability under the Free Exercise Clause).

[276] Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 882, 886 (1990).

[277] *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1413, 1431–32, 1438, 1440, 1443, 1453 (1990) (explaining the profound influence of Lockean thought on the founding principles concerning freedom of exercise and explaining Madison and Locke's concerns regarding religious authorities controlling the unhindered ability to fully express the right of freedom of religious exercise).

[278] Ed Whelan, *Chesterton's Fence*, NAT'L REV. (Feb. 10, 2015, 4:03 PM), https://www.nationalreview.com/bench-memos/chestertons-fence-ed-whelan/.

[279] G.K. CHESTERTON, THE THING 35 (1929).

[280] *Id.*

[281] *Id.*

[282] *Id.* at 36.

Justice Scalia represents precisely the "modern type of reformer" that Chesterton criticized.[283] *Smith* evidenced no awareness of, or even interest in, the history and purpose of the Free Exercise Clause.[284] Rather, upon grappling with the Clause for the first time, Justice Scalia simply dismissed it out of hand as unworkable and unnecessary.[285] It is only during the oral argument in *Hosanna-Tabor* that Scalia—as if jolted awake—apparently discovered the purpose of the fence he had destroyed.

Ultimately, the Roberts Court, in a unanimous opinion, found that the Free Exercise Clause entails a "ministerial exception" rule—restricting the government's ability to regulate the hiring and firing decisions of churches.[286] Notably, this holding imputed a unique substantive power to the Clause—directly contradicting Justice Scalia's theory that the Clause is enforceable only in a "hybrid situation."[287] Logically, the Court should have gone one step further, repudiated *Smith* as a mistake, and explicitly overturned it. Instead, the Court made a somewhat half-hearted attempt to distinguish the case, saying that "*Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision . . . ."[288]

It is difficult to impose any coherent meaning on this distinction. If the terms "outward" and "internal" refer simply to whether something is done in a church environment—as opposed to, for instance, a business setting—then *Smith* itself involved an "internal church" matter.[289] The petitioners in the case did not ingest peyote at work, but only "for sacramental purposes at a ceremony of the Native American Church."[290] If, on the other hand, the Court meant to reference *Reynolds*' distinction

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[283] *See* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1990) (holding, despite stark precedential opposition, that Oregon could, pursuant to the Free Exercise Clause, deny respondents' unemployment compensation for peyote use which they used in conjunction with their religious beliefs); CHESTERTON, *supra* note 279, at 35 (contrasting the modern type of reformer from an intelligent type of reformer who reflects on the use of something before disposing of it).

[284] *See Smith*, 494 U.S. at 892 (O'Connor, J., concurring) (noting Justice O'Connor's critique of Justice Scalia's majority holding on the bases of its lack of precedential support and farfetched interpretation of the First Amendment).

[285] *Id.*

[286] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012) (elucidating the majority holding that a ministerial exception is recognized under the First Amendment Free Exercise Clause).

[287] *Smith*, 494 U.S. at 882, 886.

[288] *Hosanna-Tabor*, 565 U.S. at 190.

[289] *See id.* (stating that unlike *Smith*, which dealt with external physical acts, the present case deals with a church decision involving and affecting the church itself); *Smith*, 494 U.S. at 874 (framing the issue as the permissible regulation of the use of peyote for purportedly religious purposes).

[290] *Smith*, 494 U.S. at 874.

between "mere opinion" and action, then *Hosanna-Tabor* contradicted itself.[291] A person's views on who is qualified for certain ministry positions may well be an "opinion," but hiring or firing a minister is nonetheless a physical action. If firing a minister is a "mere opinion," then one may just as well characterize *Reynolds* and *Smith* as punishing the "opinions" of the petitioners on the subjects of polygyny and peyote.

Ultimately, the only function of this apparent distinction is to clarify that the Court does not consider *Smith* to have been overruled. In other words, while the Court has now held that the Clause affords protections to certain religious actions, it is also true that the Clause affords no protection to religious actions.[292]

Justice D. Arthur Kelsey of the Supreme Court of Virginia has aptly analogized the common law to quantum physics, writing that "[s]o, too, in the laws of men, we look for order amid the tumult of human conflict."[293] Free exercise law under the Roberts Court is especially analogous to physics. According to the Court, the Free Exercise Clause is now both alive and dead at the same time.[294] This kind of matter-defying paradox is unsustainable in a legal system based on prospective rules. Sooner or later, the Court must open the box and reveal that the proverbial cat is either dead or alive. Free exercise advocates must now call for the box to be opened.

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[291] *See* Reynolds v. United States, 98 U.S. 145, 164 (1879) (stating that Congress was able to regulate actions which violated social duties or societal order but not pure opinion).

[292] *Compare Hosanna-Tabor*, 565 U.S. at 190–92 (justifying a church's dismissal of an employee on the basis of the ministerial exception), *with Smith*, 494 U.S. at 890 (holding that pursuant to the Free Exercise Clause, Oregon could deny unemployment compensation for religious peyote use).

[293] D. Arthur Kelsey, *The Laws of Physics and the Physics of Laws*, 62 VA. LAW. 30, 35 (Apr. 2014), https://www.vsb.org/docs/valawyermagazine/vl0414-law-physics.pdf.

[294] *Compare Hosanna-Tabor*, 565 U.S. at 190 (recognizing the ministerial exception), *with Smith*, 494 U.S. at 890 (refusing to extend the Free Exercise Clause's protection to religious peyote use).

XIII. BIPARTISANSHIP IN THE ROBERTS COURT

From a strategic standpoint, the oral argument in *Hosanna-Tabor* is significant for an additional reason. *Masterpiece Cakeshop*—now the Roberts Court's most famous Free Exercise Clause case—surprised many observers. [295] It had been widely anticipated that the case would be decided on Speech Clause grounds.[296] Instead, a broad coalition of justices—including Justice Kagan and Justice Breyer—joined an opinion that substantively applied the Free Exercise Clause.[297]

To any careful listener of Supreme Court oral arguments, however, this result was unsurprising. In their questioning in *Hosanna-Tabor,* both Justice Breyer and Justice Kagan—a Conservative Jew[298]—revealed pronounced sympathy for a robust Clause.[299] This sympathy should be assertively leveraged by free exercise advocates in the fight to finally bring *Smith* to a definitive end.

Of course, conventional wisdom holds that a judge's sympathies cannot be discerned from his or her questions during an oral argument. Yet this flies in the face of common human experience. Most judges are not stoical and Solomonic philosopher-kings. In other contexts, it is commonly recognized that the sympathies of human beings can be roughly discerned through their word choice and tone—judges are no exception. Consider, for instance, Justice Kagan's questioning of Kruger, the attorney for the Justice Department, in *Hosanna-Tabor*.[300] Justice Kagan stated:

> So, this is to go back to Justice Scalia's question, because I too find that amazing, that you think that . . . neither the Free

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[295] *See* Leslie C. Griffin, *Misunderstanding Religion in Masterpiece*, AM. CONST. SOC'Y (June 5, 2018), https://www.acslaw.org/expertforum/misunderstanding-religion-in-masterpiece/ (explaining that the decision in *Masterpiece Cakeshop* was surprising in light of the holding in *Smith* that the Free Exercise Clause requires individuals to abide by neutral laws of general applicability).

[296] *See id.* (stating that many members of the American Constitution Society anticipated that the case would be decided on free speech grounds).

[297] *See* Kate Shaw, *Why Did Liberals Join the Majority in the Masterpiece Case?*, N.Y. TIMES (June 5, 2018), https://www.nytimes.com/2018/06/05/opinion/liberal-justices-concurrence-masterpiece.html (stating that Justices Kagan and Breyer joined Justice Kennedy's majority opinion).

[298] *See* Bill Mears, *Kagan talks about her faith, the court, and her hunting trips*, CNN (Oct. 20, 2011, 6:17 PM), https://www.cnn.com/2011/10/19/politics/scotus-kagan/index.html (recognizing Justice Kagan's Jewish upbringing and identity).

[299] *See Hosanna-Tabor* Transcript of Oral Argument, *supra* note 267, at 17–18, 31–32 (exemplifying by inference, in the form of multiple questions, the empathy Justice Kagan and Justice Breyer have for the Free Exercise Clause's ministerial exception).

[300] *Id.* at 38.

> Exercise Clause nor the Establishment Clause has anything to say about a church's relationship with its own employees.[301]

As an aside, when Kruger then suggested that a church might have some substantive right to autonomy under a hybrid pairing of free exercise and free association rights, Scalia responded with a bristling and vague statement that sounded more like a personal denial than a legal argument.[302] One could be forgiven for thinking that Scalia had simply forgotten everything about *Smith* except its result. In fact, Scalia even suggested that *Smith* had no "relevance" to *Hosanna-Tabor*[303]—an idea obviously incompatible with his own sweeping imprecations in the *Smith* opinion.[304] Whether Scalia remembered the details of the opinion or not, he certainly seemed to be engaged, in the midst of Kruger's argument, in finally unraveling the awful implications of the decision.

Justice Breyer, too, indicated that he took the Free Exercise Clause seriously.[305] Kruger's position seemed absurd to him because it appeared to mean that "you could go to the Catholic Church and say [that the priests] have to be women. I mean, you couldn't say that. That's obvious. So how are you distinguishing this?"[306] Nor was this the first time that Justice Breyer evidenced a striking level of respect for controversial religious beliefs.[307]

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[301] *Id.*

[302] *See id.* ("I don't think they merge at all. Smith didn't involve employment by a church. It had nothing to do with who the church could employ. I don't -- I don't see how that has any relevance to this.").

[303] *Id.*

[304] *See* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1990) (holding that the ingestion of peyote may be regulated by the State of Oregon as long as the regulation is a general law of neutral applicability and despite the religious purpose behind the practice of peyote ingestion).

[305] *See Hosanna-Tabor* Transcript of Oral Argument, *supra* note 267, at 31–32 (following Justice Breyer's line of questioning, which indicated his desire for full respect to be accorded to the Free Exercise Clause).

[306] *Id.* at 32.

[307] *See id.* at 46–47 (illustrating Justice Breyer's empathy for a ministerial exception to the Free Exercise Clause). Take, for instance, Justice Breyer's questioning of Margie Phelps–counsel for and member of the Westboro Baptist Church in *Snyder v. Phelps*. Justice Breyer not only displayed the same professionalism shown by all the justices towards Phelps, but he also seemed to treat her less aggressively than he normally would a party with whom he disagreed. Snyder v. Phelps, 562 U.S. 443 (2011) (No. 09-751)

> ("So what I'm doing is suggesting a number of thoughts of ways of trying to do what I'm trying to accomplish, to allow this tort to exist -- but not allow the existence of it to interfere with an important public message where that is a reasonable thing to do. Now, maybe this is impossible, this task. But I would like your thoughts on it.").

This questioning had no apparent argumentative purpose and seemed designed simply to explore and consider Phelps's views on the First Amendment.

XIV. THE WEAKNESS OF "SPEECH" AS A FREE EXERCISE SUBSTITUTE

Alliance Defending Freedom ("ADF")—counsel for Masterpiece Cakeshop in the eponymous case—would have done well to listen closely to the *Hosanna-Tabor* argument. Had they done so, they may have focused their own argument on expanding substantive free exercise rights. Instead, ADF fell into the temptation of selecting an argument solely on the basis of its apparent humility.[308] Rather than simply urge that the Clause prohibits forced participation in a marriage ceremony, ADF attorney Kristen Waggoner devoted her brief and oral argument to a difficult attempt to characterize cake-baking as "speech."[309]

Although Justice Kagan was more aggressive than her colleagues in her questioning of Waggoner, it would be a mistake to see her questioning as evidence of personal hostility to ADF's religious convictions.[310] Justice Kagan has shown repeatedly that she is willing to side with evangelical Christians in the face of generally applicable non-discrimination laws: she did so in *Hosanna-Tabor* and, in fact, did so when she joined the majority in *Masterpiece Cakeshop*.[311] Yet, while Justice Kagan is willing to lend a sympathetic ear to religious conservatives, she is less sympathetic to *ad hoc* arguments contrived in the name of judicial modesty.[312] Thus, as Waggoner attempted to press her cake-as-speech argument, the following exchange took place:

> Justice Kagan: So the jeweler [is engaged in speech]?
>
> Ms. Waggoner: It would depend on the context as all free-speech cases depend on. What is the jeweler asked to do?

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[308] *See Masterpiece* Transcript of Oral Argument, *supra* note 238, at 4–5 (illustrating Ms. Waggoner's decision to make an argument on the basis of compelled speech rather than an argument analogous to that made in *Hosanna*).

[309] *Id.* at 32.

[310] *See id.* at 12–14 (illustrating Justice Kagan's persistent questioning of Ms. Waggoner concerning what constitutes art and artistic expression).

[311] *See* Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 565 U.S. 171, 198 (2012) (Kagan, J., concurring) (concurring with the Court's opinion that a ministerial exception applied in spite of the fact that the law in question was a neutral law of general applicability); Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1734–35, 1738 (2018) (Kagan, J., concurring) (concurring with the Court's protection of a baker's refusal to create a cake on the basis of his religious conviction, regardless of Colorado's applicable law on the matter).

[312] *Compare Masterpiece Cakeshop*, 138 S. Ct. at 1732 (supporting Petitioner's entitlement to a neutral decisionmaker that fairly considers his religious objection), *and Hosanna-Tabor*, 565 U.S. at 190 (agreeing with the constitutionality and applicability of a ministerial exception), *with Masterpiece* Transcript of Oral Argument, *supra* note 238, at 12 (pushing back on the concept that there is a difference between a hairstylist, make-up artist, and cake baker).

> Justice Kagan: [The] [h]air stylist?
>
> Ms. Waggoner: Absolutely not. There's no expression or protected speech in that kind of context, but what it --
>
> Justice Kagan: Why is there no speech in -- in creating a wonderful hairdo?
>
> Ms. Waggoner: Well, it may be artistic, it may be creative, but what the Court asks when they're --
>
> Justice Kagan: The makeup artist?
>
> Ms. Waggoner: No. What the Court would ask --
>
> Justice Kagan: It's called an artist. It's the makeup artist.
>
> (Laughter.)
>
> . . . .
>
> Ms. Waggoner: Because it's not speech. And that's the first trigger point --
>
> Justice Kagan: Some people may say that about cakes, you know?[313]

Justice Kagan is correct: baking a cake is not speech. Neither is, for instance, making a chair. It's true that both physical actions *express* something: a carpenter who makes a chair wishes to express, if nothing else, that his chair is one worth sitting in. Yet calling goods "speech" on that account creates precisely the untenable line-drawing problems that Justice Kagan suggested.[314]

The notion that an appellate lawyer should avoid asking a court to overturn precedent is, of course, a good general rule. What an advocate should not do is favor the kind of minimalism reflected in *Masterpiece Cakeshop* argument even when it requires strained mental gymnastics. On net, calling for *Smith*'s invalidation would have been the more sensible argument. Justice Kagan's record shows that she would have received this

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[313] *Hosanna-Tabor* Transcript of Oral Argument, *supra* note 267, at 4–5.

[314] *See id.* (suggesting that distinguishing the expression or protected speech of a baker, jeweler, or hair stylist may prove difficult in a free-speech context).

strategy with some sympathy.[315] If nothing else, she certainly would have found a call for overturning *Smith* more persuasive than Waggoner's distinction between a hairstylist and a jeweler.

Using the Speech Clause as a substitute for the Free Exercise Clause is as unworkable in principle as it is in practice. Is it *speech*, for instance, to eat pork? Personally, I find that—when I opt to have bacon with a cheeseburger—it is singularly because I want to *eat* the bacon. My purpose in eating pork is not to proclaim my porcine proclivity to others. And while it is possible to consume pork expressively—Antiochus IV, for instance, did so in Jerusalem[316]—that fact is unlikely to yield any religious freedom on Speech Clause grounds alone. Suppose, for example, Congress passed a law requiring all Americans to eat pork or face criminal penalties. Muslims and Jews who complied with this law would not necessarily be *expressing* anything except, perhaps, an overriding fear of prison.

If Congress did require that all Americans eat pork, how would today's free exercise advocates argue the case? It is disconcertingly easy to imagine an ADF attorney standing before the Supreme Court, representing a religious objector to the Universal Pork Act, and conspicuously meandering around the words "exercise" and "religion." Instead, the attorney would presumably argue that forcing Muslims to eat ham violates "free speech." Such is the bizarre and ridiculous position that *Smith* has placed us in.

The way out of this difficulty is simple: mandatory pork consumption is not consistent with the Free Exercise Clause. If it were, then it would be difficult to imagine what meaning the Clause could have. Eating pork is against Jewish *halakha* and is *haram* to Muslims;[317] refraining from it is thus part of the "exercise" of "religion." Likewise, the ADF should have argued that choosing which ceremonies one participates in is a "form of religious activity [which has] the same high estate under the First Amendment as do worship in the churches and preaching from the

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[315] *See Hosanna-Tabor*, 565 U.S. at 198 (Kagan, J., concurring) (agreeing with the Court, but clarifying her understanding of who is considered a "minister").

[316] *See* FLAVIUS JOSEPHUS, THE ANTIQUITIES OF THE JEWS 2043–46 (William Whiston trans.) (2017) (ebook); *see also When the Light Did Not Go Out*, ISR. FOREVER FOUND., israelforever.org/history/chanukah/ (last visited Feb. 5, 2020) (forcing Jews to choose between either expressively renouncing their faith by eating pork or being executed).

[317] *See* MJL, *Halacha: The Laws of Jewish Life*, MY JEWISH LEARNING, https://www.myjewishlearning.com/article/halakhah-the-laws-of-jewish-life/ (last visited Feb. 5, 2020) (describing the root and meaning of the Hebrew term, halacha); *Orthodox in Israel Pressing for a Ban on Pork*, N.Y. TIMES (July 22, 1990), https://nyti.ms/29uLX3o (stating that eating pork is forbidden for Jewish and Muslim religions); *What is Halal? A guide for Non-Muslims*, ISLAMIC COUNCIL VICT., https://www.icv.org.au/about/about-islam-overview/what-is-halal-a-guide-for-non-muslims/ (last visited Feb. 6, 2020) (noting that under a Muslim hadith, the prayers of a person will be rejected by Allah if they consume prohibited food, including any meat from pigs).

pulpits."[318] Participating in a marriage or other religious ceremony is a historical and central form of religious practice.

I recognize that this answer will also present a line-drawing question—namely, the question of what constitutes "participation" in a ceremony. The answer to this question is relatively straightforward: a contribution to a ceremony constitutes "participation" when it is itself ceremonial. Applying this common-sense test to a range of hypotheticals would be intuitive and easy. Wedding decorations—such as floral arrangements—have a clearly ceremonial nature. In contrast, a hairdresser—although a bride may wish to visit one before a wedding—is probably not creating a distinctively "wedding-type" hairstyle. Likewise, supplying power and water to the building where the ceremony occurs—while perhaps a kind of physical contribution to the wedding—is not a ceremonial affirmation of the marriage.

XV. STRATEGIC OVERVIEW

In contrast to the ADF's approach in *Masterpiece Cakeshop*, Douglas Laycock—the scholar and lawyer who represented the Missouri Synod Lutheran church in *Hosanna-Tabor*—successfully argued *Hosanna-Tabor* by focusing on substantive religious freedom.[319] Although Laycock's brief made a dubious attempt to distinguish *Smith*[320]—likely in order to win Justice Scalia's vote—he nonetheless wisely sidestepped the temptation to hang his case upon generic "freedom of association" rights.[321] Instead, Laycock highlighted his client's religious character and argued for a distinctly religious "ministerial exception."[322]

Had Laycock, rather than ADF, argued *Masterpiece Cakeshop*, it is clear that Laycock would have pressed this line of argument further and directly called for the overruling of *Smith*. In fact, this is what Laycock

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[318] Murdock v. Pennsylvania, 319 U.S. 105, 109 (1943).

[319] *Hosanna-Tabor*, 565 U.S. at 175, 177, 188, 196 (2012).

[320] Brief for Petitioner at 24, *Hosanna-Tabor*, 565 U.S. 171 (No. 10-553) ("Nor does it require the balancing condemned in *Smith*. The ministerial exception is a categorical rule; if a claim falls within it, the claim must be dismissed."). While this observation indeed spoke to the reasoning in *Smith*, Laycock nonetheless avoided confronting the clear rule in *Smith*: that the Free Exercise Clause affords no protection to religious action from generally applicable and neutral laws. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1990).

[321] Brief for Petitioner, *supra* note 320, at 14 (mentioning freedom of association, but focusing the majority of the argument on the ministerial exception).

[322] *Id.* at 13

> ("The question presented is whether Perich's religious functions and her claim fall within the boundaries of the ministerial exception. Those boundaries must be drawn in light of the ministerial exception's constitutional foundations and purposes. The ministerial exception is independently rooted in the Free Exercise Clause, the Establishment Clause, and freedom of religious association.").

did in the *amicus curiae* brief he wrote for *Masterpiece Cakeshop*—filed on behalf of various Christian and Orthodox Jewish groups.[323] Laycock, who is not himself a religious believer, boldly suggested that the Court should have ordered the filing of briefs on the issue of "reconsider[ing] the rule of *Employment Division v. Smith*" because the holding in *Smith* "fail[s] to secure religious liberty if it affords no protection here."[324]

Laycock added that, "[a]s Justice Souter once explained, there are many reasons to reconsider this part of *Smith,* beginning with the fact that the rule there announced was neither briefed nor argued."[325] In fact, it is hard not to speculate that this argument partly explains why the Court did not revisit *Smith* in *Masterpiece Cakeshop*. If one of the Court's core concerns about *Smith* is that it was not subject to adversarial testing, then the Court is unlikely to overrule it in a case where the petitioner did not brief or argue its validity.

There are reasons to think that several justices wished that ADF had focused on the Free Exercise Clause: for instance, that the justices' questioning of the ACLU focused on free exercise rights, that the Court issued an opinion on free exercise grounds in spite of ADF's argument, and that four justices have now invited a party to bring a free exercise claim and challenge *Smith*.[326]

At any rate, all signs since *Hosanna-Tabor* show that a plurality of the justices—including Justice Kagan—are skeptical of the core reasoning in *Smith*.[327] Free exercise advocates should not recoil from this opportunity and retreat to the ephemeral safety of the Speech Clause or temporary statutes. Instead, those of us who stand in the Madisonian tradition should press our advantage and openly argue that *Smith* was wrongly decided.

This challenge to *Smith* should be a comprehensive one, for *Smith* fails on every possible dimension of analysis. We have already outlined some of these failures: the decision was contrary to the Clause's intent, to textualism, to the very nature of constitutions, and—because its conclusion came out of the ether—to the adversarial process.[328] Yet we

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[323] *See* Brief of Christian Legal Soc'y et al. as Amici Curiae in Support of Petitioners, *supra* note 196, at 6 (calling for a reconsideration of the Court's ruling in Smith).

[324] *Id.*

[325] *Id.* at 35 (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 571–77 (1993) (Souter, J., concurring)).

[326] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723–24 (2018); *Masterpiece* Transcript of Oral Argument, *supra* note 238, at 69. *See* Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (Alito, Thomas, Gorsuch, and Kavanaugh, J.J., concurring) (suggesting willingness to reconsider the Court's decision in *Smith* if asked by a litigant).

[327] *See Masterpiece* Transcript of Oral Argument, *supra* note 238, at 77–78, 82–84 (outlining Justices Kennedy, Breyer, Roberts, and Sotomayor's questions to Mr. David Cole regarding what situations actually fall within *Smith*'s scope).

[328] *See supra* notes 62, 224 and accompanying text.

have since developed further reasons for overruling the decision. For one, the decision is logically contradicted by subsequent cases, but especially by *Hosanna-Tabor*.[329] Unlike *Lukumi* and *Masterpiece Cakeshop*, in *Hosanna-Tabor* there was no question as to either the neutrality or general applicability of the law.[330] The Court held that the Free Exercise Clause barred the law's application anyway.[331]

Masterpiece Cakeshop, however, did undercut *Smith* in a way that *Hosanna-Tabor* did not: namely, by requiring "an adjudication in which religious hostility on the part of the State itself would not be a factor."[332] This requirement should bring to mind a particular series of adjudications in the late 19th century: the anti-Mormon cases.[333] While ruling against Mormon litigants, the anti-Mormon Court described the litigants as being similar to "Asiatic and . . . African people," a commented intended to be derogatory;[334] called the litigants' belief a "nefarious doctrine;" and characterized the litigants' religious practice as being a "blot on our civilization" and representing "a return to barbarism."[335] The anti-Mormon Court even criticized Mormons for attempting to "establish an independent community."[336] Cases that codified official religious hostility cannot possibly be reconciled with a case like *Masterpiece Cakeshop*, which flatly prohibits it. If there remained any doubt as to the status of the anti-Mormon cases today, *Masterpiece Cakeshop* has removed it. In doing so, *Masterpiece Cakeshop* removed the sole precedential basis for *Smith*.

Of course, *Smith* itself already contained the seed of this contradiction. It purported to require that a law be "neutral" and "generally applicable"[337] but relied upon decisions in which Mormons were openly disparaged and which upheld laws targeting Mormons and their

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[329] *Compare* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1990) (holding that the Free Exercise Clause does not require religious-practice exemptions for nondiscriminatory laws), *with* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 181 (2012) (holding that the Free Exercise Clause provided protection from federal discrimination laws for religious organizations' selection of religious leaders).

[330] *Compare Masterpiece Cakeshop*, 138 S. Ct. at 1723–24 ("[T]he Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality.") *and* Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520, 524, 526 (1993) ("[T]he principle of general applicability was violated because the secular ends asserted in defense of the [challenged] laws were pursued only with respect to conduct motivated by religious beliefs."), *with Hosanna-Tabor*, 565 U.S. at 190 (holding that Oregon's law prohibiting peyote uses was a "valid and neutral law of general applicability").

[331] *Hosanna-Tabor*, 565 U.S. at 181.

[332] *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

[333] *See supra* notes 64–118 and accompanying text.

[334] Reynolds v. United States, 98 U.S. 145, 168 (1879).

[335] Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 49 (1890).

[336] *Id.*

[337] Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 881 (1990).

church for disenfranchisement and dissolution. This contradiction is hard to overstate. It is as if a law prohibiting Sikh kirpans came before the Supreme Court, and the Court then upheld the law on the grounds that, first, the law was neutral and generally applicable and, secondly, that Sikhs are a "blot on our civilization."[338] Neutrality and general applicability are fruits that cannot be borne by the tree of malice and discrimination.

This leaves open a further strategic question: to which justices should this argument be directed? At least some of the conservative justices have clearly perceived Justice Scalia's mistake: Chief Justice Roberts wrote the Court's opinion in *Hosanna-Tabor*—currently *Smith*'s most dangerous enemy—and the other four conservatives recently invited a sympathetic petitioner to challenge *Smith*.[339] Justice Kagan, besides revealing her sympathy for free exercise rights during questioning, has twice sided against the ACLU and with Christian free exercise claimants;[340] indeed, she found it "amazing" when the Obama DOJ denied the Clause's substantive power.[341] Given the right case, and the right presentation, she could most likely be persuaded to join a coalition reinvigorating it.

Assembling this coalition will be less challenging than persuading its members not merely to limit or distinguish *Smith*—as *Lukumi, Hosanna-Tabor,* and *Masterpiece Cakeshop* did—but to squarely repudiate it. The arguments recounted here should suffice to show that the opinion is beyond repair; that it fails every conceivable metric of precedential analysis; and that—if there has ever been sufficient reason to overrule precedent—then there is more than enough to topple *Smith*.

Of course, to a judge in a common law country, the prospect of overturning precedent may sometimes be inherently upsetting. To persuade the greatest number of justices, then, it must be continually emphasized that it is *Smith* itself that is the aberration from precedent, as well as from every other basis on which a legal decision might stand.

As the Oregon Employment Division itself said in its brief, it is a matter of "settled free exercise principles" that religious actions are

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[338] *See Late Corp.*, 136 U.S. at 49 (holding that the Church of Jesus Christ of Latter-Day Saints' practice of polygamy is "a return to barbarism").

[339] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 176 (2012); *see* Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (Alito, Thomas, Gorsuch, and Kavanaugh, J.J., concurring) (hinting that members of the Court are ready to reconsider the holding of *Smith*).

[340] *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1732 (2018) (Kagan, J., concurring) (ruling in favor of religious views receiving neutral and respectful consideration); *Hosanna-Tabor*, 565 U.S. at 198–206 (pronouncing that Justice Kagan joined Justice Alito's concurrence, which showed an interpretation of the ministerial exception that favored Petitioner religious organization's claims).

[341] *See Hosanna-Tabor* Transcript of Oral Argument, *supra* note 267, at 37–38.

protected.[342] The substantive power of the Clause was "settled," even according to its enemies, until Justice Scalia overturned it by surprise. In doing so, the Rehnquist Court took on the role of the legislature, *de facto* amending part of the Constitution. Now is the time to call on the Roberts Court to undo this aberration and restore the Constitution to its rightful place

[342] Brief for Petitioners, supra note 192, at 5 ("Under settled free exercise principles, the [F]irst [A]mendment protects religious actions as well as religious beliefs. However, that protection is not absolute.").

LOSING LIBERTY:
A BIBLICAL DEFENSE FOR THE FREEDOM OF SPEECH ON CAMPUS

Joseph J. Martins[*]

"We laugh at honour and are shocked to find traitors in our midst." C. S. Lewis[1]

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INTRODUCTION

In the following scenario, two student groups face a philosophical dilemma at a major state university. The Young Democratic Socialists of America (YDSA) has invited Representative Alexandria Ocasio-Cortez to campus to lecture on the advantages of adopting socialism as America's central financial policy. However, for the following week, Young America's Foundation (YAF) has invited Donald Trump, Jr. to discuss how capitalism has made America a great nation. YDSA and YAF vigorously

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[1] C.S. LEWIS, THE ABOLITION OF MAN: OR REFLECTIONS ON EDUCATION WITH SPECIAL REFERENCE TO THE TEACHING OF ENGLISH IN THE UPPER FORMS OF SCHOOLS 37 (1996).

oppose the views that will be presented by the other organization's speaker. YDSA believes that capitalism leads to gross income inequality and consolidation of power in the top 1%,[2] whereas YAF contends that socialism constitutes a usurpation of governmental authority that would destroy the wealth-producing engine that has driven America's exceptional prosperity.[3] In short, both organizations see the other speaker as a threat to the American experiment. How then should the groups' members respond when the speakers arrive on campus?

Traditionally, one would answer that the speakers should be allowed to present their messages, while those who disagree should be free to challenge those views in rational debate. This proposal presumes that truth is best discovered when exposed to reason and examination and that it is the very purpose of the First Amendment and the university to facilitate this process of inquiry. But a new generation of students has concluded that the proper response is to shout down the opposing speaker, or even use violence when necessary, to ensure that the message is never even heard, much less received.[4] To many, this may appear to be a shocking and unreasonable conclusion. But consider this: students at America's universities have been taught for over a century that they are merely products of an unintelligent, random, and material universe in which neither truth nor ethics actually exist.[5] Under this naturalistic paradigm, is rational discourse truly the preferable option? This Article will compare two opposing philosophical worldviews, naturalism and classical Christianity, and will ask which one better justifies rational debate, and thus—by extension—the First Amendment itself.

Section I will describe the new form of censorship that is eroding the First Amendment on campus. Section II will discuss how naturalism contributes to this erosion by failing to provide a coherent justification for the necessary presuppositions of free speech: truth, reason, and ethics.

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[2] Halsey Hazzard & Bill Reisman, *YDSA Endorses the Public Housing Green New Deal Act*, YOUNG DEMOCRATIC SOCIALISTS OF AM. (Nov. 14, 2019), https://y.dsausa.org/the-activist/ydsa-endorses-the-public-housing-green-new-deal-act/?fbclid=IwAR0fWT6S5-9Ja-Qe5zruNpqHCaWtopCyyaGc0dF2I_WHM6px2YmCw___fkc; UConn YDSA, Letter to the Editor: Not Me Us, DAILY CAMPUS (Oct. 30, 2019), https://dailycampus.com/stories/2019/10/30/letter-to-the-editor-not-me-us.

[3] New Guard Staff, *Socialism is Actually Selfish ft. Andy Puzder*, YOUNG AM.'S FOUND. (Nov. 5, 2019), https://www.yaf.org/news/socialism-is-actually-selfish-ft-andy-puzder/; Devon Watson, *Young America's Foundation Opposes Socialism*, FAMUAN (Jan. 31, 2020, 3:45 PM), http://www.thefamuanonline.com/2020/01/31/young-americans-foundation-opposes-socialism/.

[4] *Survey: 30% of Students Believe that Physical Violence Can Be Justified to Prevent Hate Speech*, WILLIAM F. BUCKLEY, JR. PROGRAM AT YALE (Oct. 16, 2017), https://www.buckleyprogram.com/post/survey-30-of-students-believe-that-physical-violence-can-be-justified-to-prevent-someone-from-usin.

[5] MICHAEL C. REA, WORLD WITHOUT DESIGN: THE ONTOLOGICAL CONSEQUENCES OF NATURALISM 1, 21–22, 34 (2002).

Section III proposes that academia should shift to the classical Christian worldview upon which the Constitution was founded because it upholds the First Amendment by justifying these same presuppositions.

I. THE FIRST AMENDMENT IN CRISIS ON CAMPUS

The First Amendment is facing a new and growing danger on campus. It is becoming culturally acceptable among college students to silence others rather than debate them. Incidents demonstrating this cultural shift are now commonplace. In recent years, students have shouted down speakers at Binghamton University,[6] College of William & Mary,[7] Georgetown University,[8] Portland State University,[9] University of Florida,[10] Whittier College,[11] Brown University,[12] University of Oregon,[13] and Villanova University[14] to name a few. Violent mobs forced the cancellation of a planned speech by Milo Yiannopoulos at the University of California, Berkeley[15] and disrupted speeches by Charles

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[6] Daniel Burnett, *After Binghamton Shoutdown, Protesters Need to Know How the First Amendment Works*, FIRE (Nov. 19, 2019), https://www.thefire.org/after-binghamton-shoutdown-protesters-need-to-know-how-the-first-amendment-works/.

[7] Jeremy Bauer-Wolf, *ACLU Speaker Shouted Down at William & Mary*, INSIDE HIGHER ED (Oct. 5, 2017), https://www.insidehighered.com/quicktakes/2017/10/05/aclu-speaker-shouted-down-william-mary.

[8] Robert Shibley, *With Homeland Security Chief's Aborted Speech, Georgetown Law Submits to Heckler's Veto*, FIRE (Oct. 7, 2019), https://www.thefire.org/with-homeland-security-chiefs-aborted-speech-georgetown-law-submits-to-hecklers-veto/.

[9] *Campus Police No Match for Heckler with Cowbell Who Hijacked Speech at Portland State*, FIRE (Mar. 12, 2019), https://www.thefire.org/campus-police-no-match-for-heckler-with-cowbell-who-hijacked-speech-at-portland-state/.

[10] *Richard Spencer Ends University of Florida Speech Early to Boos, Protests*, FOX NEWS (Oct. 19, 2017), https://www.foxnews.com/us/richard-spencer-ends-university-of-florida-speech-early-to-boos-protests.

[11] Adam Steinbaugh, *Hecklers Shout Down California Attorney General, Assembly Majority Leader at Whittier College*, FIRE (Oct. 13, 2017), https://www.thefire.org/hecklers-shout-down-california-attorney-general-assembly-majority-leader-at-whittier-college/.

[12] Will Creeley, *At Brown, Free Speech Loses as Hecklers Silence NYPD Commissioner*, FIRE (Oct. 30, 2013), https://www.thefire.org/at-brown-free-speech-loses-as-hecklers-silence-nypd-commissioner/.

[13] Will Creeley, *University of Oregon President Pens Powerful Reflection on Being Shouted Down*, FIRE (Nov. 1, 2017), https://www.thefire.org/university-of-oregon-president-pens-powerful-reflection-on-being-shouted-down/.

[14] Chris Maltby, *Protesters Disrupt Charles Murray at Villanova University*, FIRE (Apr. 3, 2017), https://www.thefire.org/protesters-disrupt-charles-murray-at-villanova-university-video/.

[15] *Updated Statement on Violent Protest at University of California, Berkeley*, FIRE (Feb. 2, 2017), https://www.thefire.org/updated-statement-on-violent-protest-at-university-of-california-berkeley/. The mob lit fires, vandalized property, and assaulted persons interested in attending the event. *Id*.

Murray at Middlebury College[16] and Ben Shapiro at California State University, Los Angeles.[17] Notably, at the latter event, some faculty even helped to coordinate an effort to create a human blockade to prevent students from attending Mr. Shapiro's speech.[18] Students attempting to enter the event reported being pushed down, shoved, punched, and elbowed.[19] And at the end of the event, Mr. Shapiro had to exit under a police escort after announcing to the audience that "it is literally a threat to life and limb to go out there" and that the police "can't personally guarantee . . . any of your securities."[20] In the irony of ironies, students even interrupted the University of California's annual conference on campus free speech.[21]

Perhaps the most chilling example of this new heckler's veto occurred at Evergreen State College in 2017. There, students surrounded the president's office, blocked entrances with furniture, and refused to let faculty leave until Professor Bret Weinstein was fired for challenging a proposed day of racial segregation on campus.[22] A group of around fifty students confronted Professor Weinstein outside of his classroom and charged him with being a racist.[23] When he tried to defend himself and reason with them, one student shouted, "*You need to stop demanding that everybody use logic and reason and white forms of knowledge to f***___ing prove yourself. . . .*"[24] As the protests continued, the Campus Police Chief eventually warned Professor Weinstein not to come to campus because a

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[16] Peter Beinart, *A Violent Attack on Free Speech at Middlebury*, ATLANTIC (Mar. 6, 2017), https://www.theatlantic.com/politics/archive/2017/03/middlebury-free-speech-violence/518667/.

[17] Natalie Johnson, *Campus Protestors Try to Silence Conservative Speaker, Demand College President's Resignation*, DAILY SIGNAL (Feb. 26, 2016), https://www.dailysignal.com/2016/02/26/campus-protesters-try-to-silence-conservative-speaker-demand-college-presidents-resignation/.

[18] *Cal State L.A. Agrees to Drop Discriminatory Speech Policies, Settles Lawsuit*, ALLIANCE DEFENDING FREEDOM (Feb. 28, 2017), http://www.adfmedia.org/News/PRDetail/10117.

[19] Alliance Defending Freedom, *ADF, YAF, Ben Shapiro File Free Speech Suit Against CSULA*, YOUTUBE (May 18, 2016), https://www.youtube.com/watch?v=Hwr5TvGrMiU&feature=youtu.be.

[20] *Id.*

[21] Greta Anderson, *Free Speech Challenges in Real Time*, INSIDE HIGHER ED. (Feb. 28, 2020), https://www.insidehighered.com/news/2020/02/28/students-protest-free-speech-conference.

[22] *The 10 Worst Colleges for Free Speech: 2018*, FIRE (Feb. 12, 2018), https://www.thefire.org/the-10-worst-colleges-for-free-speech-2018/.

[23] Bari Weiss, *When the Left Turns on Its Own*, N.Y. TIMES (June 1, 2017), https://www.nytimes.com/2017/06/01/opinion/when-the-left-turns-on-its-own.html.

[24] Benjamin A. Boyce, *Bret Weinstein Reasons with Evergreen Protestors*, YOUTUBE (July 16, 2018), https://www.youtube.com/watch?v=nawe3lC74jI.

mob of students was "hunting" for him.[25] Professor Weinstein eventually resigned from the college.[26]

As troubling as these stories are, the statistics that verify the attitudes in the emerging campus "cancel culture" are even more disturbing. They show a steep decline in support for the First Amendment and an increase in support for disruption as a means to silence "offensive" views. A 2018 study compared student opinions from 2000 and 2016 regarding freedom of speech at Smith College, a private, liberal arts college in Massachusetts.[27] To the authors, "[P]erhaps the most startling change in the 2016 survey was the large decline in support [from 70% in 2000 to 47% in 2016] for even the most generalized phrasing of norms regarding speech rights."[28] They reasoned that this trend is normative on other campuses and beyond:

> There is no reason to suppose these tendencies are particular to Smith. Indeed, even if the results here are typical only of elite colleges and universities, they represent an important and, in our view, worrisome development. These schools provide a disproportionate amount of tenured and tenure-track professors, opinion setters, political activists, and . . . members of the legal community.[29]

Other studies confirm this conclusion and demonstrate that student support for disrupting speakers is rising, while support for free speech is falling. A 2017 national study conducted by the Brookings Institution found that 51% of college students believe it is acceptable for students to shout down and disrupt a controversial campus speaker.[30] That same year, a national survey commissioned by Yale University's William F. Buckley, Jr. Program found that 30% of college students think that "physical violence can be justified to prevent someone from using hate

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[25] Mike Nayna, *PART THREE: The Hunted Individual*, YOUTUBE (Apr. 24, 2019), https://www.youtube.com/watch?v=2vyBLCqyUes.

[26] Abby Spegman, *Evergreen Professor at Center of Protests Resigns; College will Pay $500,000*, SEATTLE TIMES (Sept. 16, 2017, 8:36 PM), https://www.seattletimes.com/seattle-news/evergreen-professor-at-center-of-protests-resigns-college-will-pay-500000/ (last updated Oct. 5, 2017, 10:07 AM).

[27] Julie Voorhes, *Student Opinion on Campus Speech Rights: A Longitudinal Study*, HETERODOX ACAD. (Oct. 26, 2018), https://heterodoxacademy.org/student-opinion-on-campus-speech-rights-a-longitudinal-study/; *Smith College*, U.S. NEWS AND WORLD REP., https://www.usnews.com/best-colleges/smith-college-2209.

[28] Voorhes, *Student Opinion*, *supra* note 27 (citation omitted).

[29] *Id.*

[30] John Villasenor, *Views Among College Students Regarding the First Amendment: Results From a New Survey*, BROOKINGS INST. (Sept. 18, 2017), https://www.brookings.edu/blog/fixgov/2017/09/18/views-among-college-students-regarding-the-first-amendment-results-from-a-new-survey/.

speech or making racially charged comments."[31] This trend is increasing rapidly: The Knight Foundation found that between 2018 and 2019 student support for shouting down controversial speakers jumped from 37% to 51%.[32]

These trends are disturbing for two reasons, according to UCLA Professor John Villasenor, who conducted the Brookings Institution survey. First, this cultural trend will eventually shift to society at large because "[t]oday's college students are tomorrow's attorneys, teachers, professors, policymakers, legislators, and judges."[33] Indeed, the fact that university officials issued "stand down" orders to police during some of these incidents implicitly encouraged violence and indicated that this trend has already moved beyond the student population to the administration.[34] And second, students are the ones who will ultimately determine what is said and not said on campus.

> Students act as *de facto* arbiters of free expression on campus. The Supreme Court justices are not standing by at the entrances to public university lecture halls ready to step in if First Amendment rights are curtailed. If a significant percentage of students believe that views they find offensive should be silenced, those views will in fact be silenced.[35]

Commentators such as New York Times columnist Frank Bruni; Yale Law Professor Stephen Carter; First Amendment lawyer Floyd Abrams; Dean Erwin Chemerinsky (University of California, Berkeley School of Law); and Chancellor Howard Gillman (University of California, Irvine) all agree that this "[n]ew [c]ensorship" on the college campus is a sinister development.[36] However, few have provided viable suggestions on what is driving this trend. Could it be that students in America's universities no longer subscribe to the fundamental presuppositions necessary to sustain free speech on campus?

The First Amendment is a means to an end, as is the university itself. Indeed, the Supreme Court has confirmed multiple times that the

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[31] *Survey: 30% of Students Believe that Physical Violence Can Be Justified to Prevent Hate Speech*, *supra* note 4.

[32] Daniel Burnett, *Survey: Speaker Shoutdown Support Gets Double-Digit Boost in One Year*, FIRE (May 20, 2019), https://www.thefire.org/survey-speaker-shoutdown-support-gets-double-digit-boost-in-one-year/.

[33] Villasenor, *supra* note 30.

[34] *E.g.*, Weiss, *supra* note 23 (describing the Evergreen State incident in which the school's president asked police not to interfere with an ongoing protest).

[35] Villasenor, *supra* note 30.

[36] Thomas Healy, *Return of the Campus Speech Wars*, 117 MICH. L. REV. 1063, 1065 (2019).

preeminent purpose of the First Amendment is to "further[] the search for *truth*."[37] "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which *truth* will ultimately prevail."[38] And "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas . . . .'"[39] Indeed, "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers *truth* 'out of a multitude of tongues.'"[40] This,

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[37] Janus v. Am. Fed'n of State, Cty., & Mun. Emps., 138 S. Ct. 2448, 2464 (2018) (emphasis added).

> Free speech serves many ends. It is essential to our democratic form of government, and it furthers the search for truth. Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends.

Id. (first citing Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964); then citing Thornhill v. Alabama, 310 U.S. 88, 95 (1940)). To be sure, the First Amendment serves multiple purposes but even these additional ends are closely tied to the search for truth. Preserving the right of individuals to join in free debate is essential to self-government. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339 (2010) ("The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.").

> "The First Amendment protects . . . a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way. . . . Truth can be sifted out from falsehood only if the government is vigorously and constantly cross-examined . . . ."

Herbert v. Lando, 441 U.S. 153, 186 n.2 (1979) (Brennan, J., dissenting) (citation omitted). Additionally, by protecting the individual "freedom of the mind," Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943), the liberty to hold dissenting religious beliefs, Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947), and the right to associate with others in pursuit of even unpopular ideas, Roberts v. United States Jaycees, 468 U.S. 609, 622–23 (1984), the First Amendment broadly curtails the government's ability to manipulate the search for truth. *See* Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 538 (1980) ("To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.") The framers believed that the "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth." Boy Scouts of Am. v. Dale, 530 U.S. 640, 660–61 (2000). Furthermore, the Court has held that the First Amendment does not protect expression such as defamation, fighting words, and obscenity because they are "of such slight social value *as a step to truth* that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 383–89 (1992) (emphasis added). Therefore, the Amendment may serve multiple ends, but it is impossible to divorce them entirely from protecting the search for truth.

[38] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (emphasis added).

[39] Healy v. James, 408 U.S. 169, 180–81 (1972) (emphasis added) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

[40] *Keyishian*, 385 U.S. at 603 (emphasis added) (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (D.C. Cir. 1943)). Thomas Jefferson said of the University of Virginia, "[H]ere we are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it." Letter from Thomas Jefferson to William Roscoe (Dec. 27, 1820), *in* 7 THE WRITINGS OF THOMAS JEFFERSON: BEING HIS AUTOBIOGRAPHY, CORRESPONDENCE, REPORTS, MESSAGES, ADDRESSES, AND OTHER WRITINGS, OFFICIAL AND PRIVATE 196 (H. A. Washington ed., 1854). Several university

according to the Court, is why "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[41] For this reason, the government is also empowered to prevent disruption on campus to ensure an orderly exchange of ideas.[42] This truth-advancing purpose of the First Amendment and the university *presupposes* that universal and objective truth exists, that our minds can actually discover such truth, and that there is an ethical manner by which such truth should be discovered.[43] It stands to reason that support for free speech would erode over time if the campus community no longer believes in these foundational presuppositions. For students to choose reasoned debate over violence, they must find the justifications for the former to be more convincing than those for the latter. Thus, we must ask if the predominant worldview on campus can still provide a convincing justification for truth, reason, and ethics while also condemning mob violence as a means of addressing conflicting ideas. If it cannot, then we must consider another paradigm that can justify such presuppositions in order to preserve liberty of expression on campus.

II. CAN NATURALISM JUSTIFY THE FIRST AMENDMENT?

Naturalism is the predominant worldview on America's college campuses. As philosopher Michael C. Rea has noted, "Philosophical naturalism has dominated the Western academy for well over a century. It is not just fashionable nowadays; it enjoys the lofty status of academic

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mottos echo this purpose: Colgate University ("For God and Truth"); Columbia University ("In Thy light we see light"); Harvard University ("Truth"); Johns Hopkins University ("The truth shall make you free"); Yale University ("Light and Truth"). Michael Holobosky, *Deo ac Veritati: Our Motto and Seal*, COLGATE AT 200 YEARS, https://200.colgate.edu/looking-back/moments/deo-ac-veritati-our-motto-and-seal; *Columbia University at a Glance*, OFF. OF PUB. AFFS., COLUM. U., http://www.columbia.edu/cu/pr/special/cuglance.html; Corydon Ireland, *Seal of Approval*, HARV. GAZETTE (May 14, 2015), https://news.harvard.edu/gazette/story/2015/05/seal-of-approval/; Ronald J. Daniels, *'The Truth Will Set You Free'*, JOHNS HOPKINS MAG. (Winter 2017), https://hub.jhu.edu/magazine/2017/winter/convocation-address-the-truth-will-set-you-free/; *Not Just Your Lux or My Veritas*, YALE DAILY NEWS (Aug. 31, 2012 1:00 AM), https://yaledailynews.com/blog/2012/08/31/not-just-your-lux-or-my-veritas/.

[41] *Healy*, 408 U.S. at 180–81 (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)) (alteration in original).

[42] *Id.* at 188–89. In the context of the "special characteristics of the school environment," the power of the government to prohibit "lawless action" is not limited to acts of a criminal nature. Also prohibitable are actions which "materially and substantially disrupt the work and discipline of the school." Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.
Id. (footnote omitted) (citations omitted).

[43] Jane Bambauer, *The Untestable Marketplace of Ideas*, WASH. POST (Sept. 1, 2017, 2:44 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/09/01/the-untestable-marketplace-of-ideas/.

orthodoxy."[44] At its core, "[n]aturalism is a *metaphysical* [philosophy], which means simply that it states a particular view of what is ultimately real and unreal."[45] Naturalism often encompasses "atheism, scientific materialism, and secular humanism" and thus can be difficult to quantify precisely.[46] However, naturalism does have a well-recognized set of essential principles. "The single unifying theme of all [n]aturalisms is anti-transcendentalism."[47] Philosopher and theologian Ronald Nash summarizes this system of belief further:

> Nature is a self-explanatory system. Any and every thing that happens within the natural order must, at least in principle, be explainable in terms of other elements of the natural order. It is never necessary to seek the explanation for any event within nature in something beyond the natural order.[48]

"The essential point is that nature is understood by both naturalists and materialists to be 'all there is' and to be fundamentally mindless and purposeless."[49] As the late William Provine, atheist and evolutionary professor, explained, "[M]odern evolutionary biology tells us loud and clear—and these are basically Darwin's views. There are no gods, no purposes, and no goal-directed forces of any kind."[50] Richard Dawkins, the world's most famous atheist, concurs when he describes the universe as having "at bottom, no design, no purpose."[51] For our purposes, the critical question is whether naturalism, on its own terms, can satisfactorily justify the existence of truth, reason, and ethics, which, as stated before, are necessary preconditions for the freedom of speech. If it cannot, we should jettison naturalism and seek a new justifying principle. This Article now turns to that question.

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[44] REA, *supra* note 5, at 1; *see also* PHILLIP E. JOHNSON, REASON IN THE BALANCE: THE CASE AGAINST NATURALISM IN SCIENCE, LAW & EDUCATION 33 (1995) ("[N]aturalistic thinking rules the intellectual world, including the National Academy of Sciences, the public schools, the universities and the elite of the legal profession.").

[45] JOHNSON, *supra* note 44, at 37 (emphasis omitted).

[46] Terry Mortenson, *The Religion of Naturalism*, ANSWERS IN GENESIS (May 5, 2017), https://answersingenesis.org/world-religions/religion-of-naturalism/.

[47] Dallas Willard, *Knowledge and Naturalism*, *in* NATURALISM: A CRITICAL ANALYSIS 24, 44 n.1 (William Lane Craig & J. P. Moreland eds., 2000) (emphasis omitted).

[48] RONALD H. NASH, WORLDVIEWS IN CONFLICT 120 (1992).

[49] JOHNSON, *supra* note 44, at 38 n*.

[50] William Provine & Phillip Johnson, *Darwinism: Science or Naturalistic Philosophy?*, ORIGINS RES. (Apr. 30, 1994), http://www.arn.org/docs/orpages/or161/161main.htm.

[51] RICHARD DAWKINS, RIVER OUT OF EDEN: A DARWINIAN VIEW OF LIFE 133 (1995); Mortenson, *supra* note 46.

A. Can Naturalism Justify the Existence of Truth

Naturalists fundamentally reject the idea of universal and objective truth.[52] This is an understandable rejection under a worldview that has no place for God. After all, if there is a universal, pre-existing God who created all things, that God would have the authority to set the standard for what is true and what is false. As Creator, He would be the central reference point for the truth of all things. But without such a standard-bearer, there is no objective standard to establish truth and error.[53] In essence, "truth" becomes relative and everyone's opinion of the "truth" is just as valid as everyone else's.

Friedrich Nietzsche, a champion of naturalist philosophy, knew this to be true. He bluntly declared that "God is dead"[54] and concluded that "there are no eternal facts as there are no absolute truths."[55] He described truth as "illusions about which one has forgotten that this is what they are,"[56] and he characterized the one who believes in "absolute truth" as a "child" and "not [a] man of scientific thinking."[57] He further explained that truth does not exist because there is no uniform point of reference:

> The real truth about "objective truth" is that the latter is a fiction. Every candidate for truth must first be expressed in language, and language is notoriously unable to get us to reality. Words, like a hall of mirrors, reflect only each other and in the end point to the condition of their users without having

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[52] Mortenson, *supra* note 46.

[53] *Id.*

[54] *E.g.* FRIEDRICH NIETZSCHE, *The Gay Science*, *in* THE PORTABLE NIETZSCHE 93, 95 (Walter Kaufmann trans., Penguin Books 1976) (1954).

[55] FRIEDRICH NIETZSCHE, HUMAN, ALL TOO HUMAN: A BOOK FOR FREE SPIRITS 22 (Alexander Harvey trans., Charles H. Kerr & Co. 1915).

[56] FRIEDRICH NIETZSCHE, *On Truth and Lie in an Extra-Mortal Sense*, *in* THE PORTABLE NIETZSCHE, *supra* note 54, at 42, 47.

[57] FRIEDRICH NIETZSCHE, *Section Nine: Man Alone with Himself*, *in* HUMAN, ALL TOO HUMAN: A BOOK FOR FREE SPIRITS para. 630, available at http://nietzsche.holtof.com/reader/friedrich-nietzsche/human-all-too-human/aphorism-630-quote_862bd20b2.html (last visited Apr. 17, 2020).

> *Conviction is the belief that in some point of knowledge one possesses absolute truth.* Such a belief presumes, then, that absolute truths exist; likewise, that the perfect methods for arriving at them have been found; finally, that every man who has convictions makes use of these perfect methods. All three assertions prove at once that the man of convictions is not the man of scientific thinking; he stands before us still in the age of theoretical innocence, a child, however grownup he might be otherwise. But throughout thousands of years, people have lived in such childlike assumptions, and from out of them mankind's mightiest sources of power have flowed. The countless people who sacrificed themselves for their convictions thought they were doing it for absolute truth. All of them were wrong. . . .

Id.

> established anything about how things really are. Truth is the name we give to that which agrees with our own instinctive preferences. It is what we call our interpretation of the world, especially when we want to foist it upon others.[58]

The late naturalist philosopher and professor Richard Rorty[59] echoed Nietzsche when he stated that truth is "indefinable"[60] or simply "what your contemporaries let you get away with"[61] and therefore, "no interpretation is closer to reality than any other."[62] He summed up his position this way:

> To say that truth is not out there is simply to say that where there are no sentences there is no truth, that sentences are elements of human languages, and that human languages are human creations.
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> . . . .

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[58] Ravi Zacharias, *The Death of Truth and a Postmortem*, https://www.rzim.org/read/rzim-global/the-death-of-truth-and-a-postmortem (last visited April 13, 2020). Cornelius Van Til reaffirmed the necessity of God as a central reference point in this manner:

> Our argument for the objectivity of knowledge with respect to the universe can never be complete and satisfactory unless we bring in the relation of both the object and the subject of knowledge to God. We may debate endlessly about psychological problems without fruitage if we refuse to bring in the metaphysical question of the nature of reality. If the Christian position with respect to creation, that is, with respect to the idea of the origin of both the subject and the object of human knowledge is true, there is and must be objective knowledge. In that case the world of objects was made in order that the subject of knowledge, namely man, should interpret it under God. Without the interpretation of the universe by man to the glory of God the whole world would be meaningless. The subject and the object are therefore adapted to one another. On the other hand if the Christian theory of creation by God is not true then we hold that there cannot be objective knowledge of anything. In that case all things in this universe are unrelated and cannot be in fruitful contact with one another.

CORNELIUS VAN TIL, THE DEFENSE OF THE FAITH 60 (1955).

[59] Bjørn Ramberg, *Richard Rorty*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY 1 (2007), https://plato.stanford.edu/entries/rorty/ ("Rorty has sought to integrate and apply the milestone achievements of Dewey, Hegel and Darwin in a pragmatist synthesis of historicism and naturalism.").

[60] Philosophy Overdose, *Richard Rorty on Pragmatism*, YOUTUBE at 1:52 (July 17, 2017), https://www.youtube.com/watch?v=5nTRunosX8w.

[61] Santiago Zabala, *Richard Rorty: Life, Pragmatism, and Conversational Philosophy*, L.A. REV. BOOKS (July 22, 2017), https://www.lareviewofbooks.org/article/richard-rorty-life-pragmatism-and-conversational-philosophy.

[62] Philosophy Overdose, *supra* note 60.

> The suggestion that truth . . . is out there is a legacy of an age in which the world was seen as the creation of a being who had a language of his own.[63]

According to the naturalists, that era has passed, and so has the idea of objective truth.[64]

Not only is this position self-defeating (is it *true* that there is no truth?), but the search for truth is thus rendered futile under naturalistic presuppositions because there is no objective truth to find. In the prior era, there remained the "idea . . . that at a certain point in the process of inquiry you come to rest because you've reached the goal," but in the era of naturalism, "[t]he idea that the aim of inquiry is conformity or correspondence to reality . . . is one that we just can't make any use of."[65] The naturalist finds himself in the predicament of "always learning [but] never [being] able to come to the knowledge of the truth."[66]

Without an objective truth to discover, the First Amendment is rendered meaningless; its very purpose is to protect a pursuit that is inherently fruitless under naturalistic presuppositions. The "[l]iberty [of speech] depends upon the existence of truth [and] [t]ruth depends upon the existence of God. No God, no truth, no liberty . . . ."[67] This is the quandary of the naturalist.

B. Can Naturalism Justify the Existence of Reason?

While naturalists embrace the idea of rational man who observes his environment and reasons his way to new discoveries, naturalism fails to provide an adequate explanation for man's power to reason. Reason, broadly defined, is "the power of the mind to think and understand in a logical way."[68] The entire process of inquiry "assumes that human beings . . . are rational beings who can observe nature accurately and employ logical reasoning to understand the reality behind the appearances."[69]

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[63] RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 5 (1989). Rorty's sentiments on truth echo those of Pontius Pilate when he responded to Jesus Christ's assertion that He came into the world to "bear witness to the truth." Pilate replied sarcastically, "What is truth?" *See John* 8:38.

[64] NIETZSCHE, *supra* note 57, para. 630.

[65] Philosophy Overdose, *supra* note 60.

[66] *2 Timothy* 3:7. Bible translations are from the New King James Version unless otherwise noted. In this translation, italicized words are those without verbal equivalents in the original languages.

[67] R. Albert Mohler, Jr., *The Eclipse of God, the Subversion of Truth, and the Assault upon Religious Liberty*, ALBERT MOHLER (July 16, 2019), https://albertmohler.com/2019/07/16/the-eclipse-of-god-the-subversion-of-truth-and-the-assault-upon-religious-liberty.

[68] *Reason*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/reason (last visited Feb. 28, 2020).

[69] JOHNSON, *supra* note 44, at 61.

Thus, at a minimum, for inquiry to be successful, there must be reality, and human beings must have minds that can accurately perceive and analyze this reality.[70] However, naturalism fails to explain why our minds can perceive and analyze correctly.

As a starting point, naturalism faces an uphill battle explaining the inception of human consciousness, or awareness of one's body and one's environment. "Naturalistic evolutionary theory . . . says that creation was by *impersonal* and *unintelligent* forces."[71] Richard Dawkins clarifies that natural selection is a "blind, *unconscious*, automatic process."[72] From where then, comes man's consciousness? And at what point in the evolutionary process did it emerge? Naturalism does not adequately explain how consciousness could come from cosmic unconsciousness. On its face, naturalism appears committed to the idea that consciousness simply appeared *ex nihilo* through some sort of spontaneous generation.[73] This explanation is less than satisfying.

Similarly, naturalists struggle to explain how consciousness currently operates in human beings. At its core, consciousness raises a dilemma for the naturalist—how to identify "an empirically adequate meeting point between the physical extensions of our brain and bodies and the apparently non-physical mind"?[74] Indeed, "[l]ooking at molecules, cytoskeletons, microtubules and other fine-grained structures of the cell does not tell us anything about how that cell 'experiences' the world."[75] Scientists and philosophers have noted this problem for at least half a century.[76]

Wilfrid Sellars commented in 1962 that "there seems to be an irreconcilable conflict between the Manifest Image of colours, sounds, smells, desires and beliefs and the world of atoms, molecules and fields described by modern physical science."[77] In 1983, materialist philosopher Joseph Levine famously characterized the failure of modern science to adequately explain consciousness as the "explanatory gap."[78] In 1995, philosopher and cognitive scientist David Chalmers noted that Levine's gap had morphed into the "hard problem of consciousness" and concluded

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[70] *Id.*

[71] *Id.* at 108 (emphasis added).

[72] RICHARD DAWKINS, THE BLIND WATCHMAKER: WHY THE EVIDENCE OF EVOLUTION REVEALS A UNIVERSE WITHOUT DESIGN 9 (2015) (emphasis added).

[73] Todd Moody, *Naturalism and the Problem of Consciousness*, 2 PLURALIST 72, 73–75, 77–78 (2007).

[74] Marius Stanciu, *The Explanatory Gap: 30 Years After*, 127 PROCEDIA – SOC. & BEHAV. SCI. 292, 292 (2014).

[75] *Id.* at 296.

[76] *Id.* at 292–93.

[77] *Id.* (emphasis omitted) (citing WILLIFRED SELLARS, PHILOSOPHY AND THE SCIENTIFIC IMAGE OF MAN 35–38 (Robert Colodny ed., Univ. of Pittsburgh Press 1962)).

[78] *Id.* at 293.

that "we have no good explanation of why we are conscious entities and not simple mechanical automata, or to use the jargon of analytical philosophy, why we are not 'zombies.'"[79] And in recent years Professor John Searle, who teaches philosophy of mind and language at the University of California, Berkeley, admitted that "we do not have an adequate theory of consciousness,"[80] while Dr. Marius M. Stanciu concluded that, despite serious efforts, the explanatory gap has yet to be filled.[81] The best theories that materialists have proposed are that either our natural minds are insufficient to explain consciousness, or that qualia—subjective experiences—simply do not exist.[82] Neither of these explanations is sufficient for obvious reasons. Thus, "[i]t is widely agreed among contemporary philosophers of mind that science leaves us with an 'explanatory gap'—that even after we know everything that science can tell us about the conscious mind and the brain, their relationship still remains mysterious."[83]

Naturalists also assume that the mind and senses can accurately represent the real world around them. Of course, it is a necessary precondition of the scientific method that our senses can accurately observe nature.[84] However, as with consciousness, naturalism provides, at most, doubtful support for the ability of the mind to correctly interpret sense perceptions.[85] Philosopher Alvin Plantinga explained this deficiency in his "Evolutionary Argument Against Naturalism":

> If (naturalistic) evolution is true, then our cognitive faculties will have resulted from blind mechanisms like natural selection, working on sources of genetic variation such as random genetic mutation. And the ultimate purpose or function (Churchland's "chore") of our cognitive faculties, if indeed they *have* a purpose or function, will be survival . . . But then it is unlikely that they have the production of true beliefs as a function. So the probability of our faculties' being reliable, given naturalistic evolution, would be fairly low.[86]

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[79] *Id.* (citing D. CHALMERS, THE CONSCIOUS MIND: IN SEARCH OF A FUNDAMENTAL THEORY 213 (1996)).

[80] JOHN SEARLE, 7 IN THE LIGHT OF EVOLUTION: THE HUMAN MENTAL MACHINERY 3 (Camilo J. Cela-Conde, et al. eds., 2014).

[81] Stanciu, *supra* note 74, at 293 ("[I]t is natural to ask ourselves whether or not some progresses have been made in the last 30 years in respect to this highly problematic issue. The blunt and short answer, I think, is definitely 'no'.").

[82] *Id.*

[83] David Papineau, *What Exactly is the Explanatory Gap?*, 39 PHILOSOPHIA 5, 5 (2011).

[84] JOHNSON, *supra* note 44, at 61.

[85] Alvin Plantinga, *An Evolutionary Argument Against Naturalism*, BETHINKING (1996), https://www.bethinking.org/atheism/an-evolutionary-argument-against-naturalism.

[86] *Id.*

In a nutshell, unguided evolution enables organisms to succeed in four things: "feeding, fleeing, fighting, and reproducing."[87] Natural selection *can* produce improvements in sensorimotor control that give the organism "a fancier style of representing" reality, but *only to the extent* that such a change "enhances the organism's chances of survival."[88] Thus, Plantinga argues, "Truth, whatever that is, definitely takes the hindmost."[89] This argument has real force. Essentially, Plantinga points out that naturalistic evolution proves too little—or aims too low—because survival does not require true representation. In fact, misperceptions can greatly increase an individual's or species' chances of survival. A mouse, for example, may flee at every rustle of a leaf, thinking that a predator is around the corner. Its skittish sense of perception will certainly assist the mouse in surviving, even though in most cases, there is no predator.

Naturalists recognize that Plantinga's argument has obvious implications for humans, who, according to Darwinian evolution, "really are just animals with surplus neurons."[90] Professor Searle notes that our evolutionary paths "include the brains of dogs, baboons, [and] dolphins" and cautions, "[I]t is a mistake to assume that everything that exists is comprehensible to our brains."[91] Charles Darwin himself was plagued by the thought that his own theory undercut the reliability of the human mind:

> [W]ith me the horrid doubt always arises whether the convictions of man's mind, which has been developed from the mind of the lower animals, are of any value or at all trustworthy. Would any one trust in the convictions of a monkey's mind, if there are any convictions in such a mind?[92]

Scottish philosopher David Hume[93] was perhaps most skeptical of the reliability of man's mind to correctly interpret sense perceptions:

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[87] *Id.* (quoting PATRICIA SMITH CHURCHLAND, NEUROPHILOSOPHY: TOWARD A UNIFIED SCIENCE OF THE MIND-BRAIN 1 (1986) (ebook)).

[88] *Id.* (emphasis omitted).

[89] *Id.* (quoting Patricia Smith Churchland, *Epistemology in the Age of Neuroscience*, 84 J. PHIL. 544, 549 (1987)).

[90] JOHNSON, *supra* note 44, at 129.

[91] *Id.* at 125.

[92] Letter from Charles Darwin to W. Graham (July 3, 1881), *in* 1 THE LIFE AND LETTERS OF CHARLES DARWIN INCLUDING AN AUTOBIOGRAPHICAL CHAPTER 315, 316 (Francis Darwin ed., 1887).

[93] William Edward Morris & Charlotte R. Brown, *David Hume*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY 1 (2019), https://plato.stanford.edu/entries/hume/. While there is some debate over whether Hume was an atheist, "it is certainly true that one of his most basic philosophical objectives is to discredit the doctrines and dogmas of traditional theistic belief." Paul Russell & Anders Kraal, *Hume on Religion*, *in* THE STANFORD

> As to those *impressions*, which arise from the *senses*, their ultimate cause is, in my opinion, perfectly inexplicable by human reason, and 'twill always be impossible to decide with certainty whether they arise immediately from the object, or are produc'd by the creative power of the mind . . . . We may draw inferences from the coherence of our perceptions, whether they be true or false; whether they represent nature justly, or be mere illusions of the senses.[94]

Hume's skepticism has taken on a whole new dimension as physicists and philosophers today have begun to seriously consider the validity of the "simulation hypothesis," which postulates that physical reality is an illusion and that we all actually live in a computer simulation.[95] Professor Rorty sums up the naturalist's lack of faith in the mind by simply conceding, "After Darwin, it becomes very hard to say that human beings grasp the true nature of things."[96]

Naturalism also fails to account for the mind's ability to discover truth using laws of logic. As stated above, human reason entails not only a mind that can accurately perceive what the body touches, tastes, hears, and sees, but one that can also discover truth by following logical relations. In short, the working mind can both perceive *and* analyze. The latter function is particularly important for obtaining knowledge because "[c]omparatively speaking, there is very little that we know we know because we are able to directly examine the respective subject matter and verify the truth of our ideas about it."[97] The vast majority of discovery is made by using "true premisses [sic] from which we may proceed to other known truths by following out logical relations."[98] Mathematics and computers have astronomically expanded our ability to discover "unexperienced (and even unexperienceable) existence"[99] through the process of logical derivation. Thus, for instance, we can calculate Jupiter's gravitational pull based on Newton's law of universal gravitation without

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ENCYCLOPEDIA OF PHILOSOPHY 1 (2017), https://plato.stanford.edu/entries/hume-religion/. Hume's "skepticism and naturalism [] feature prominently in his *Treatise of Human Nature*." *Id.*

[94] DAVID HUME, TREATISE ON HUMAN NATURE bk. I, pt. III, § V (L.A. Selby-Bigge, ed., 2d ed. 1978).

[95] Nick Bostrom, *Are You Living in a Computer Simulation?*, 53 PHIL. Q. 243, 243 (2003).

[96] Intelecom, *Pragmatism, Language and Reality*, YOUTUBE (Mar. 16, 2018), https://www.youtube.com/watch?v=EZ6S8zktfho&feature=youtu.be.

[97] Willard, *supra* note 47, at 42.

[98] *Id.*

[99] *Id.*

ever landing on Jupiter.[100] We can determine the speed of light even though we cannot travel that fast.[101] And we can skip the flight to France and apply the law of non-contradiction[102] to know that the Eiffel Tower cannot *be* the Eiffel Tower and *not be* the Eiffel Tower at the same time. The human mind thus has the unique ability to employ logical reasoning to "consider abstractions of abstractions to nearly any level."[103]

Naturalistic explanations for human logic again fall victim to Plantinga's argument because they prove too little. Naturalistic evolution explains adaptations that help an organism *survive*; it does not, however, explain how the human mind can reason logically using known premises to gain new knowledge beyond our immediate experience that does not aid in survival.[104] Understanding the gravitational pull on Jupiter, calculating the speed of light, and knowing that a distant and famous landmark cannot be and *not* be itself at the same time, contribute little if anything to human survival. In 2019 alone, humans used laws of logic, mathematics, motion, and physics to build machines that could discover a hidden continent, image a black hole, measure earthquakes on Mars, and find a new exoplanet.[105] These fascinating discoveries contribute significantly to human understanding, but their impact on human survival is doubtful. "If humans are animals whose mental capacities evolved solely for their effectiveness in leaving viable offspring in a hunter-gatherer environment, it is difficult to see how we could have access to an objective truth that transcends our common sensory experience."[106] Thus, naturalism does not adequately explain how our

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[100] Matt Williams, *How Strong is Gravity on Other Planets?*, PHYS ORG (Jan. 1, 2016), https://phys.org/news/2016-01-strong-gravity-planets.html.

[101] *See* Chris Oates, *How Were the Speed of Sound and the Speed of Light Determined and Measured?*, SCI. AM. (June 9, 2003), https://www.scientificamerican.com/article/how-were-the-speed-of-sou/ (explaining the scientific process of calculating the speed of light).

[102] Laurence R. Horn, *Contradiction*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY 1 (Aug. 29, 2018), https://plato.stanford.edu/entries/contradiction/. Aristotle defined the law of non-contradiction as follows: "It is impossible that the same thing can at the same time both belong and not belong to the same object and in the same respect . . . ." *Id.* Christian Apologist Ravi Zacharias states the law this way: "Two statements that mutually exclude the other cannot both be true." Ravi Zacharias, *The Law of Noncontradiction*, RAVI ZACHARIAS INT'L MINISTRIES (Apr. 30, 2018), https://www.rzim.org/listen/just-a-thought/the-law-of-non-contradiction.

[103] Anthony Castaldo, *Editor's Pick: Consciousness and Intelligence Are Different*, NEWSCIENTIST (July 19, 2017), https://www.newscientist.com/letter/mg23531352-400-1-editors-pick-consciousness-and-intelligence-are-different/.

[104] JOHNSON, *supra* note 44, at 197–98.

[105] Aylin Woodward, *The Most Mind-Boggling Scientific Discoveries of 2019 Include the First Image of a Black Hole, a Giant Squid Sighting, and an Exoplanet with Water Vapor*, BUS. INSIDER (Dec. 26, 2019, 10:45 AM), https://www.businessinsider.com/biggest-scientific-discoveries-of-2019-2019-11#scientists-also-successfully-harnessed-the-power-of-sunlight-to-propel-a-spacecraft-11.

[106] JOHNSON, *supra* note 44, at 197.

minds are able to use logical relations to understand far more than is necessary for survival.

Naturalism also fails to provide a materialistic explanation for laws of logic.[107] The late philosopher Dr. Greg Bahnsen described such laws as "universal, . . . invariant, and . . . not material in nature."[108] Accordingly, they "have a transcendental necessity about them"[109] and they "can not be avoided."[110] To be internally consistent, the naturalist must maintain that laws of logic somehow evolved from unintelligent and impersonal forces through a process of random chance.[111] The naturalist could argue that such laws are merely societal conventions based on utility, but this argument is unavailing. Consider, for example, the law of noncontradiction, which states that "two statements that mutually exclude the other cannot both be true."[112] If this law of logic is not a universal norm but a mere convention, it would vary among different cultures based on its respective usefulness to that culture. Yet we observe, to the contrary, that this law is observed universally—that is, in every culture. The savvy naturalist will respond that the law of noncontradiction—"either/or logic"—is not a universal norm but rather a mode of Western thinking and that Eastern minds utilize dialectical logic—"both/and logic"—in which something can be both true and not true at the same time.[113] However, the naturalist, by arguing that the law of noncontradiction is not normative, actually confirms the law of noncontradiction . Why? Because, essentially, he is arguing that it is *either* true that the LNC is a universal law, *or* that it is a mere cultural

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[107] Ravi Zacharias, *Contending for the Truth: 2007 National Conference*: *Postmodernism and Philosophy*, LIGONIER MINISTRIES (2007), https://www.ligonier.org/learn/conferences/orlando_2007_national_conference/postmodernism-and-philosophy/?.

> One is the law of identity. When you have identified something as A, you are not talking about non-A. The second is the law of non-contradiction. The third is the law of the excluded middle. Which basically means that just because two things have one thing in common does not mean that they have everything in common. And fourth is the law of rational inference.

Id.

[108] *The Great Debate: Greg Bahnsen v. Gordon Stien*, INTERNET ARCHIVE (Apr. 25, 2015) [hereinafter *The Great Debate*], https://archive.org/details/Bahnsen-Vs-Stein-The-Great-Debate-Does-God-Exist. A full transcript of the Bahnsen-Stein debate is available at http://andynaselli.com/wp-content/uploads/Bahnsen-Stein_Transcript.pdf.

[109] *Id.*

[110] *Id.*

[111] *Id.*; DAWKINS, *supra* note 72, at 9.

[112] Zacharias, *supra* note 102.

[113] This is Hegel's dialectic, which states that two things that are contradictory "does not lead to the rejection of both concepts and hence to nothingness . . . but leads to a positive result, namely, to the introduction of a new concept—the synthesis—which unifies the two, earlier, opposed concepts." Julie E. Maybee, *Hegel's Dialectics*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY 1, 4 (2016), https://plato.stanford.edu/entries/hegel-dialectics/.

convention. He uses the law of noncontradiction to try to refute the law of noncontradiction , which is ultimately self-defeating. Moreover, Christian apologist Ravi Zacharias has noted that "even though Hindus may claim that something can be *both* true *and* untrue concurrently, they, too, look both ways when crossing a road, for they know it will *either* be the bus *or* them that survive an unsolicited collision."[114] Bahnsen and Zacharias would agree with Aristotle that the law of non-contradiction is a universal "first principle" that "is necessary for anyone to have who knows any of the things that are."[115] Logic as convention simply does not match reality.

Because law of noncontradiction and other laws of logic are uniform, epistemological necessities, they also cannot be mere products of chemical reactions in the brain. If they were, they would cease to be normative, and would thus not be laws.[116] For, as Dr. Bahnsen explained, "[W]hat happens inside your brain is not the same as what happens inside my brain, and so what happens inside your brain is not a law. . . . [If] laws of logic come down to being materialistic entities then they no longer have their law-like character."[117] Without any fixed norm of reasoning, each person can define his own "laws" of logic, and rational discourse collapses into meaninglessness.[118] Cornelius Van Til described the naturalist's hopeless intellectual dilemma:

> Suppose we think of a man made of water in an infinitely extended and bottomless ocean of water. Desiring to get out of water, he makes a ladder of water. He sets this ladder upon the water and against the water and then attempts to climb out of the water. So hopeless and senseless a picture must be drawn of the natural man's methodology based as it is upon the assumption that time or chance is ultimate. On his assumption his own rationality is a product of chance. On his assumption even the laws of logic which he employs are products of chance. The rationality and purpose that he may be searching for are still bound to be products of chance.[119]

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[114] RICK M. NAÑEZ, FULL GOSPEL, FRACTURED MINDS?: A CALL TO USE GOD'S GIFT OF THE INTELLECT 175 (2005).

[115] Paula Gottlieb, *Aristotle on Non-Contradiction*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY 1, 2 (2019), https://plato.stanford.edu/entries/aristotle-noncontradiction/.

[116] *The Great Debate*, *supra* note 108 (arguing that atheism renders such laws no longer "law-like").

[117] *Id.*

[118] *Id.*

[119] VAN TIL, *supra* note 58, at 119.

Hume would agree with Van Til that naturalism leads to intellectual despair:

> The *intense* view of these manifold contradictions and imperfections in human reason has so wrought upon me, and heated my brain, *that I am ready to reject all belief and reasoning, and can look upon no opinion even as more probable or likely than another*. Where am I, or what? From what causes do I derive my existence, and to what condition shall I return? Whose favour shall I court, and whose anger must I dread? What beings surround me? and on whom have, I any influence, or who have any influence on me? I am confounded with all these questions, and begin to fancy myself in the most deplorable condition imaginable, [e]nvironed with the deepest darkness, and utterly deprived of the use of every member and faculty.[120]

In summary, naturalism does not provide an adequate justification for human reason. The First Amendment is "rooted in faith in the force of reason."[121] So if naturalism provides no foundation for reason, then likewise, it provides no foundation for the freedom of speech.

C. Can Naturalism Justify the Existence of Ethics?

Naturalism does not provide a materialistic justification for a universal code of ethics. At its core, naturalism rejects God. However, without God, there is no universal moral standard to determine what "ought" to be.[122] There is no criterion to establish what is "right" and what is "wrong."[123] And honest naturalists openly admit this conclusion. Nietzsche called the idea of a "moral world order" a "lie[]."[124] He also spoke of "*my* way" and "your[]" way, but concluded that as for "*the* way—that does not exist."[125] Professor Provine stated bluntly, "There is no ultimate foundation for ethics . . . ."[126] And Richard Dawkins says, "[T]here is . . .

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[120] HUME, *supra* note 94, at bk. I, pt. IV, § VII (emphasis added).

[121] Kunz v. New York, 340 U.S. 290, 302 (1951) (Jackson, J., dissenting).

[122] John Frame & Paul Kurtz, *Do We Need God to Be Moral?*, FRAME-POYTHRESS.ORG (May 17, 2012), https://frame-poythress.org/do-we-need-god-to-be-moral/ (originally published in *Free Inquiry*, a journal of secular humanists).

[123] *Id.*

[124] Friedrich Nietzsche, *The Antichrist*, *in* THE PORTABLE NIETZSCHE, *supra* note 54, at 565, 611 (emphasis omitted).

[125] Friedrich Nietzsche, *Thus Spake Zarathustra: Third Part*, *in* THE PORTABLE NIETZSCHE, *supra* note 54, at 260, 307.

[126] Provine & Johnson, *supra* note 50.

no evil and no good, nothing but blind, pitiless indifference. DNA neither knows nor cares."[127]

If naturalism is true, then there is no right way we ought to think. No ideas (including naturalism itself) are more valid, sound, or correct than any other ideas.[128] Everyone's value judgments become mere preferences. What then is left to resolve intellectual differences, but Nietzsche's "will to power"?[129] For without ethics, "finding any rational grounds for building a consensus on any significant human question becomes problematic."[130] Relativism "leads to the conclusion that social conflicts cannot be resolved by reason or even compromise because there is no common reason that can unite groups that differ on fundamental questions."[131] The abandonment of truth and ethics thus leads directly to the conclusion that debate over fundamental differences is futile and that "only force can decide who is to prevail."[132]

If naturalism is true, then there is also no right way we ought to act. No actions are morally more praiseworthy than any others. Indeed, as Fyodor Dostoevsky famously said, "If God does not exist, everything is permitted."[133] In other words, "notions of good and evil lose their force when people cease to acknowledge God."[134] Accordingly, a naturalist cannot say that debating an opponent is any more commendable than punching that opponent. Force is just as valid a response to offensive speech as is debate.

Atheist Sam Harris has conceded that objective moral duties exist and has attempted to argue that such duties have a naturalistic explanation. He does so by defining the "morally good" as those things that "relate to facts about the well-being of conscious creatures."[135] But his argument stumbles at the first step. His redefinition of the word "good" to mean the flourishing of conscious creatures, simply begs the question why,

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[127] DAWKINS, *supra* note 51, at 133.

[128] JOHNSON, *supra* note 44, at 169–70.

[129] Friedrich Nietzsche, *The Antichrist*, *in* THE PORTABLE NIETZSCHE, *supra* note 54, at 565, 566 ("What is good? Whatever augments the feeling of power, the will to power, power itself, in man.").

[130] JOHNSON, *supra* note 44, at 169.

[131] *Id.* at 183.

[132] *Id.* at 184.

[133] *See* Andrei I. Volkov, *Dostoevsky Did Say It: A Response to David E. Coresti (2011)*, SECULAR WEB, https://infidels.org/library/modern/andrei_volkov/dostoevsky.html (last visited Mar. 4, 2020) (explaining the controversy over whether Dostoevsky actually said the quote so often attributed to him and concluding, based on the original Russian versions of his works, that the quotation is, at least in substance if not in form, accurate).

[134] Frame & Kurtz, *supra* note 122.

[135] SAM HARRIS, THE MORAL LANDSCAPE: HOW SCIENCE CAN DETERMINE HUMAN VALUES 6, 32 (2010).

in a naturalistic universe, is such flourishing good?[136] Dr. Harris's argument essentially leaps from "is" to "ought" with no naturalistic explanation, and this oversight is fatal to his moral theory. "A study of matter, motion, time, and chance will tell you what *is* up to a point, but it will not tell you what you *ought* to do."[137] The scientific method can tell us that smoking leads to lung cancer, but it cannot tell us whether smoking is "bad" and whether one ought to quit.[138] Such an assessment requires reference to teleology or philosophy on the value of life, which is beyond the purview of observation.[139] Dr. Harris can identify what conditions lead to human flourishing, but he cannot tell us whether such flourishing is good—he simply assumes it is without explanation.

In the end, Darwinian evolution simply provides no grounds to condemn violent attempts to silence controversial speakers on America's college campuses because "impersonal objects and forces cannot justify ethical obligations."[140]

> Scientific naturalism is a story that reduces reality to physical particles and impersonal laws, portrays life as a meaningless competition among organisms that exist only to survive and reproduce, and sees the mind as no more than an emergent property of biochemical reasons. In consequence, a merely scientific concept of rationality prepares the way for the irrationalist and tribalist reaction that is so visible all around us.[141]

Naturalism empowers the motto of the cancel culture's campus protestor, which is, "Your speech is violence, but my violence is speech." In sum, naturalism fails to justify any normative code of ethics on its own terms, and thus, provides no intelligible reason to condemn mob violence or to commend debate as the proper response to "offensive" speech.[142]

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[136] *See, e.g.*, Kwame Anthony Appiah, *Science Knows Best*, N.Y. TIMES (Oct. 1, 2010), https://www.nytimes.com/2010/10/03/books/review/Appiah-t.html ("But wait: How do we know that the morally right act is, as Harris posits, the one that does most to increase well-being, defined in terms of our conscious states of mind?").

[137] Frame & Kurtz, *supra* note 122.

[138] JOHNSON, *supra* note 44, at 200 ("By its very nature, the scientific method has no power to resolve disputes about value or teleology (the purpose for which things like living organisms were created).").

[139] *Id.*; Frame & Kurtz, *supra* note 122.

[140] Frame & Kurtz, *supra* note 122.

[141] JOHNSON, *supra* note 44, at 197.

[142] Let me be clear that I am not contending that naturalists ascribe to no moral code. Undoubtedly, many naturalists give to humanitarian causes and seek the well-being of their neighbors and friends. Indeed, many materialist scientists probably joined the scientific community for the purpose of human knowledge and flourishing. My point is simply that

Naturalism is the predominant worldview in academia.[143] It embraces only naturalistic explanations for reality, and thus rejects any form of transcendentalism.[144] Naturalism openly discards objective truth, implicitly undercuts man's ability to reason, and fails to provide a materialistic basis for a consistent moral ethic. Under naturalistic assumptions, there is no truth to find, there is no assurance the mind works, and there is no reason to abandon force as a means to resolve disagreements. Because truth, reason, and ethics are necessary preconditions for a rational search for the truth—which the First Amendment was designed to protect—naturalism undercuts the very foundation of this liberty. We should therefore not be shocked that students are abandoning rational debate for violence. Because naturalism, on its own terms, fails to provide an internally consistent explanation for the freedom of speech on campus, an alternative paradigm must be considered.

III. CAN CLASSICAL CHRISTIANITY JUSTIFY THE FIRST AMENDMENT?

The classical Christian worldview stands in stark contrast to the naturalistic one. The former endorses—rather than rejects—transcendentalism. Nature is not all there is, nor can nature provide all the answers. The Christian worldview affirms that there is a supernatural component to reality. Whereas the naturalist believes in an impersonal, unintelligent, and random universe, the Christian believes the natural world is run by a personal, intelligent, and purposeful Being. Specifically, the Christian worldview is built, at a minimum, on the following three basic presuppositions: God exists, God created the natural world for a purpose, and God has revealed truth to mankind.[145] The source of this knowledge is God's Word as revealed in the Bible.[146] Can these biblical principles, if true, explain the existence of truth, reason, and ethics and

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despite these laudable impulses, naturalism provides no internally consistent epistemological reason for a universal code of ethics.

143 *See* Merrill Ring, *Naturalism and Normativity*, CAL. ST. UNIV., FULLERTON, philosophy.fullerton.edu/faculty/merrill_ring/papers.aspx (last visited Mar. 7, 2020) (explaining that naturalism has dominated English-speaking philosophy for the past century).

144 *Id.*

145 GLENN R. MARTIN, PREVAILING WORLDVIEW OF WESTERN SOCIETY SINCE 1500, at 36–42 (2006). Martin generally discusses the three basic presuppositions of the Christian worldview. I have stated them somewhat differently here, but they are essentially the same principles.

146 *See id.* at 39. While the Bible was written by many human writers in sixty-six books over hundreds of years, God is the ultimate author. "*All Scripture is given by inspiration of God*, and is profitable for doctrine, for reproof, for correction, for instruction in righteousness, that the man of God may be complete, thoroughly equipped for every good work." *2 Timothy* 3:16–17 (emphasis added).

thus provide an adequate justification for the First Amendment? Or, to put it more bluntly, can classical Christianity succeed where naturalism fails?

As an initial matter, it is worth noting that the American system of government, including the First Amendment, was based upon the foundational presuppositions of classical Christianity. It is only natural and right for contemporary Americans to look to those presuppositions in search of an adequate justification for our liberties and public institutions. The private writings and public documents that constitute the historical record of the American Revolution and the Founding Era reveal an underlying classical Christian worldview.[147]

Americans anchored their belief in political rights to God and God's law, for the Declaration of Independence proclaims that "all men are created equal, [and] that *they are endowed by their Creator with certain unalienable [r]ights*."[148] "Governments are instituted" to secure these rights,[149] but the people retain the right to "alter or abolish" any government that oversteps its lawful bounds.[150] Relying on the authority of "*the Laws of Nature and of Nature's God*," the people of the American colonies declared themselves independent and began the work of creating states from colonies and a republic from a former part of an empire.[151] John Adams declared what is plain from the text, that the "[Declaration of Independence] . . . laid the corner stone of human government upon the first precepts of Christianity."[152] This is not surprising given that "[t]he Bible was the most prominent literary text in eighteenth-century America"[153] and was "[t]he most important source of meaning for eighteenth-century Americans."[154] Indeed, the Bible was the most quoted source of authority in the public political literature written between 1760 and 1805.[155] Guided and justified by those "Laws of Nature and of Nature's

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[147] *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 24, 26, 30, 32 (2d ed. 1992) (noting the superficial influence of classical authors, the direct influence of Enlightenment thinkers, the reliance upon English common law, and pervasive influence of theological ideas derived from "the political and social theories of New England Puritanism").

[148] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

[149] *Id.*

[150] *Id.*

[151] *Id.* at para. 1 (emphasis added).

[152] John Qunicy Adams, An Oration Delivered Before the Inhabitants of the Town of Newburyport, at Their Request, on the Sixty-First Anniversary of the Declaration of Independence (July 4, 1837).

[153] DANIEL L. DREISBACH, READING THE BIBLE WITH THE FOUNDING FATHERS 49 (2017).

[154] JOYCE APPLEBY, LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION 1 (1992).

[155] DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 140–45 (1988) (comparing citations to the Bible to citations to other sources referenced by the Founding

God," the American people "alter[ed] their . . . [s]ystems of [g]overnment" to secure their God-given rights.[156]

Among the most cherished of these rights are the freedom of speech and the free exercise of religion, which (as the Supreme Court has explained) are related components of the "individual freedom of mind" protected by the First Amendment.[157] The Court has noted that the foundations of this protected "sphere of intellect"[158] were revealed in Virginia's struggle for religious liberty.[159] And this struggle revealed a consistent reliance on Christian principles as the basis of political freedom. Thomas Jefferson's Bill for Establishing Religious Freedom, drafted in 1779, stated the fundamental principle for liberty of thought:

> *Well aware that* . . . Almighty God hath created the mind free, that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of

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Fathers). While the colonists also borrowed frequently from European and Enlightenment thinkers, Lutz concluded that the references to the Bible dominated the founding era:

> When reading comprehensively in the political literature of the war years, one cannot but be struck by the extent to which biblical sources used by ministers and traditional Whigs undergirded the justification for the break with Britain, the rationale for continuing the war, and the basic principles of Americans' writing their own constitutions.

Id. at 142.

[156] THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776).

[157] Wooley v. Maynard, 430 U.S. 705, 714 (1977) (quoting Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)) ("A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"); *see also Barnette*, 319 U.S. at 638 ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

[158] In *Barnette*, the plaintiff's suit was founded upon the Free Exercise Clause. 319 U.S. at 630. However, the Court ultimately held that the mandatory pledge and flag salute violated a more fundamental principle of the First Amendment. "We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id.* at 642.

[159] *See* Everson v. Bd. of Educ., 330 U.S. 1, 11–13 (1947) (discussing the influence of the writings of Jefferson and Madison—who drafted the Memorial and Remonstrance and co-authored the Declaration of Rights with George Mason—on the meaning of the First Amendment); *see also* McGowan v. Maryland, 366 U.S. 420, 437–38 (1961) (explaining that Virginia's Declaration of Rights was "particularly relevant in the search for the First Amendment's meaning").

> the holy author of our religion . . . that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles, on the supposition of their ill tendency, is a dangerous fallacy . . . that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order . . . .[160]

James Madison echoed these principles in his Memorial and Remonstrance Against Religious Assessments by writing the following about religious liberty in 1785:

> This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: *It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him.* This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society.[161]

In short, both Madison and Jefferson concluded that the mind is free because *God has not given the civil government jurisdiction over it.* God retains exclusive authority over the human mind and leaves no room for physical or political force as a means of persuasion.[162] Accordingly, men are free to believe and express their opinions—religious or otherwise—without fear of human retribution. This principle provided the basis for the Virginia legislature to adopt the Bill for Establishing Religious Freedom in 1786, and ultimately, for the nation to ratify the First Amendment in 1791.[163] These organic documents clearly illustrate that the core presuppositions of classical Christianity formed the foundation upon which the Revolutionary political philosophy was built

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[160] THOMAS JEFFERSON, A BILL FOR ESTABLISHING RELIGIOUS FREEDOM (1779), *reprinted in* 2 THE PAPERS OF THOMAS JEFFERSON, 1777 TO 18 JUNE 1779, at 545, 545–46 (Julian P. Boyd, ed., 1950) (ebook).

[161] JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* 2 THE WRITINGS OF JAMES MADISON, COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED 1783–1787, at 183, 184–85 (Gaillard Hunt ed., 1901) (emphasis added).

[162] *See Jeremiah* 17:10 ("I, the Lord search the heart, I test the mind . . . ."); *Psalm* 7:9 (NASB) ("For the righteous God tries the hearts and minds.").

[163] 1786 Va. Acts 26.

and provided an adequate justification for, among other things, a widespread commitment to freedom of speech.[164]

A. Can Classical Christianity Justify the Existence of Truth?

The Christian worldview unambiguously embraces the idea of universal, objective truth. The Bible is replete with affirmations of the ontological reality of truth.[165] The foundation of this premise is the existence of God.

> The starting point for the Biblical Christian is God and His rule. The basic reality is God. Therefore, the center of all things is God. God is the final authority. He is ultimate. The first four words of the Bible are, without question, the most instructive of the words of God to man. "In the beginning, God . . . ."[166]

Accordingly, God is the very source of truth. As the standard-bearer, or central point of reference for reality, He defines what truth is by His very nature. The Bible affirms that God is a "God of truth."[167] Jesus Christ, the incarnation of God in human flesh, proclaimed, "I am . . . the truth."[168] Because truth is of the essence of God, He cannot lie.[169] It follows

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[164] *See, e.g.*, FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 57 (1985).

> Americans liked to believe that their rights—whether to life, liberty, property, or anything else—were founded, not on mere will or caprice, but upon some broader legitimating principle. Accordingly, when the First Continental Congress had convened in September of 1774 and had appointed a committee to draft a statement of "rights, grievances, and means of redress," the committee immediately entered into a preliminary discussion of the sources of American rights. Richard Henry Lee of Virginia led off by asserting that "the rights are built on a fourfold foundation," namely, natural law, the British constitution, the charters of the several colonies, and "immemorial usage."

Id. (footnote omitted).

> When the decision for Independence was made, all claims to rights that were based upon royal grants, the common law, and the British constitution became theoretically irrelevant. Independence—the very existence of the United States—was unequivocably justified in the Declaration itself by an appeal to "the laws of Nature and of Nature's God."

Id. at 58–59.

[165] VAN TIL, *supra* note 58, at 49. The Christian has "taken the final standard of truth to be the Bible itself." *Id.* Accordingly, the arguments in this section will primarily rely on texts from the Bible.

[166] MARTIN, *supra* note 145, at 36.

[167] *Deuteronomy* 32:4; *see also Exodus* 34:6 ("The Lord, the Lord God, merciful and gracious, longsuffering, and abounding in goodness and truth.").

[168] *John* 14:6.

[169] *Hebrews* 6:18 ("[I]t *is* impossible for God to lie . . . .").

then that everything God says is truth,[170] including His word,[171] His law,[172] and His commandments.[173] His word not only declares truth, but it also reveals lies,[174] fables,[175] iniquity,[176] darkness,[177] evil, and unrighteousness[178] as the opposites of truth.

By affirming objective truth as an ontological reality, classical Christianity provides a rational justification for the First Amendment in two ways. First, it asserts the existence of truth, the pursuit of which is the very purpose of the freedom of speech.[179] By confirming the actuality of truth, Christianity confirms the object of the First Amendment. In other words, it makes sense to protect the pursuit of truth because truth is actually there to discover, according to the Bible. Second, Christianity affirms the authoritative nature of the First Amendment. Without truth, there could not be the "self-evident" truth that "all men are . . . endowed by their Creator with certain unalienable [r]ights" among which are the "[l]iberty" of speech.[180] As discussed, *supra*, the First Amendment is built on the premise that only God has authority over the mind.[181] This governmental limit only has teeth if it is a true principle *truly* backed by God's authority. Whereas naturalism hollows the First Amendment by removing truth and God's authority, classical Christianity supports both and thus validates the Amendment.[182]

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[170] *Psalm* 119:160 ("The entirety of Your word *is* truth . . . .").

[171] *John* 17:17 ("Sanctify them by Your truth. Your word is truth.").

[172] *Psalm* 119:142 ("Your righteousness *is* an everlasting righteousness, and Your law *is* truth.").

[173] *Psalm* 119:151 ("You *are* near, O Lord, and all Your commandments *are* truth.").

[174] *1 John* 2:21 ("I have not written to you because you do not know the truth, but because you know it, and that no *lie* is of the *truth*.") (emphasis added).

[175] *2 Timothy* 4:4. The Apostle Paul describes persons who "will turn *their* ears away from the truth, and be turned aside to fables." *Id.*

[176] *1 Corinthians* 13:6 ("[Love] does not rejoice in iniquity, but rejoices in the truth.").

[177] *1 John* 1: 5–6 ("This is the message which we have heard from Him and declare to you, that God is light and in Him is no darkness at all. If we say that we have fellowship with Him, and walk in darkness, we lie and do not practice the truth.").

[178] *Romans* 2:2–8. The Apostle Paul describes how God will judge those who "do not obey the *truth*, but obey *unrighteousness"* and will pour out "wrath . . . on every soul of man who does *evil*." *Romans* 2:8–9 (emphasis added).

[179] Frederick Schauer, *Free Speech, the Search for Truth, and the Problem of Collective Knowledge*, 70 SMU L. Rev. 231, 231 (2017).

[180] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[181] *See supra* note 162 and accompanying text.

[182] Frame & Kurtz, *supra* note 122 (explaining that atheists lack a firm basis for morality while Christians find their basis for morality in the person of God).

B. Can Classical Christianity Jutify the Existence of Reason?

The classical Christian worldview also provides a sound justification for human reason, as the Bible accounts for both the human mind's ability to accurately perceive reality as well as its power to think logically. Human reason is founded on the fact that we are created in the image of God.[183] Indeed, from beginning to end, the Bible tells the story about a personal and intelligent Creator who is communicating with His intelligent creation (mankind). God reveals Himself from the beginning as *all*-intelligent by describing His intimate connection with an unmistakable sign of intelligence, namely—language. "In the beginning was the *Word*, and the *Word* was with God, and the *Word was God*."[184] Elsewhere, the Bible describes God as having "unsearchable" understanding[185] and "all the treasues of wisdom and knowledge."[186] The Apostle Paul attempts to capture the intelligence of God as follows:

> Oh, the depth of the riches both of the wisdom and knowledge of God!
> How unsearchable *are* His judgments and His ways past finding out!
> "For who has known the mind of the Lord?
> Or who has become His counselor?"[187]

God, having created us in His image, calls us to imitate Him,[188] which includes thinking like Him. As St. Thomas Aquinas noted, "Since human beings are said to be in the image of God in virtue of their having a nature that includes an intellect, such a nature is most in the image of God in virtue of being most able to imitate God."[189] Because our thinking powers are created by an intelligent God, it is rational to believe that the human mind can know and discover reality, not exhaustively as God does, but truly nonetheless.[190]

Additionally, we see in God's instructions to humanity that He presumes man's capability to accurately (if not fully) perceive God and His natural world. Jesus Christ says that the "first and great

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[183] *Genesis* 1:27 ("So God created man in His *own* image; in the image of God He created him; male and female He created them.").

[184] *John* 1:1 (emphasis added).

[185] *Isaiah* 40:28 ("Have you not known? Have you not heard? The everlasting God, the Lord, The Creator of the ends of the earth, Neither faints nor is weary. His understanding is unsearchable.").

[186] *Colossians* 2:3.

[187] *Romans* 11:33–34.

[188] *Ephesians* 5:1 ("Therefore be imitators of God as dear children.").

[189] ELEONORE STUMP, AQUINAS 232 (2003).

[190] MARTIN, *supra* note 145, at 39.

commandment" is to "love the Lord your God with all your . . . *mind*."[191] This commandment presupposes a working mind that can both think about God and "think[] God's thoughts after Him."[192] And the Bible tells us that man can know God because "His invisible *attributes* are clearly seen, being *understood*" by humanity.[193] Additionally, the Bible often teaches lessons by exhorting the reader to examine nature. For example, the writer of Proverbs calls us to observe ants, rock badgers, and locusts, to learn about diligence, safety, and strength in numbers, respectively.[194] Moreover, Jesus Himself regularly referenced natural concepts such as sowing and reaping, wheat and tares, sheep and wolves, and vines and branches to teach lessons about the Kingdom of God.[195] These lessons would be meaningless unless hearers could accurately understand Jesus's references to nature. As philosopher Cornelius Van Til put it, "[T]he truth of Christianity appears to be the immediately indispensable presupposition of the fruitful study of nature."[196] The Christian, unlike the naturalist, can thus have confidence in his sense perceptions.

In addition to affirming the idea that man can accurately observe his environment, the Christian worldview also justifies man's ability to use reason and logic to discover new knowledge and wisdom. Indeed, God has laid the burden of discovery on all of mankind, as King Solomon noted:

> I, the Preacher, was king over Israel in Jerusalem. And I set my heart to seek and search out by wisdom concerning all that is done under heaven; this burdensome task God has given to the sons of man.[197]

God is effectively calling all mankind to the search for truth. This general call is even more pronounced in the book of Proverbs, where Solomon urges the readers to pursue wisdom and knowledge above all things:

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[191] *Matthew* 22:37–38 (emphasis added).

[192] *See* Christine Dao, *Man of Science, Man of God: Johann Kepler*, INST. FOR CREATION RES. (Mar. 1, 2008), https://www.icr.org/article/science-man-god-johann-kepler ("[Johann Kepler] is frequently quoted as saying, 'O God, I am thinking Thy thoughts after Thee.'").

[193] *Romans* 1:20 (second emphasis added).

[194] *Proverbs* 30:24–27.

[195] *E.g.*, *Matthew* 13:1–23 (explaining human responses to the gospel message through the parable of the sower); *Matthew* 13:24–30 (explaining the spiritual nature of the kingdom of God through the parable of the wheat and the tares); *John* 10:1–30 (comparing His relationship with true believers to the relationship between a shepherd and his sheep); *John* 15:1–8 (comparing His relationship with true believers to the relationship between a vine and its branches).

[196] VAN TIL, *supra* note 58, at 283.

[197] *Ecclesiastes* 1:12–13.

> Get wisdom! Get understanding!
> Do not forget, nor turn away from the words of my mouth. Do not forsake her, and she will preserve you;
> Love her, and she will keep you.
> Wisdom *is* the principal thing;
> *Therefore* get wisdom.
> And in all your getting, get understanding.[198]

This is no futile invitation. The Bible encourages us that "those who seek [wisdom] diligently will find [it]"[199] and that "you shall know the truth, and the truth shall make you free."[200]

Beyond this clarion call to get understanding, the Bible provides several positive examples of the use of logical reasoning. For instance, when God is calling Israel back to the Mosaic covenant, He says, "Come now, and let us *reason* together."[201] Also, Paul made it his "custom" to "*reason*[]" with Jews and Gentiles throughout his missionary journeys.[202] Moreover, we see Christ Himself using laws of logic as part of His discussions with the Pharisees. For example, in one encounter, Jesus says, "When it is evening, you say, '*It will* be fair weather for the sky is red'. . . . *You know how* to discern the face of the sky."[203] Here, we see Jesus affirm the soundness of the classic Aristotelian syllogism:

> Major Premise: Red skies in the evening portend fair weather.
> Minor Premise: This evening the skies are red.
> Conclusion: The weather will be fair.[204]

Christ confirms that the Pharisees can arrive at correct conclusions about tomorrow's weather based on deductive reasoning.

In another confrontation, when the Pharisees challenge Christ's authority, He employs the law of non-contradiction by asking them if the baptism of John the Baptist was "[f]rom heaven or from men?"[205] The Pharisees quickly recognized that Christ had placed them in a real bind. John's baptism testified to Christ's authenticity, and it was *either* false (from man) *or* true (from heaven)—but it could not be both at the same time. The Pharisees understood that if they affirmed John's baptism they would also be affirming Christ, but if they denied John's baptism, the

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198 *Proverbs* 4:5–7.
199 *Proverbs* 8:17.
200 *John* 8:31–32.
201 *Isaiah* 1:18 (second emphasis added).
202 *Acts* 17:2.
203 *Matthew* 16:2–3 (second emphasis added).
204 John Piper, *Faith and Reason*, DESIRING GOD (Mar. 15, 2007), https://www.desiringgod.org/messages/faith-and-reason.
205 *Matthew* 21:23–25.

people might harm them, for they considered John to be a prophet.[206] Neither alternative was acceptable to them, so they answered, "We do not know."[207] Of course, Jesus's use of the laws of logic, while inexplicable to a naturalist, is entirely consistent with a theistic worldview that affirms the existence of "abstract, universal, invariant" laws that flow from an intelligent God.[208]

In summary, the classical Christian worldview, unlike naturalism, provides an internally consistent explanation for human reason because God's Word confirms that God has given man a mind that can accurately perceive nature and can use logical relations to discover truth. Given these presuppositions, the protection provided by the First Amendment makes rational sense.

C. Can Classical Christianity Justify the Existence of Ethics?

The classical Christian worldview also provides a sound basis for ethics generally and specifically for condemning violent means to silence offensive speech. As with truth and reason, the foundation of ethics begins with a God "who thinks, speaks, acts rationally, and judges the world."[209] The Bible reveals that God alone is holy[210] and good[211] and that He is the ultimate Lawgiver.[212] God's law is a reflection of His character.[213] Accordingly, His law is holy and good,[214] and obedience to God's law is the "standard of human righteousness."[215] And because God does not change,[216] His law is the immutable moral standard to be followed in every

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[206] *Matthew* 21:25–26 ("And they reasoned among themselves, saying, "If we say, 'From heaven,' He will say to us, 'Why then did you not believe him?' But if we say, 'From men,' we fear the multitude, for all count John as a prophet.").

[207] *Matthew* 21:27.

[208] *The Great Debate*, *supra* note 108.

[209] Frame & Kurtz, *supra* note 122.

[210] *Revelation* 15:4 ("*You* alone *are* holy.").

[211] *Mark* 10:18 ("No one *is* good but One, *that is*, God.").

[212] *James* 4:12 ("There is one Lawgiver, who is able to save and to destroy. Who are you to judge another?").

[213] GREG L. BAHNSEN, BY THIS STANDARD: THE AUTHORITY OF GOD'S LAW TODAY 56 (Inst. of Christian Econ. ed., 1985) ("[T]he law is a transcript of the holiness of God . . . .").

[214] *Romans* 7:12, 16 ("Therefore the law *is* holy, and the commandment holy and just and good. . . . If, then, I do what I will not to do, I agree with the law that *it is* good."); *1 Timothy* 1:8 ("But we know that the law is good if one uses it lawfully . . . .").

[215] BAHNSEN, *supra* note 213, at 49; *see also Deuteronomy* 12:28 ("Observe and obey all these words which I command you, that it may go well with you and your children after you forever, when you do *what is* good and right in the sight of the Lord your God."); *Psalm* 119:68 ("You *are* good, and do good; Teach me Your statutes."); *Micah* 6:8 ("He has shown you, O man, what *is* good; And what does the Lord require of you But to do justly, To love mercy, And to walk humbly with your God?").

[216] *See Malachi* 3:6 (NASB) ("I, the Lord, do not change . . . ."); *James* 1:17 ("Every good gift and every perfect gift is . . . from the Father of lights, with whom there is no

age.[217] Whereas the unintelligent and impersonal universe of the naturalist has no one to decree laws or enforce them, the Christian worldview affirms a personal God who is both lawgiver and judge.[218]

God's law implicitly condemns the use of violence to resolve differences of opinion in the command, "You shall love your neighbor as yourself."[219] Indeed, God's entire law is fulfilled in this commandment.[220] This decree imposes a moral duty on us to focus on the well-being of others before ourselves.[221] Paul describes this moral duty as follows:

> *Love suffers long and is kind*; love does not envy; love does not parade itself, is not puffed up; *does not behave rudely*, does not seek its own, *is not provoked*, thinks no evil; does not rejoice in iniquity, but rejoices in the truth; *bears all things*, believes all things, hopes all things, *endures all things*.[222]

Jesus Christ sums up this high standard of love in the "Golden Rule": "[W]hatever you want men to do to you, do also to them."[223] This timeless principle has even been incorporated into our national public policy. Both the Virginia Declaration of Rights and the Memorial and Remonstrance affirm that "it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other,"[224] and as discussed *supra*, the Supreme Court has recognized these documents as foundational to a proper understanding of the First Amendment.[225] The love ethic is thus a moral standard that governs all mankind, in all times and in all places—including the college campus.

The campus cancel culture obviously falls short of this standard. It is not loving to shout down or assault someone with whom you disagree. Such actions are "rude," not "kind," and do not demonstrate any of the

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variation or shadow of turning."); *Hebrews* 13:8 ("Jesus Christ *is* the same yesterday, today, and forever.").

[217] *See Matthew* 5:18 ("For assuredly, I say to you, till heaven and earth pass away, one jot or one tittle will by no means pass from the law till all is fulfilled.").

[218] *See* VAN TIL, *supra* note 58, at 70. ("According to non-Christian thought, there is no absolute moral personality to whom man is responsible and from whom he has received his conception of the good, while according to Christian thought God is the infinite moral personality who reveals to man the true nature of morality.").

[219] *Mark* 12:31.

[220] *Galatians* 5:14 ("For all the law is fulfilled in one word, *even* in this: 'You shall love your neighbor as yourself.'")

[221] *Philippians* 2:4 ("Let each of you look out not only for his own interests, but also for the interests of others.").

[222] *1 Corinthians* 13:4–7 (emphasis added).

[223] *Matthew* 7:12.

[224] This affirmation, which prominently appears in each of these documents, has been memorialized in the Virginia Constitution. VA. CONST. art. I, § 16.

[225] *See supra* Section II.

respect, patience, forbearance or endurance required by the law of love.[226] Moreover, because no one would want to be shouted down or assaulted for speaking, it is morally wrong to use such tactics against an opponent.[227] Indeed, the biblical mandate requires us to love even our "enemies" who express views that are extremely offensive.[228]

Furthermore, the Bible not only implicitly condemns mob violence in the great commandment, but it expressly singles out such violence as morally wrong in other verses. King Solomon characterizes "violent men" as wicked, unfaithful, and unjust.[229] King David equates "violent men" and "evil men."[230] And Jesus commands us to not resist the "evil person" who "slaps you on your right cheek."[231] The ministry of the Apostle Paul further demonstrates that force is the wrong response to offensive speech. In the first century, Paul traveled throughout Israel, Asia Minor, and Europe preaching that faith in Jesus Christ was the only way man could be saved from his sins,[232] and this highly offensive message[233] was often met with forceful resistance. For example, the Bible records that when Paul preached the gospel in Iconium, a "violent attempt was made by both the Gentiles and Jews, with their rulers, to abuse and stone [him]."[234] Similarly, in Jerusalem, a mob shouted Paul down[235] and beat him[236] because of his teaching.[237] And in Antioch, the Jews incited the prominent

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[226] *1 Corinthians* 13:4–7.

[227] *Matthew* 7:12 ("Therefore, whatever you want men to do to you, do also to them . . . .").

[228] *Matthew* 5:44 ("But I say to you, love your enemies, bless those who curse you, do good to those who hate you, and pray for those who spitefully use you and persecute you.").

[229] *Proverbs* 10:11 ("[V]iolence covers the mouth of the wicked."); *Proverbs* 13:2 ("[T]he soul of the unfaithful feeds on violence."); *Proverbs* 21:7 ("The violence of the wicked will destroy them, because they refuse to do justice.").

[230] *Psalm* 140:1 ("Deliver me, O Lord, from evil men; preserve me from violent men.").

[231] *Matthew* 5:39 ("But I tell you not to resist an evil person. But whoever slaps you on your right cheek, turn the other to him also.").

[232] *Romans* 6:23 ("[T]he wages of sin *is* death, but the gift of God *is* eternal life in Christ Jesus our Lord."); *1 Timothy* 1:15 ("This *is* a faithful saying and worthy of all acceptance, that Christ Jesus came into the world to save sinners . . . .").

[233] *See 1 Peter* 2:5–8 (describing Jesus Christ as a "rock of offense").

[234] *Acts* 14:1–6.

[235] *Acts* 22:22–24 ("And they listened to him until this word, and *then* they raised their voices and said, 'Away with such a *fellow* from the earth, for he is not fit to live!' Then, as they cried out and tore off *their* clothes and threw dust into the air, the commander ordered him to be brought into the barracks, and said that he should be examined under scourging, so that he might know why they shouted so against him.").

[236] *Acts* 21:30–32. ("And all the city was disturbed; and the people ran together, seized Paul, and dragged him out of the temple; and immediately the doors were shut. Now as they were seeking to kill him, news came to the commander of the garrison that all Jerusalem was in an uproar. He immediately took soldiers and centurions, and ran down to them. And when they saw the commander and the soldiers, they stopped beating Paul.").

[237] *Acts* 21:27–29 ("[T]he Jews from Asia, seeing [Paul] in the temple, stirred up the whole crowd and laid hands on him, crying out, 'Men of Israel, help! This is the man who teaches all *men* everywhere against the people, the law, and this place . . . .'").

men and women to drive Paul out of the city.[238] The Book of Acts lists several other incidents in which mobs either shouted down, chased, assaulted, or stoned Paul (or one of his companions), specifically because he spoke a message they did not want to hear,[239] and the Bible denounces these aggressive actions.[240] God's law would likewise condemn the vandalism, shouting, threats, and assaults used to silence Milo Yiannopoulos, Charles Murray, Ben Shapiro, and other "controversial speakers." From cover to cover, God's law prohibits people from employing force to silence their intellectual opponents as a means to pursue truth.[241] Accordingly, the Christian has principled grounds to condemn the cancel culture, whereas the naturalist's appeal for civility is meaningless under his worldview, for he has nothing higher to appeal to but an empty universe.[242]

The naturalist might respond by contending that Christians have no authority to oppose violence, given that church history is replete with brutal treatment of alleged heretics. Persecution of religious dissenters was well-known in the founding era and was one of the primary reasons colonists fled from the Old World and a major reason for adopting the First Amendment.[243] That horrific incidents have occurred in the name of

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[238] *Acts* 13:50.

[239] *Acts* 9:21–25 (explaining that after Paul ably defeated some of the Jews in Damascus in debate, they "plotted to kill him"); *Acts* 14:19 ("Then Jews from Antioch and Iconium came there; and having persuaded the multitudes, they stoned Paul *and* dragged *him* out of the city, supposing him to be dead."); *Acts* 16:20–24 (recounting that the magistrates, after receiving complaints against Paul's doctrine, had Paul and his companions beaten and imprisoned); *Acts* 17:5–9 (noting that a crowd attacked the house where Paul was said to be staying and dragged the owner and others to the city rulers); *Acts* 19:21–41 (recounting the riot at Ephesus, during which the crowd shouted down a speaker for two hours, stirred up by the silversmiths to preserve their profits from the worship of Diana).

[240] *2 Corinthians* 11:23–26 (listing a host of troubles Paul suffered for the sake of the gospel, including the beatings and "perils" he experienced at the hands of both Jews and Gentiles who opposed his teaching). The clear implication of this passage is that these violent actions are unjust, but that Paul has persevered through them nonetheless. *Id.*

[241] *See John* 8:32 ("And you shall know the truth, and the truth shall make you free."); *John* 17:17 ("Sanctify them by Your truth. Your word is truth.").

[242] Frame & Kurtz, *supra* note 122.

[243] *See* Everson v. Bd. of Educ., 330 U.S. 1, 8–9 (1947).

> The[] words of the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity. . . . The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to

"Christianity" simply cannot be denied. However, God's Word thoroughly condemns these incidents of religious persecution, which were carried out by mobs, ecclesiastical authorities, and civil rulers, as patently unjust. First, the Bible denounces incidents of mob bloodshed, such as the St. Bartholomew's Day Massacre,[244] under the principles discussed immediately above. God calls us to love our neighbors, not assault them. And there is simply no justification in the Bible for individual or mob violence against an "unbeliever." The Bible also condemns incidents such as the Inquisition, in which the church aligned with the state to enforce purely ecclesiastical law.[245] Simply put, God never gave the church the authority to exercise the power of the sword[246] (that authority was given to the state[247]), and He never gave the state the power over the mind (that authority was reserved to God[248]). Thus, the Bible permits neither the

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> time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed.

Id.

[244] JOHN WITTE, JR., THE REFORMATION OF RIGHTS 81–82 (2007). On the night of August 24, 1572, Roman Catholics turned out in droves in Paris to murder French Protestants. According to estimates, between 10,000 and 100,000 French Calvinists were slaughtered over the next two months. *Id.*

[245] *See generally*, *e.g.*, JENNIFER KOLPACOFF DEANE, A HISTORY OF MEDIEVAL HERESY AND INQUISITION 7–8 (2011) (discussing how church law was imposed on the people in the Middle Ages).

[246] An example of this biblical separation between church and state can be seen when King Saul offered a sacrifice to God on behalf of the Hebrew people. The prophet Samuel rebuked the King for exercising a function that was clearly reserved for Israel's religious leaders. For exceeding his civil jurisdiction and usurping religious authority, King Saul eventually lost his kingdom. *See 1 Samuel* 13:5–14. The point is that the church cannot exercise civil force against unbelievers because it has no authority to do so. A reader might still contend that the Bible does not completely disavow violence as a punishment for beliefs given that the Mosaic law gave Hebrew officials some authority to punish false prophets and persons who worshipped idols instead of the God of Israel. *See*, *e.g.*, *Deuteronomy* 17:2–7. However, because God had a special covenant with the nation of Israel, God could command Israel's sole allegiance to Him in this unique circumstance. *See Deuteronomy* 7:6 ("For you *are* a holy people to the Lord your God. The Lord your God has chosen you to be a people for Himself, a special treasure above all the peoples on the faceof the earth."). God was the literal civil magistrate in Israel, so worshipping the gods of other nations was a type of disloyalty that was akin to treason, and thus punishable by the civil authorities. Likewise, treason is still a capital offense that is punishable by the United States government. 18 U.S.C. § 2381 (2012).

[247] *Romans* 13:3–4 ("For rulers are not a terror to good works, but to evil. Do you want to be unafraid of the authority? Do what is good, and you will have praise from the same. For he is God's minister to you for good. But if you do evil, be afraid; for he does not bear the sword in vain; for his is God's minister, an avenger to *execute* wrath on him who practices evil.").

[248] *Jeremiah* 17:10 ("I, the Lord, search the heart, *I* test the mind, even to give every man according to his ways, according to the fruit of his doings."); *Psalm* 7:9 ("Oh, let the

church nor the state to use force to execute violence on religious dissenters for their opinions. Biblical writers cite to this jurisdictional principle to rebuke civil authorities, such as King Nebuchadnezzar,[249] King Darius,[250] and the Sanhedrin[251] for trying to force idol worship, compel prayer, and prevent evangelism, respectively. Jefferson's Bill for Establishing Religious Freedom simply affirms the well-established, biblical constant that "all attempts to influence [the mind] by temporal punishments or burthens, or by civil incapacitations . . . are a departure from the plan of the holy author of our religion."[252] So it is actually *Christian* principles that denounce mob, ecclesiastical, and civil violence against religious dissenters, and it was those same principles that ended the abuses of religious establishments in America.

Not only does classical Christianity denounce violence, but it prescribes rational discourse as the ethical method for searching for the truth; indeed, it provides numerous examples of this principle in action. The Bible starts with God's example of using reason to persuade mankind to enter into relationship with Him. As Jefferson explains, God refused to "propagate" Christianity by "coercions," even though He, "being Lord both of body and mind" had the power to do so.[253] The Holy Scriptures themselves testify that God has chosen language, rather than force, to reach His creation. God sent prophets in the Old Testament to exhort the people to return to the Mosaic covenant.[254] God sent His own Son, Jesus

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wickedness of the wicked come to an end, but establish the just; for the righteous God tests the hearts and minds.").

[249] *Daniel* 3:1–30. When King Nebuchadnezzar ordered Shadrach, Meshach, and Abednego, to worship the idol, they answered, "O Nebuchadnezzar, we have no need to answer you in this matter." *Daniel* 3:16. Essentially, these Hebrew men were telling the King that He had no authority over their minds, and thus, they need not even answer him on this matter. *Daniel* 3:17–18.

[250] *Daniel* 6:1–23. Daniel was thrown into a den of lions for refusing to pray to the king. When King Darius came to the lions' den to see if Daniel was still alive, Daniel responded, "My God sent His angel and shut the lions' mouths, so that they have not hurt me, because I was found innocent before Him; and also, O king, *I have done no wrong before you*." *Daniel* 6:22 (emphasis added). Daniel was explaining that the king had no authority to order him to pray to the king in the first place, and thus, no wrong was done when Daniel refused this command. *Id*. In other words, Daniel's beliefs were not subject to the king's authority.

[251] *Acts* 5:17–39. When Peter and the other apostles were ordered by the Sanhedrin to stop preaching about Christ, Peter replied, "We ought to obey God rather than men." *Acts* 5:27–29. Peter was affirming that the Jewish civil government did not have jurisdiction over Peter's beliefs.

[252] *See* JEFFERSON, *supra* note 160, at 545. AUTOBIOGRAPHY, *in* 1 THE WRITINGS OF THOMAS JEFFERSON 62 (Paul Leicester Ford ed., Letterpress ed., 1982). The wording was Thomas Jefferson's original, but this portion was amended by the Virginia House of Burgesses. 1786 Va. Acts 26.

[253] JEFFERSON, *supra* note 160, at 545.

[254] *See, e.g.*, *Nehemiah* 1:9 ("[R]eturn to Me, and keep My commandments and do them . . . ."); *Joel* 2:13 ("Return to the Lord your God . . . .").

Christ—the very *Word* of God[255]—to communicate with man on his level. And Christ, in turn, commissioned His followers to persuade men[256] by teaching and preaching the gospel.[257]

The Apostle Paul serves as a model example of this principle of persuasion in action. The Book of Acts alone records at least ten times that Paul's strategy was to "reason" with Jews and Gentiles to convince them of the truth of the gospel.[258] Paul's preaching in Thessalonica and Berea serve as textbook lessons demonstrating the Bible's commendation of reason and condemnation of violence:

> [Paul and Silas] . . . came to Thessalonica, where there was a synagogue of the Jews. Then Paul, as his custom was, went in to them, and for three Sabbaths reasoned with them from the Scriptures, explaining and demonstrating that the Christ had to suffer and rise again from the dead, and *saying*, "This Jesus whom I preach to you is the Christ."[259]

The Bible records that "some of them were persuaded," but the ones who were not "gather[ed] a mob, set all the city in an uproar, and attacked [a] house" seeking to capture Paul and Silas.[260] Paul then fled to the nearby city of Berea and again reasoned with those in the synagogue there. The Bible explains that the Bereans were "more noble-minded than those in Thessalonica" because they listened to Paul's message and then "examin[ed] the Scriptures daily *to see* whether these things were so."[261] The contrast between the rioting Thessalonians and the Bereans could not be clearer. God's Word chastises the former for their destructiveness and commends the latter for their willingness to engage in rational dialogue.

Similarly, the Bible also affirms civil discussion as the proper method to resolve serious disagreements over church doctrine. For example, in Jerusalem, there arose a great dispute over the applicability of the Mosaic law to the Gentiles, so the apostles and a multitude of church elders "came together to consider the matter" in a great debate.[262] Some of the church

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[255] *John* 1:1 ("In the beginning was the Word, and the Word was with God, and the Word was God.").

[256] *2 Corinthians* 5:11 ("[W]e persuade men . . . .").

[257] *Mark* 16:15–16 ("Go into all the world and preach the gospel to every creature. He who believes and is baptized will be saved . . . ."); *see also 2 Timothy* 4:2–5 ("Preach the word! Be ready in season *and* out of season. Convince, rebuke, exhort, with all longsuffering and teaching. . . . But you be watchful in all things, endure afflictions, do the work of an evangelist, fulfill your ministry.").

[258] *Acts* 17:2, 4, 17; 18:4, 19; 19:8–9; 20:7, 9; 24:25.

[259] *Acts* 17:1–3.

[260] *Acts* 17:4–5.

[261] *Acts* 17:11 (NASB).

[262] *Acts* 15:1–6.

leaders argued that Gentiles had to keep the law of Moses in order to be saved.[263] However, the apostles contended that neither Jews nor Gentiles were justified by the law, but rather both were saved "through the grace of the Lord Jesus Christ."[264] The council ultimately sided with the apostles' argument and sent a decree to the churches in Europe clarifying the church's official position on this matter.[265] This entire incident provides a model for addressing significant matters of disagreement. First, the issue of the Mosaic law was no small matter but actually cut to the core of Christianity, because it challenged the content of the gospel. As Paul explained later in his letter to the Galatians, those who teach that salvation comes through the law "want to pervert the gospel of Jesus Christ."[266] Second, the peacefulness and order of the debate are also noteworthy. Each person spoke in turn and everyone else "kept silent and listened."[267] And finally, the discussion was effective as "the apostles and elders, with the whole church" arrived at a consensus on the proper doctrinal position according to the Scriptures.[268] This is the type of civil, peaceful, and orderly debate the Bible affirms as the proper and ethical way to persuade others, search for truth, and resolve intellectual differences.

The type of rational discourse modeled by Paul, the Bereans, and the Jerusalem council reinforces the time-tested lesson that good speech is the best remedy for bad speech. Our founders knew this to be true. As Jefferson stated in the closing of the Bill for Establishing Religious Freedom,

> [T]ruth is great and will prevail if left to herself, that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, *free argument and debate, errors ceasing to be dangerous when it is permitted freely to contradict them*.[269]

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[263] *Acts* 15:5 ("But some of the sect of the Pharisees who believed rose up, saying, 'It is necessary to circumcise them, and to command *them* to keep the law of Moses.'").

[264] *Acts* 15:11 ("But we believe that through the grace of the Lord Jesus Christ we shall be saved in the same manner as they.").

[265] *Acts* 15:22–29.

[266] *Galatians* 1:7–9 ("[B]ut there are some who trouble you and want to pervert the gospel of Christ. But even if we, or an angel from heaven, preach any other gospel to you than what we have preached to you, let him be accursed. As we have said before, so now I say again, if anyone preaches any other gospel to you than what you have received, let him be accursed."); *see also Galatians* 2:21 ("I do not set aside the grace of God; for if righteousness *comes* through the law, then Christ died in vain.").

[267] *Acts* 15:12 ("Then all the multitude kept silent and listened to Barnabas and Paul declaring how many miracles and wonders God had worked through them among the Gentiles.").

[268] *Acts* 15:22–29.

[269] 1786 Va. Acts 27 (emphasis added).

The Supreme Court has reaffirmed the vigor of this principle, explaining that "counterargument and education" are the proper weapons to expose "errors in judgment or unsubstantiated opinions."[270] And "[i]f there be time to expose through discussion the falsehood and fallacies . . . the remedy to be applied is more speech, not enforced silence."[271]

In summary, the classical Christian worldview justifies the existence of a system of universal, invariant, and binding ethics that flow directly from God's law. This law denounces force and lauds rational discourse as the way one ought to pursue knowledge. Surely, the Court would agree with King Solomon's assessment of the persuasive power of patient and gentle words: "By long forbearance a ruler is persuaded, [a]nd a gentle tongue breaks a bone."[272]

Classical Christianity, in contrast to naturalism, affirms that reality is made up of both the natural and the supernatural. It asserts that God is real, that He created the world for a purpose, and that He has revealed Himself and His Word to mankind. Under this paradigm, truth, reason, and ethics make sense. Because God exists, there also exists a standard-bearer who defines what is true and what is false. Because we are created in the image of this intelligent God, we can be confident that our minds accurately perceive reality and that they can effectively reason to the truth. And because this God is the ultimate lawgiver, He can both decree immutable ethical principles and enforce them. For these reasons, the classical Christian worldview provides an internally consistent justification for truth, reason, and ethics. And because these are preconditions of the First Amendment, the Christian worldview also justifies the Amendment itself.

CONCLUSION

The First Amendment is in danger on America's college campuses. Student support for the protection of free speech is waning, while support for disrupting offensive speakers is rising quickly. Because the law follows the culture, the First Amendment will only be as strong as the cultural consensus that supports it.[273] If the culture no longer subscribes to First Amendment principles, then the Amendment will cease to have any

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[270] Wood v. Georgia, 370 U.S. 375, 389 (1962).

[271] Texas v. Johnson, 491 U.S. 397, 419 (1989) (quoting Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

[272] *Proverbs* 25:15.

[273] *See* Mark L. Movsesian, *Masterpiece Cakeshop and the Future of Religious Freedom*, 42 HARV. J.L. & PUB. POL'Y 711, 750 (2019) ("As everyone knows, law and culture have a mutually reinforcing relationship.").

viability. The campus culture is rapidly heading in that direction and only a return to first principles can stop this cultural shift.

The First Amendment was enacted to protect an orderly pursuit of knowledge, and thus, it presupposes that truth exists, that our minds can discover truth, and that there is an ethical way to pursue truth. These presuppositions cannot be maintained under the naturalistic worldview that currently dominates academia. Naturalism rejects God and any other supernatural or non-materialistic explanations for the natural world. In so doing, naturalism also discards universal truth because there is no objective reference point to determine the truth or falsity of anything. Naturalism also implicitly abandons reason because it fails to explain the accuracy of our sense perception or the existence of non-material laws of logic. And finally, without a lawgiver, naturalism cannot justify a universal moral law that could bind persons to a code of civility. If there is no truth to find, if our reasoning powers are questionable at best, and there is no ethic to condemn aggression, why are we surprised when students abandon principles of free speech and resort to disruption and violence? Indeed, why would students engage in discourse at all when every idea is just as valid as any other? Under the terms of naturalism, force is a rational response to "offensive" speech and the Free Speech Clause itself becomes irrational.

Not so under the classical Christian worldview. America's first freedoms were conceived in a distinctly theistic paradigm. As the Supreme Court has noted, "We are a religious people whose institutions presuppose a Supreme Being."[274] By affirming the existence of God, the Christian worldview provides an internally consistent foundation for truth, reason, and ethics, and by extension, the First Amendment itself.

Because God exists, there is a central, objective point of reference to determine the truth and falsity of any proposition. The Bible confirms God is intelligent and that He created intelligent human beings in His image with the capability to know Him and His creation. The Bible likewise confirms that God decrees and enforces a uniform and objective law that serves as an immutable code of ethics for all generations. This law condemns force and prescribes rational discourse as the way we ought to pursue knowledge. The First Amendment is therefore rational under a Christian worldview because there is truth to discover, our minds are capable of discovering truth, and reason—not force—is prescribed as the proper way to discover it. With truth, reason, and ethics firmly grounded in the Bible, it made sense for the founders to enact the First Amendment to protect an orderly and rational search for knowledge, and it still makes sense today.

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[274] Zorach v. Clausen, 343 U.S. 306, 313 (1952).

If students and faculty at our universities continue to embrace naturalistic assumptions, the crumbling intellectual foundations of the First Amendment will collapse and the freedom of speech will be unable to command our respect. The culture will ultimately abandon the First Amendment, and it will become a lost relic of a forgotten era. America must choose between the principles of naturalism or those of Christianity. We proceed on the current course at our own peril.

THE ORPHANED RIGHT: HOW A SAN DIEGO RESIDENT MIGHT HAVE SAVED SECOND AMENDMENT LIBERTY—*Peruta v. California*, 137 S. Ct. 1995 (2017)

*Daniel J. Wright**

INTRODUCTION

> *"The laws that forbid the carrying of arms . . . disarm only those who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity . . . will respect the less important and arbitrary ones . . . Such laws make things worse for the assaulted and better for the assailants, they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man." - Thomas Jefferson*[1]

The current state of affairs in the United States places our Constitution in serious jeopardy. Protestors purporting to stand *against* fascism trample the First Amendment in an ironic demonstration of "fascism."[2] More apparent, however, is the daily assault on the Second

* Judicial Law Clerk, District Court of the State of Minnesota; LL.M. candidate, University of Arizona College of Law. The views expressed are my own and do not necessarily reflect the views of the State of Minnesota or the Minnesota Judicial Branch. To my darling wife, Catherine, who—for years—has painstakingly listened to me babble on about the Constitution, agreeing with my every word, "Whatever I treasure and enjoy . . . all would be without meaning if I didn't have you."

[1] THOMAS JEFFERSON, THE COMMONPLACE BOOK OF THOMAS JEFFERSON: A REPERTORY OF HIS IDEAS ON GOVERNMENT 314 (Gilbert Chinard ed., Johns Hopkins Press, 1926) (quoting CESARE BECCARIA, AN ESSAY ON CRIMES & PUNISHMENTS 145–46, trans. from Italian with commentary, attributed to M. de Voltaire, trans. from French (1872)).

[2] *See* Lucia I. Suarez Sang, *Portland Antifa Protesters Caught on Video Bullying Elderly Motorist, Woman in Wheelchair*, FOX NEWS (Oct. 10, 2018), https://www.foxnews.com/us/portland-antifa-protesters-caught-on-video-bullying-elderly-motorist-woman-in-wheelchair (describing a violent antifa protest in Portland); Marc A. Thiessen, *Yes, Antifa is the Moral Equivalent of Neo-Nazis*, WASH. POST (Aug. 30, 2017, 5:01 AM), https://www.washingtonpost.com/opinions/yes-antifa-is-the-moral-equivalent-of-neo-nazis/2017/08/30/9a13b2f6-8d00-11e7-91d5-ae4bb76a3a_story.html?utm_term=.652b3b2d5e4f (documenting antifa's attacks on peaceful protesters); Cathy Young, *Deniers of the War on Free Speech on College Campuses Are Dead Wrong*, USA TODAY (Mar. 15, 2018, 6:00 AM), https://www.usatoday.com/story/opinion/2018/03/15/christina-hoff-sommer-free-speech-under-attack-college-campuses-cathy-young-column/424704002/ (discussing antifa's attempts to disrupt controversial speakers on college campuses).

Amendment[3]—the orphaned right.[4] This assault is arguably even more dangerous to liberty, for without it nothing in our Constitution is guaranteed.[5]

The Supreme Court has held the Second Amendment to mean that there exists an individual right to self-defense, by and through the possession of a firearm within, at least, one's home.[6] To be sure, there has

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[3] *See* Ryan W. Miller, *Virginia Lawmakers Advance Gun Control Bills, Including "Red Flag" Law, Month After Pro-gun Rally*, USA TODAY (Feb. 27, 2020, 4:41 PM), https://www.usatoday.com/story/news/nation/2020/02/27/virginia-lawmakers-pass-gun-control-bills-red-flag-law/4854818002/ (describing proposed restrictions on firearms in the commonwealth of Virginia and response of local governments refusing to enforce the laws deeming them unconstitutional violations of the Second Amendment); Timothy Williams, *Trump on Virginia Gun Dispute: 2nd Amendment "Under Very Serious Attack,"* N.Y. TIMES (Jan. 18, 2020), https://www.nytimes.com/2020/01/18/us/virginia-guns-trump.html (reporting President Trump's defense of Second Amendment rights in light of proposed Virginia firearm restrictions).

[4] Silvester v. Becerra, 138 S. Ct. 945, 952 (2018) (Mem.) (Thomas, J., dissenting) ("The right to keep and bear arms is apparently this Court's constitutional orphan. And the lower courts seem to have gotten the message.").

[5] *See* FREDERICK DOUGLASS, THE LIFE AND TIMES OF FREDERICK DOUGLASS 275 (Dover ed. 2003) (1892) ("[T]he liberties of the American people were dependent upon the ballot-box, the jury-box, and the cartridge-box – that without these no class of people could live and flourish in this country."). *But see* Gregory A. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49, 53 (2012) ("Second Amendment insurrectionism falls short of First Amendment dynamism normatively, because debate is more constructive and participatory than violence. Second Amendment insurrectionism also threatens the legal status of First Amendment dynamism, because recognizing a constitutionally permissible path to violent insurrection dramatically increases the cost of constitutionally protecting advocacy of violence. We cannot have both First Amendment dynamism and Second Amendment insurrectionism—and we have made our choice."). However, Second Amendment insurrectionism is what allows First Amendment dynamism in the first place. Certainly, society has chosen the First Amendment to "settle arguments at the ballot box," to borrow Douglass' words, but the Second Amendment still protects individuals from tyrannical government and from tyranny that takes the form of speech prohibitions. While such protection ensures the proper function of government, like settling debates in the marketplace of ideas, it does nothing to *promote* such action. To be sure, Professor Magarian neither sees the protections the Second Amendment affords by allowing the violent overthrow of a tyrannical government nor does he see the actuality by which it prevents a tyrannical government from overthrowing an individual. Thus it is deterrence, rather than an arbitrary overthrow of a tyrannical government, that provides the populace its essential protection. We would do well to note Thomas Jefferson's admonition as a last resort:

> And what country can preserve it's [sic] liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance? Let them take arms. The remedy is to set them right as to facts, pardon and pacify them. What signify a few lives lost in a century or two? The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants.

Letter from Thomas Jefferson to William Stephens Smith (Nov. 13. 1787) *in* 12 THE PAPERS OF THOMAS JEFFERSON, 7 AUGUST 1787–31 MARCH 1788, at 356 (Julian P. Boyd et al. eds. Princeton, 1955).

[6] District of Columbia v. Heller, 554 U.S. 570, 592, 628–29 (2008).

been much debate surrounding the meaning of *infringe* and the organization of the clauses within the Amendment's text.[7]

There are four distinct positions within the gun control debate. First, those on the extreme left do not believe the Second Amendment provides for general possession of firearms. They claim that the Amendment only covers militia service—a service that is no longer relevant because of the current volunteer Armed Forces of the United States.[8] Next, there are those who believe that the Second Amendment protects the right of an individual to possess a firearm, but usually only in one's own home and probably not an "assault rifle."[9] Moving right, there are those who believe that the Second Amendment guarantees the right to possess most types of firearms in the home, public, or otherwise. This position favors only minimal regulation such as adopting one or more of the following: age limits to purchase, good criminal and moral history, or freedom from mental defects.[10] Finally, on the extreme right are those that do not

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[7] *Compare* Ryan Notarangelo, *Hunting Down the Meaning of the Second Amendment: An American Right to Pursue Game*, 61 S.D. L. REV. 201, 203, 205–08 (2016) (supporting the holding in *Heller* and the Court's interpretation of the organization of the clauses and discussion of "infringe"); *with* Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 896-902, 934–35 (2012) (arguing error in historical and textual analysis of the Court in *Heller* and proposing new readings of "infringe" and the effect of the prefatory and operative clauses of the Second Amendment).

[8] *See* Magarian, *supra* note 5 at 87 (suggesting that the need for a militia is unnecessary now that the United States maintains standing armies); *see also* H. RICHARD UVILLER & WILLIAM G. MERKEL, THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT 227–28 (2002) ("That individual right is, however, limited by both text and context to the service of communal security by provision for a well-regulated military force known as a militia . . . . What this means is that on the pressing question of gun control, the Constitution is neutral. The Second Amendment would take no notice if the Congress . . . outlawed all handguns and assault rifles in private hands.").

[9] *See, e.g.,* Laurence H. Tribe, *Sanity and the Second Amendment*, The WALL ST. J. (Mar. 4, 2008), https://www.wsj.com/articles/SB120459428907209205?mod=opinion_main_commentaries&ns=prod/accounts-wsj (discussing the arguments presented before the Court in *Heller* and criticizing the argument that the Second Amendment only protects certain types of weapons). The correct term, however, is semi-automatic rifle. *See* Stephen P. Halbrook, *Reality Check: The "Assault Weapon" Fantasy and Second Amendment Jurisprudence*, 14 GEO. J.L. & PUB. POL'Y 47, 49-51 (2016) (discussing the use of terms "assault weapon" and "assault rifle" and their impact on legislation and public perception). An "assault weapon" or "assault rifle" is a political pejorative term used for rhetorical effect and generally refers to semi-automatic AR-15 style rifles. *Id.* However, despite their appearance and the claim that these firearms are more dangerous than handguns, both types of weapons are semi-automatic, meaning that the user must pull the trigger each time they wish to fire a projectile. *Id.*

[10] *See* Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57, 63 (1995) (explaining the pro-gun lobbyists' views that it is a broad right that protects possession for all purposes); Randy

believe in any type of gun regulation whatsoever. Some of these individuals may argue that a citizen should be able to own ballistic missiles or nuclear weapons[11] and that any type of age limit or background check is unconstitutional.[12]

The immediate extremes on each side may be summarily eliminated. To begin with, the argument that the Second Amendment only applies to state militia service and has been preempted by the institution of a centralized military is illogical and has been disproved by history and Supreme Court jurisprudence:. First, a centralized U.S. military was established before the Second Amendment was ratified through the Articles of Confederation and Perpetual Union, which established the Continental Army in 1781.[13] Article I of the Constitution calls for an Army and Navy circa 178;[14] the Second Amendment was ratified in 1791.[15] Next, *District of Columbia v. Heller* confirmed that the Second Amendment

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Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 272 (2004) (reviewing H. RICHARD UVILLER & WILLIAM G. MERKEL, THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT (2002)) (explaining that an individual rights view would disfavor restrictions unless absolutely necessary).

[11] *See* Gary Nolan, *Why Can't I Have a Nuclear Weapon?*, LOGICAL LIBERTARIAN (Jan. 26, 2013), https://logicallibertarian.com/2013/01/26/why-cant-i-have-a-nuclear-warhead/ (describing how those who ask such questions are not actually advocating for ownership); Tom Toles, *Personal Ownership of Nuclear Weapons May be Legal Under the Second Amendment*, WASH. POST (Feb. 22, 2018), https://www.washingtonpost.com/news/opinions/wp/2018/02/22/personal-ownership-of-nuclear-weapons-may-be-legal-under-the-second-amendment/?utm_term=.032efb66eaec (same).

[12] *See* David French, *Universal Background Checks are Constitutionally Suspect*, NAT'L REVIEW (Aug. 12, 2019 2:38 PM) https://www.nationalreview.com/2019/08/universal-background-checks-are-constitutionally-suspect/ (arguing that universal background checks for intrastate firearm transfers are an unconstitutional violation of the commerce clause); Nicholas L. Waddy, *Age Restrictions on Guns Unconstitutional*, OLEAN TIMES HERALD (Feb. 28, 2018), http://www.oleantimesherald.com/commentary/age-restrictions-on-guns-unconstitutional/article_bdd3c154-1ca7-11e8-a3e4-47bd5564fbb4.html (arguing that because an individual's constitutional right cannot be denied on the basis of his or her sex, race, religion, or age, age restrictions on firearm sales to individuals over 18 and under 21 are unconstitutional). There is nothing by way of scholarly material advocating for the lawful possession of nuclear weapons. However, an interesting column on Debate.org shows that 64% of participants believe the Second Amendment protects an individual right to own nuclear weapons. *Should People be Allowed to Have Nuclear Weapons Under the 2nd Amendment?*, DEBATE.ORG, (last visited Jan. 24, 2020) https://www.debate.org/opinions/should-people-be-allowed-to-have-nuclear-weapons-under-the-2nd-amendment.

[13] *See* ARTICLES OF CONFEDERATION OF 1781, arts. VII–IX (establishing the role of the Congress in the establishment of the "common defence"); David B. Kopel & Joseph G.S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. Ill. U. L.J. 495, 542 (2019) (discussing the role the legislature had in managing the Continental Army).

[14] U.S. CONST. art. I, § 8, cl. 12–13.

[15] David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 202 (2017).

does, in fact, confer an individual right to self-defense, unconnected with militia service.[16] Finally, *McDonald v. City of Chicago* applied that logic to each state through the Fourteenth Amendment.[17]

The extreme right's argument also fails. First, although seen as a victory for gun control opponents, *Heller* also held that the Second Amendment is not free from all restriction.[18] Next, while the argument that the government's military should not have greater firepower that the citizenry has validity, the government can still permissibly regulate the materials needed to make ballistic missiles and nuclear weapons for obvious reasons.[19] Finally, when applying a strict lens to the Second Amendment's self-defense purpose, one can argue that conventional, lawful weapons are *discriminate*.[20] That is, a common semi-automatic handgun is typically used to kill those whom the user intends. The same could be said for a typical semi-automatic rifle, such as an AR-15. However, a ballistic missile, and especially a nuclear weapon is *indiscriminate*—these weapons can and will kill numerous people other than whom the user intends.[21] This is counterintuitive to a personal or individual need for self-defense.

We are then left with *Peruta*'s gravamen—whether the Second Amendment guarantees individuals the right to possess and carry firearms in public. In other words, does the Second Amendment's already

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[16] 554 U.S. 570, 595–96, 599–601 (2008).

[17] 561 U.S. 742, 791 (2010).

[18] 554 U.S. at 626–27.

[19] This is primarily because these materials are so dangerous and volatile, irrespective of their use in weapons. *See generally* New York v. United States, 505 U.S. 144, 159–60 (1992) (holding, among other things, that regulation of interstate market in radioactive waste disposal is within Congress' Commerce Clause authority). On the other hand, however, it would likely be questionable for the government to regulate barium, lead, and antimony—the three major components of primer material in projectiles [bullets]—in such a way that would burden the production or possession of projectiles, since each is not inherently dangerous to human life in such a profound way. *See* Allison C. Murtha & Linxian Wu, *The Science Behind GSR: Separating Fact from Fiction*, FORENSIC MAGAZINE (Sept. 27, 2012 5:56 AM), https://www.forensicmag.com/article/2012/09/science-behind-gsr-separating-fact-fiction (noting that barium, antimony, and lead are the three primary components of primer); *Priming Compositions*, BEV FITCHETT'S GUNS MAGAZINE: CHEMICAL ANALYSIS FIREARMS, https://www.bevfitchett.us/chemical-analysis-of-firearms/priming-compositions.html (last updated Dec. 27, 2019) (discussing the ideal components of a primer as being nonexplosive independently and identifying the common components of primer).

[20] *See* Nolan, *supra* note 11 (describing how an AR-15 owner may continue to own his firearm without harming anyone because the projectiles only hit the targets he intends to hit).

[21] *Id.* (discussing how nuclear weapons cannot be safely used by individuals without harming others).

elucidated guarantee of an individual right to self-defense extend past the home?

Against this backdrop, in 2017, the United States Supreme Court denied certiorari in *Peruta v. California*,[22] a case in which the *en banc* Ninth Circuit Court of Appeals overturned its panel decision and held that the Second Amendment does not guarantee a right to carry a concealed weapon in public.[23] Peruta had tried to obtain a permit to carry his firearm in public but was denied because he failed to demonstrate "good cause" to justify obtaining a permit.[24] Justice Thomas, with whom Justice Gorsuch joined, penned a scathing dissent from the Court's certiorari denial: "[T]he Framers made a clear choice: They reserved to all Americans the right to bear arms for self-defense. I do not think we should stand by idly while a State denies its citizens that right, particularly when their very lives may depend on it."[25] This Article agrees with the argument in the dissent that the Court should have granted certiorari.

This Article begins with a brief discussion of the history of the Second Amendment and its relevant jurisprudence. Next, it discusses *Peruta's* facts and unique procedural history. This Article then explores how the Court could have, and should have, held by arguing that California's "good cause" requirement to carry a weapon in public is facially unconstitutional. This Article also asserts that intermediate scrutiny is not a proper method of judicial review in this instance and, even if it were, the regulation at issue in *Peruta* still fails under this level of scrutiny. It then suggests that the inequity in good cause permit issuance across California is so inequitable that it violates Fourteenth Amendment Due Process rights. This Article further argues that tiered levels of scrutiny may not be the best method of judicial review for Second Amendment cases, as activist judges have demonstrated little, if any, restraint in this area. Finally, this Article closes with a brief discussion of subsequent, relevant cases recently at issue before the Supreme Court and concludes that the Court should cease treating the Second Amendment as a less important fundamental right.

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[22] Peruta v. California, 137 S. Ct. 1995, 1996 (2017) (mem.).
[23] Peruta v. Cty. of San Diego, 824 F.3d 919, 924, 942 (9th Cir. 2016) (en banc).
[24] *Id.* at 924.
[25] *Peruta*, 137 S. Ct. at 1996, 1999–2000 (Thomas J., dissenting).

I. BRIEF HISTORY OF THE RIGHT TO KEEP AND BEAR ARMS

The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed."[26] *Infringe* means "to limit or undermine (something); encroach on,"[27] or "to encroach upon in a way that violates law or the rights of another."[28] One might then say that the Second Amendment prevents the government from encroaching on the people's right to possess arms.[29] Justice Scalia, for example, believed that use of the term *infringe* meant that the right to keep and bear arms was a preexisting right—not that the Second Amendment was "granting" a new right, but that it was protecting a preexisting right from government encroachment.[30]

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[26] U.S. CONST. amend. II.

[27] *Infringe*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010).

[28] *Infringe*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 2001).

[29] One of the chief debates concerning the individual right interpretation is the clause organization of the Second Amendment. District of Columbia v. Heller, 554 U.S. 570, 577–78, 578 nn.3–5 (2008). It can be broken into a prefatory or justification clause, "A well regulated Militia, being necessary to the security of a free State . . ." and an operative clause, "the Right of the People to keep and bear arms shall not be infringed." CONST. amend. II; *Heller,* 554 U.S. at 577–78; *see also* Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 793–94, 796–97 (1998) (discussing the unusual clause structure of the Second Amendment and its contribution to confusion in interpretation). Some argue that the operative clause's placement by the Framers after the justification shows that the Second Amendment guarantees a collective right. *Heller*, 554 U.S. at 640–45 (Stevens, J., dissenting); *see also* David C. Williams, *The Unitary Second Amendment*, 73 N.Y.U. L. REV. 822, 824–25 (1998) (responding to Eugene Volokh's article, *The Commonplace Second Amendment,* in the same issue). But, the operative clause's placement after the prefatory is not limiting. *Heller*, 554 U.S. at 577.

> The [prefatory clause] does not limit the [operative clause] grammatically, but rather announces a purpose. The Amendment could be rephrased, 'Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.' Although this structure of the Second Amendment is unique in our Constitution, other legal documents of the founding era, particularly individual rights provisions of state constitutions, commonly included a prefatory statement of purpose. Logic demands that there be a link between the stated purpose and the command. The Second Amendment would be nonsensical if it read, 'A well regulated Militia, being necessary to the security of a free State, the right of the people to petition for redress of grievances shall not be infringed.' That requirement of logical connection may cause a prefatory clause to resolve an ambiguity in the operative clause.

Id. (citations omitted).

[30] *Heller*, 554 U.S. at 592–95.

A. Treatment in the Articles of Confederation and Perpetual Union

Scholars widely agree that the United States' first governing document, the Articles of Confederation and Perpetual Union, was inadequate.[31] The Articles of Confederation did not create a strong enough central government.[32] The fledgling nation of America had recently emerged from a war with a country that overpowered its individual states, so it is conceivable that the Framers did not want an incredibly powerful central government. For example, 1781's Articles of Confederation did not provide a method for the federal government to collect taxes to fund the only real thing that the Articles provided for: the military.[33] The proper amount of government is a lot like the proper amount of taxes: too little is bad, too much is worse.[34]

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[31] *See* Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 SAN DIEGO L. REV. 249, 253–54 (1997) ("The Articles of Confederation were often criticized by Federalists, and even Antifederalists, as creating a relatively weak general government that was unable to exert its supremacy over the state governments. This is the standard view of the general government under the Articles held by modern commentators as well."); *see also* Eric M. Freedman, *Why Constitutional Lawyers and Historians Should Take a Fresh Look at the Emergence of the Constitution from the Confederation Period: The Case of the Drafting of the Articles of Confederation*, 60 TENN. L. REV. 783, 785–86 (1993) ("Those favoring a weak national government prevailed, but when put to the test of practice, their creation simply did not work.").

[32] Smith, *supra* note 31, at 253–54; Freedman, *supra* note 31, at 785–86; *see also* United States v. Emerson, 270 F.3d 203, 236 (5th Cir. 2001) ("The primary shortcoming of the Articles of Confederation was that the central government it provided for was too weak. It was generally recognized that, although a stronger central government was needed, the central government was to remain one of limited and enumerated powers only, lest the cure be worse than the disease. Thus, the challenge was to design a federal government strong enough to deal effectively with that particular range of issues requiring federal control, without enabling the federal government to become an instrument of tyranny.").

[33] *See* Marjorie E. Kornhauser, *For God and Country: Taxing Conscience*, 1999 WIS. L. REV. 939, 963 (explaining that the Articles of Confederation failed to provide for the collection of taxes); Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155. MIL. L. REV. 1, 53 (1998) (attributing the downfall of the Articles of Confederation to its inability to collect taxes to fund the Continental Army).

[34] Martin J. McMahon, Jr. & Alice G. Abreu, *Winner-Take-All Markets: Easing the Case for Progressive Taxation*, 4 FLA. TAX REV. 1, 63 n.235 (1998) (discussing the "Laffer Curve"). Along with Laffer, this ideology comes from the Mises-Friedman-Sowell schools of economics. According to these schools of thought, there exists a bell curve on which one side the government does not collect enough taxes and thus does not have the revenue necessary to fund itself or its programs, and on the other, the government projects too high a tax rate and cannot collect the amount necessary because the people either refuse to pay or simply cannot. *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 78–814 (40th ed. 2002) (discussing the hypothetical impacts upon a subsequent generation of increasing tax rates); THOMAS SOWELL, BASIC ECONOMICS: A COMMON SENSE GUIDE TO THE ECONOMY 426–28 27 (5th ed. 2015) (explaining how government pension programs require increased taxes later in time due to inadequate taxation at program inception)*see also* 3 LUDWIG VON MISES,

Similarly, the Articles of Confederation did not contain the rights upon which the government could not infringe. Nowhere in the Articles is there language like that of the Second Amendment. Like the Constitution, however, the Articles of Confederation did provide for the "common defence" through the Continental Congress.[35] This was achieved through militias that were comprised of "all free male inhabitants in each state from 20 to fifty."[36] It is surprising, however, that specific language was never entered to dissuade one of the largest problems that plagued Revolutionary-era America: Britain's gun confiscation in the colonies.[37]

B. Drafting of the Constitution

As the Articles of Confederation were proving ineffective in 1787, the original states had already begun the process of creating their own constitutions.[38] Several states codified the right to self-defense related to arms, military protection, or the right to forcible resistance to preserve liberty through their state constitution or by other means.[39] Some, however, saw these individualized attempts as problematic:

HUMAN ACTION: A TREATISE ON ECONOMICS 808 (Bettina Bien Greaves ed., 4th ed. 2007) ("If capitalists are faced with the likelihood that the income tax or the estate tax will rise to 100 per cent, they will prefer to consume their capital funds rather than to preserve them for the tax collector."). *But see* Elizabeth Popp Sherman & Laura M. Milanes-Reyes, *The Politicization of Knowledge Claims: The "Laffer Curve" in the U.S. Congress*, 36 QUAL. SOCIOLOGY 53 (2013) (arguing that other Chicago school economists describe the Laffer Curve as tautology).

[35] ARTICLES OF CONFEDERATION OF 1781, *supra* note 13.

[36] NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 168 (2012) (quoting 25 J. OF THE CONT. CONG. 1774–1789, at 741–42 (1922) (adopted Oct. 23, 1783)).

[37] *See id.* at 163 (discussing the decision of British commanders to maintain a standing army, repeal militia laws, suspend production of ammunition and gunpowder, and disarm colonists seeking to revolt in 1777).

[38] *See* James T. Knight II, Note, *Splitting Sovereignty: The Legislative Power and the Constitution's Federation of Independent States*, 17 GEO. J. L. & PUB. POL'Y 683, 693–95, 697–701, 703–05 (2019) (discussing the drafting and formation of state constitutions during the period of enforcement of the Articles of Confederation and prior to the drafting and ratification of the United States Constitution); Mark A. Graber, *State Constitutions as National Constitutions*, 69 ARK. L. REV. 371, 373 (2016) (clarifying that fourteen state constitutions were in force during the 1787 Constitutional Convention).

[39] Johnson, *supra* note 35, at 169–79. Massachusetts, for example, began its 1780 Constitution with a Declaration of Rights that asserted "[a]ll men are born free and equal, and have certain natural, essential, and unalienable rights . . . [like] the right of enjoying and defending their lives and liberties . . . ." *Id.* at 176 (quoting MASS. CONST. of 1780, pt. I, art. I). Further, the Massachusetts Constitution's Declaration of Rights stated that "[t]he people have a right to keep and bear arms for the common defence." *Id.* (quoting MASS. CONST. of 1780, art. XVII).

> As George Washington put it, "That something is necessary, none will deny; for the situation of the general government, if it can be called a government, is shaken to its foundation, and liable to be overturned by every blast. In a word, it is at an end; and, unless a remedy is soon applied, anarchy and confusion will inevitably ensue."[40]

Despite the states' attempt to govern themselves, at least some form of centralized government was necessary for an organized army. The general arming of the citizenry was viewed as necessary, but there was widespread debate about its accomplishment.

Alexander Hamilton generally believed that the Constitution ought to provide limits for the government rather than prescribe every right of the citizenry because there was no need to explicitly state something in the Constitution that the government never maintained the power to suppress.[41] Nevertheless, Hamilton believed so strongly in the need for a protective army—likely to protect against a British invasion—that he wanted an express constitutional provision.[42] James Madison took it a step further; he believed in the central army as much as Hamilton but

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[40] *Id.* at 185 (quoting Letter from George Washington to Thomas Jefferson (May 30, 1787), *in* 3 RECS. OF FED. CONV. OF 1787 31 (Max Farrand ed., 1911)).

[41] THE FEDERALIST NO. 84, at 445 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) ("[T]hey . . . are not only unnecessary . . . but would even be dangerous. They would contain various exceptions to powers not granted; and on this very account, would afford a colourable [sic] pretext to claim more than were granted. For why declare that things shall not be done, which there is no power to do?").

[42] THE FEDERALIST NO. 29, *supra* note 41, at 142–43 (Alexander Hamilton).

> Little more can reasonably be aimed at, with respect to the people at large, than to have them properly armed and equipped; and in order to see that this be not neglected, it will be necessary to assemble them once or twice in the course of a year.
>
> "But though the scheme of disciplining the whole nation must be abandoned as mischievous or impracticable; yet it is a matter of the utmost importance, that a well digested plan should, as soon as possible, be adopted for the proper establishment of the militia. The attention of the government ought particularly to be directed to the formation of a select corps of moderate size, upon such principles as will really fit them for service in case of need. By thus circumscribing the plan, it will be possible to have an excellent body of well trained militia, ready to take the field whenever the defence [sic] of the state shall require it. This will not only lessen the call for military establishments; but if circumstances should at any time oblige the government to form an army of any magnitude, that army can never be formidable to the liberties of the people, while there is a large body of citizens, little, if at all, inferior to them in discipline and the use of arms, who stand ready to defend their own rights, and those of their fellow citizens. This appears to me the only substitute that can be devised for a standing army; and the best possible security against it, if it should exist."

Id.

feared the tyrannical interior government with more vigor. As Madison wrote in the Federalist Papers:

> Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government; still it would not be going too far to say, that the state governments, with the people on their side, would be able to repel the danger.[43]

Finally, perhaps one of the most outspoken individuals against an unarmed populace was Tench Coxe, a Philadelphia merchant and delegate to the Continental Congress, who later served many political roles, including assistant secretary of the Treasury, and secretary of the Pennsylvania Society for Promoting the Abolition of Slavery, of which Benjamin Franklin was president.[44] In 1788, Coxe wrote in the Pennsylvania Gazette, "Congress have no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are *the birth-right of an American*."[45]

C. Drafting of the Second Amendment

At its most basic level, federalism concerns the relationship between the federal government as a singular unit and the individual states as their own sovereign units.[46] At the founding of the United States, federalists like James Madison and Alexander Hamilton believed in a slightly more centralized and powerful federal government.[47]

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[43] THE FEDERALIST NO. 46, *supra* note 41, at 247 (James Madison).

[44] Stephen P. Halbrook & David B. Kopel, *Tench Coxe and the Right to Keep and Bear Arms, 1787–1823*, 7 WM. & MARY BILL RTS. J. 347, 349, 351–53, 357, 368 (1999).

[45] *A Pennsylvanian III*, PA. GAZETTE, Feb. 20, 1788, *reprinted in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1778–80 (Merrill Jensen ed., 1976). He continued, "What clause in the state or foederal [sic] constitution hath given away that important right . . . . [T]he unlimited power of the sword is not in the hands of either the foederal [sic] or state governments, but where I trust in God it will ever remain, in the hands of the people." *Id.*; *see also* Stephen P. Halbrook and David B. Kopel, *Tench Coxe and the Right to Keep and Bear Arms, 1787-1823*, 7 WM. & MARY BILL RTS. J. 347, 364 (1999) (discussing Tench Coxe's contribution to the debate as the author of the "Pennsylvanian" letters).

[46] Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 518 (2007).

[47] *See* Jeff Kosseff, *Hamiltonian Cybersecurity*, 54 WAKE FOREST L. REV. 155, 166 (2019) (discussing Hamilton's and Madison's defense through the Federalist Papers of the Constitution's implementation of a strong central government).

Anti-federalists such as Thomas Jefferson and Patrick Henry[48] were skeptical of a strong federal government[49]—and rightly so, given the country's reason for declaring independence from British tyranny.[50]

The anti-federalists even published their own version of *The Federalist Papers*, dubbed, conveniently, *The Antifederalist Papers.*[51] Writing under the pseudonym *Brutus*,[52] the anti-federalists famously wrote concerning the Constitution and Bill of Rights:

> If every thing which is not given is reserved, what propriety is there in these exceptions? Does this constitution any where grant the power of suspending the habeas corpus, to make ex post facto laws, pass bills of attainder, or grant titles of nobility? It certainly does not in express terms. The only answer that can be given is, that these are implied in the general powers granted. With equal truth it may be said, that all the powers which the bill of rights guard against the abuse of, are contained or implied in the general ones granted by this Constitution.[53]

Even Jefferson was afraid that not enumerating the important rights could lead to the same tyrannical government they just escaped. He wrote

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[48] Charles L. Cohen, *The "Liberty or Death" Speech: A Note on Religion and Revolutionary Rhetoric*, 38 WM. &MARY Q. 702, 702–03 (1981) (noting that the famous words "give me liberty, or give me death" "carried a close vote at the Virginia Convention of March 1775 in favor of a militia bill [Patrick] Henry supported").

[49] David E. Steinberg, *Thomas Jefferson's Establishment Clause Federalism*, 40 HASTINGS CONST. L.Q. 277, 288–89 (2013).

[50] *See* Carlton F.W. Larson, *The Declaration of Independence: A 225th Anniversary Re-Interpretation*, 76 WASH. L. REV. 701, 702–23, 764 (2001) (identifying such reasons for declaring independence from Britain as including the right to self-governance and freedom from oppression by King George III). That's not to say that Eighteenth Century federalists were anything like today's pro-government progressives; even a libertarian of today would arguably be left of Madison and Hamilton.

[51] Aaron Zelinsky, *Misunderstanding the Anti-Federalist Papers: The Dangers of Availability*, 63 ALA. L. REV. 1067, 1071 (2012). Though at the time, neither side named their writings—they were just letters to the people of New York. *Id*. The anti-federalist writing generally appeared in response to the federalist writings. *See id.* at 1071–73 (discussing the prominent New York men who wrote the Federalist and Anti-Federalist Papers).

[52] Though Brutus' identity is not known definitively to this day, modern scholars suggest that Brutus was both Melancton Smith, of Poughkeepsie, New York, and John Williams, of Salem, New York. *See* Michael P. Zuckert & Derek A. Webb, THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE xxv (2009) (identifying Melancton Smith as the likely author of the Brutus essays); Joel A. Johnson, *'Brutus' and 'Cato' Unmasked: General John Williams's Role in the New York Ratification Debate, 1787-88*, AM. ANTIQUARIAN SOC. 297, 299 (2009) (identifying John Williams as the likely author of the Brutus essays).

[53] *Brutus II*, *in* THE ANTI-FEDERALIST 120–21 (Herbert Storing ed., 1985).

to Madison, "Half a loaf is better than no bread. If we cannot secure all our rights, let us secure what we can."[54] The Bill of Rights was drafted as a compromise between the federalists and the anti-federalists and called for protection of some of the most fundamental rights according to both groups—including the right to keep and bear arms.

II. HISTORY OF RELEVANT LAW

The heart of the issue in *Peruta* is whether, under the Second Amendment, California may deny a regular, law-abiding citizen the ability to carry a weapon in public. To determine the answer, we must first lay the historical groundwork by considering how Federal law has treated the Second Amendment over the past 100 years. Next, we must consider how our nation's key Second Amendment jurisprudence provides insight into how the Supreme Court *ought* to have decided *Peruta.*

A. Firearm-related Federal Laws

The National Firearms Act of 1934 was enacted in response to the St. Valentine's Day Massacre in 1929, where seven people were killed in a prohibition-related gang shootout that included Al Capone's gang and the iconic "Tommygun."[55] It required, among other things, registration and taxation of certain firearms, such as machine guns (like the Tommygun) and sawed-off shotguns.[56] A few years later, the Federal Firearms Act of 1938 established the Federal Firearms License (FFL) system and

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[54] Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *reprinted in* 14 PAPERS OF THOMAS JEFFERSON 8 OCTOBER 1788 TO 26 MARCH 1789, at 660 (Julian P. Boyd et al. eds., Princeton, 1958).

[55] John O'Brien, *The St. Valentine's Day Massacre*, CHI. TRIB. (Feb. 14, 2014, 2:54 PM), https://www.chicagotribune.com/news/nationworld/politics/chi-chicagodays-valentines massacre-story-story.html.

[56] National Firearms Act, Pub. L. No. 73-474, §§ 1(a)–(b), 2, 3(a), 48 Stat. 1236–37 (1934). This Act was held constitutional in *United States v. Miller*, 307 U.S. 174, 177–78, 183 (1939), but was amended in 1968 after the Supreme Court's ruling in *Haynes v. United States*, 390 U.S. 85, 95–97, 100 (1968). In *Haynes*, the Court held that firearm registration by convicted felons was the equivalent of self-incrimination and thus a violation of the Fifth Amendment. *See* Elliot Buckman, Note, *Just a Soul Whose Intentions Are Good? The Relevance of a Defendant's Subjective Intent in Defining a "Destructive Device" Under the National Firearms Act*, 79 FORDHAM L. REV. 563, 573–76 (2010) (discussing Congress's response to the portion of the National Firearms Act being held unconstitutional and the passing of the Gun Control Act that amended the issues identified by the Court in *Haynes*).

prohibited certain persons, namely convicted felons, from lawfully possessing firearms.[57]

Next, the Omnibus Crime Control and Safe Streets Act of 1968 prohibited the interstate trade of firearms, absent a license, and forbade individuals under twenty-one from purchasing firearms.[58] The Gun Control Act of 1968 was a combined response to the assassinations of John F. Kennedy in 1963, and Martin Luther King, Jr. and Robert Kennedy, both in 1968.[59] In addition to revising the restrictions in the Federal Firearms Act of 1938, it mainly prohibited interstate transfers of firearms except between licensed dealers.[60] This Act also prohibited mail-order sales of guns[61]—likely in the wake of JFK's assassination, in which Lee Harvey Oswald purchased the rifle he used from a mail-order catalog.[62]

The Firearm Owner Protection Act of 1986 scaled back some of the regulations in the Gun Control Act of 1968 and instituted new ones.[63] For example, interstate sales of rifles were allowed, as was mail-order ammunition sales.[64] However, the Act banned private possession of fully automatic weapons—enhancing the National Firearms Act—with few exceptions.[65] The Act also instituted *safe passage* provisions, whereby traveling individuals transporting weapons in their vehicles could do so lawfully even in states that otherwise prohibited their possession.[66] Further, the Act prohibited the government from creating a firearms registry, except for the firearms contained in the National Firearms Act.[67]

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[57] Federal Firearms Act, Pub. L. No. 75-785, §§ 2(f), 3(a), 52 Stat. 1250, 1250–51 (1938); Stephanie Cooper Blum, *Drying Up the Slippery Slope: A New Approach to the Second Amendment*, 67 BUFF. L. REV. 961, 985 (2019).

[58] Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, §§ 922(a)(1)–(2), (b)(1), 82 Stat. 197, 228, 230.

[59] *Gun Control Act of 1968*, ATF, https://www.atf.gov/rules-and-regulations/gun-control-act (last visited Feb. 4, 2020).

[60] Gun Control Act of 1968, Pub. L. No. 90-618, § 922(a)(5), 82 Stat. 1213, 1217–18 (1968).

[61] *See* 18 U.S.C. §§ 922(a)(1)(A), (a)(2) (2012) (prohibiting interstate shipping of firearms between anyone other than licensed importers, manufacturers, or dealers); *see also* James B. Jacobs & Kimberly A. Potter, *Keeping Guns Out of the "Wrong" Hands: The Brady Law and the Limits of Regulation*, 86 J. CRIM. L. & CRIMINOLOGY 93, 106 n.85 (1995) (identifying the effect of § 922(a) as prohibiting mail-order firearm sales).

[62] *See* VINCENT BUGLIOSI, RECLAIMING HISTORY: THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY 200 (2007) (discussing the FBI's investigation of President Kennedy's assassination, which uncovered a mail-in order form by an alias of Lee Harvey Oswald for the firearm used in the assassination).

[63] Firearms Owners' Protection Act, Pub. L. No. 99-308, § 1(b)(2), 100 Stat. 449, 449 (1986).

[64] *Id.* §§ 102(4)(A)–(B), 100 Stat. at 451.

[65] *Id.* § 102(9), 100 Stat. at 452–53.

[66] *Id.* § 107(a), 100 Stat. at 460.

[67] *Id.* § 106(4), 100 Stat. at 459–60.

Finally, the Act expanded the list of individuals prohibited from possessing a firearm contained in the Gun Control Act of 1968.[68]

Several years later, the Gun Free School Zones Act of 1990 prohibited the possession of loaded firearm in a "school zone."[69] Although the Supreme Court held the Act as unconstitutional exercise of Congress' commerce clause authority, in *United States v. Lopez,*[70] Congress adopted an amended version in the Omnibus Consolidated Appropriations Act of 1997 whereby the firearm in question must have moved in or otherwise affected interstate commerce.[71]

The Brady Handgun Violence Prevention Act of 1993 then established a background check requirement in order to ensure that an individual attempting to purchase a firearm was not a member of the prohibited class listed in the Firearm Owner Protection Act,[72] which is now known as the National Instant Criminal Background Check System ("NICS").[73]-In 1996, the Lautenberg Amendment[74] added a classification to the list of individuals prohibited from possessing firearms to include

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[68] The list was expanded to include fugitives, illegal aliens, individuals dishonorably discharged from the Armed Forces, individuals renouncing citizenship, and any person under indictment. *Id.* § 102(5), 100 Stat. at 452.

[69] Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702(b)(1), 104 Stat. 4844, 4844. Federal law defines a school zone as property that is on or within 1,000 feet of the grounds of a public, private, or parochial school. 18 U.S.C. § 921(a)(25) (2012).

[70] 514 U.S. 549, 565–68 (1995). In this case, a high school student brought an unloaded firearm and five bullets to school. *Id.* at 551.

[71] Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 657, 110 Stat. 3009-370 (1996).

[72] Brady Handgun Violence Protection Act, Pub. L. No. 103-159, § 102(b), 107 Stat. 1536, 1539–40 (1993).

[73] *Id.* § 102(b), 107 Stat. at 1539. However, the original Act required that until the NICS system could be established, local law enforcement officials were responsible for conducting the background checks. *See id.* § 102(a), 107 Stat. at 1536, 1538 (describing the required written statement to be made at application for purchase of a firearm that includes basic personal information, verifies the individual is not a fugitive or has a criminal background barring him from purchase, or an illegal alien, among other requirements). In 1997, this interim requirement was held unconstitutional in *Printz v. United States* as it violated the Tenth Amendment's prohibition against the federal government commandeering state governments. 521 U.S. 898, 933 (1997); *see also id.* at 935–36 (O'Connor, J., concurring) (discussing the violation of the Tenth Amendment). The issue was almost moot in *Printz* because the NICS system was established in 1998. Alyssa Dale O'Donnell, Note, *Monsters, Myths, and Mental Illness: A Two-Step Approach to Reducing Gun Violence in the United States*, 25 S. CAL. INTERDISC. L.J. 475, 477 (2016).

[74] § 658 110 Stat. at 3009-371 to -372; *see also* Patrick D. Murphree, Comment, *"Beat Your Wife, and Lose Your Gun": Defending Louisiana's Attempts to Disarm Domestic Abusers*, 61 LOY. L. REV. 753, 765, 765 n.76 (2015) (identifying this section of the Act as the Lautenberg Amendment, named after the senator who championed the amendment).

anyone under court order for a domestic-related crime.[75] This amendment was held constitutional in *United States v. Emerson* in 2002.[76]

Finally, the Public Safety and Recreational Firearms Use Protection Act of 1994 housed the "Federal Assault Weapons Ban," which instituted a ten year prohibition on the manufacture, transfer, or possession of a "semiautomatic assault weapon."[77] It defined a semi-automatic assault weapon as essentially any weapon that resembled an AR-15 style rifle and was capable of adding certain cosmetic or utility features, such as a folding stock or flash suppressor.[78] The Act also banned certain semi-automatic pistols, grenade launchers, pistol-grip shotguns, and "large capacity magazines," defined as any magazine capable of containing more than ten rounds of ammunition.[79] The ten-year sunset provision ended September 13, 2004.[80] During that ten-year period, a study from the University of Pennsylvania found no significant evidence that the ban reduced murders by firearms.[81] Research by Dr. John Lott, a prominent advocate in the gun rights debate, agreed with the University of Pennsylvania study, finding no impact by the Federal Assault Weapons Ban;[82] Lott later expanded his research to include all violent crime other than murder and included various other gun control measures aside from the Federal Assault Weapons Ban.[83]

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[75] 18 U.S.C. § 922(g)(8)(B) (2012) (prohibiting interstate firearm and ammunition shipment and sales by an individual who is "subject to a court order that . . . restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child").

[76] 270 F.3d 203, 263 (5th Cir. 2001) *cert. denied*, 536 U.S. 907 (2002).

[77] Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, §§ 110102(a), 110105, 108 Stat. 1996, 2000 (1994).

[78] *See id.* § 110102(b), 108 Stat. at 1997–98 (describing the specific model types and features of banned weapons).

[79] *Id.* §§ 110102(b), 110103(b), 108 Stat. at 1998–99.

[80] *Id.* § 110105, 108 Stat. at 2000 (enacted September 13, 1994).

[81] CHRISTOPHER S. KOPER ET AL., AN UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACTS ON GUN MARKETS AND GUN VIOLENCE, 1994-2003, at i, 1, 96 (2004), https://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf ("Therefore, we cannot clearly credit the ban with any of the nation's recent drop in gun violence. And, indeed, there has been no discernible reduction in the lethality and injuriousness of gun violence, based on indicators like the percentage of gun crimes resulting in death or the share of gunfire incidents resulting in injury . . . ."). This study was completed using grant funding through the U.S. Department of Justice. *Id.* at ii. Although the Department of Justice chose not to publish this report, it is available on the National Criminal Justice Reference Service website.

[82] JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS 326–27 (3d ed. 2010).

[83] *Id.* at 254, 326–27.

B. "Shall Issue" versus "Good Cause"

Most states require each citizen to possess a permit in order to carry a weapon in public whether openly or concealed. The "open carry" of a weapon includes an individual carrying a gun on a waist belt, while "concealed carry" indicates concealing a firearm underneath one's clothing or in one's vehicle.[84] Some states allow for unpermitted open carry but require permitted concealed carry.[85]

Today, most states assume one of three types of permitting stances: "shall issue," "may issue," and "good cause." Forty-one states adhere to the "shall issue" position.[86] This means that those states' statutes compel a law enforcement authority—usually the county sheriff but sometimes the state attorney general—to issue a concealed weapons permit so long as the applicant meets basic criteria.[87] Such criteria typically requires that the carrier be of proper age, have no felony convictions, is not a fugitive from justice, and is not currently involuntarily committed, among others.[88]

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[84] Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, AM. U.L. REV. 585, 596 (2012). This Article does not address whether requiring a permit generally to exercise one's constitutional right to carry a firearm is unconstitutional. There is a valid argument that a fundamental right does not require a license or permission from the government. But, to be sure, a compelling government interest could very well exist in regulating who among the general populace is capable of lawful killing. Moreover, a permit does not, in and of itself, infringe one's right to possess a firearm, at least according to the plain definition of *infringe*. *See supra* notes 27–28 and accompanying text.

[85] North Carolina, for example, allows for unpermitted open carry of either a pistol, shotgun, or rifle, but requires a shall issue permit to carry a concealed handgun. *See* N.C. GEN. STAT. § 14-269 (LexisNexis, LEXIS through Sess. Laws 2019—227 of 2019 Reg. Sess. General Assemb.) (indicating prohibition on concealed carry without a permit, but no provision for open carry prohibitions).

[86] Shall-Issue states include Alabama, Alaska, Arizona, Arkansas, Colorado, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island (for permits issued by local authorities), South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming; the territory of Guam is also Shall-Issue. James Bishop, Note, *Hidden or on the Hip: The Right(s) to Carry After Heller*, 97 CORNELL L. REV. 907, 912 (2012); *Which States Are Likely to Issue Gun Permits and Which Are Not*, HG.ORG (last visited Feb. 20, 2020) https://www.hg.org/legal-articles/which-states-are-likely-to-issue-gun-permits-and-which-are
-not-31130.

[87] Bishop, Note, *supra* note 86.

[88] *Id.*

Nine states, including California, adhere to a "may issue" or "good cause" position.[89] This means that the state statutes themselves expressly authorize a law enforcement official to impose other arbitrary requirements in addition to satisfying the basic criteria, such as requiring the applicant to provide proof of why a concealed carry permit should be issued.[90] Inevitably, there is inequity in the application of such requirements. For example, in the more rural and generally more conservative counties in California, sheriffs routinely issue concealed carry permits without this arbitrary "good cause" requirement.[91] In many of the urban and more liberal counties such as San Diego—the county at issue in *Peruta*—Los Angeles or San Francisco, a good cause showing may be insurmountable, as such counties rarely issue concealed carry permits.[92] The sheer unlikelihood that such a permits will be issued creates a *de facto* "no issue" category, although there is no such definitive, explicit state law stating the same.[93]

Finally, thirteen states do not require a concealed carry permit; this no-permit requirement is known colloquially as "constitutional carry."[94] In those states, there is very little regulation of lawful firearm protection.[95] Those states may also issue carry permits so that their

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[89] M.R. Franks, *Racial Discrimination in Issuance of Concealed-Carry Permits*, T. MARSHALL L. REV. 5, 10–11 (2016). The nine states are Rhode Island, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, New York, Connecticut, and California. *Id.*

[90] *See* Bishop, *supra* note 86 at 913–14 (identifying the inconsistent nature of may-issue permit statutes); *see also* CAL. PENAL CODE § 26150(a)(2) (West, Westlaw through Ch. 870 of 2019 Reg. Sess.).

[91] Charlie Sarosy, Comment, *California's Unloaded Open Carry Bans: A Constitutional and Risky, but Perhaps Necessary, Gun Control Strategy*, 61 UCLA L. REV. 464, 468 (2104).

[92] *See id.* (explaining that San Francisco and Los Angeles Counties require an actual threat before issuing a permit and thus do not issue many permits).

[93] Notably, the same is also true for states like Hawaii where, in 2016, no permits were issued. *See* Stephen Gutowski, *Hawaii Did Not Issue Any Gun-Carry Permits to Private Citizens in 2016*, WASH. FREE BEACON (Feb. 2, 2017 10:50 AM), https://freebeacon.com/issues/hawaii-state-not-issue-single-gun-carry-permit-2016/.

[94] Jack M. Amaro, Note, *"Good Reason" Laws Under the Gun: May-Issue States and the Right to Bear Arms*, 94 CHI.-KENT L. REV. 27, 37 (2019). These states are New Hampshire, West Virginia, Wyoming, Mississippi, North Dakota, South Dakota, Missouri, Alaska, Arizona, Idaho, Kansas, Maine, and Vermont. *Id.* In some states, for example, individuals carrying concealed weapons who are approached by law enforcement officers must inform the approaching officer of the fact that they are carrying. *Id.*

[95] *See* ALASKA STAT. § 11.61.220(a)(1)(A) (West, Westlaw through the 2019 First Reg. Sess. & 2019 First Spec. Sess. 31st Leg.) (requiring a person who is being approached by an officer to inform the officer of his or her possession of any deadly weapons).

residents may have reciprocity with other states that require permits.[96] These states default to "shall issue" status in that regard.

*C. Pre-*Heller *Jurisprudence*

In *United States v. Cruikshank*, the Court held that the Second Amendment "applies only to the Federal Government."[97] However, this is no longer true because *McDonald v. Chicago* expressly overruled *Cruikshank* and incorporated the Second Amendment to the states.[98] Unfortunately, *Cruikshank* can be lumped in with the likes of *Dred Scott*,[99] as it vacated the convictions of a group of white men who actively prevented a group of blacks from possessing firearms during the Reconstruction Era after the Civil War.[100]

In *Presser v. Illinois*, the Court held that the right to keep and bear arms was not violated by a law that forbade "bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law."[101] Aligning with the *Slaughter House Cases*, which held that the Privileges or Immunities Clause of the Fourteenth Amendment to the U.S. Constitution only protects the legal rights that are associated with federal U.S. citizenship, *Presser* held that the Second Amendment did not apply to the individual states.[102] According to Justice Scalia,

> [*Presser*] does not refute the individual-rights interpretation of the Amendment; no one supporting that interpretation has

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[96] *See Concealed Carry Permit Reciprocity Maps*, USA CARRY, https://www.usacarry.com/concealed_carry_permit_reciprocity_maps.html#concealed-carry-reciprocity (last visited May 23, 2020) (detailing which states will honor other states' concealed carry permits and licenses).

[97] 92 U.S. 542, 553 (1876); District of Columbia v. Heller, 554 U.S. 570, 620 n.23 (2008).

[98] 561 U.S. 742, 750, 757, 791 (2010).

[99] Dred Scott v. Sandford, 60 U.S. 393, 452–53 (1857) (holding that, among other things, a freed slave from a free territory could not sue for his freedom when transported to a non-free territory). *Dred Scott* is universally seen as not only the Supreme Court's worst decision, but also as the tipping point that started the Civil War. Michael A. Wolff, *Missouri Law, Politics, and the Dred Scott Case*, *in* THE DRED SCOTT CASE: HISTORICAL AND CONTEMPORARY PERSPECTIVES ON RACE AND LAW 213 (David Thomas Konig et al. eds., 2010).

[100] United States v. Cruikshank, 92 U.S. 542, 548, 553 (1875).

[101] 116 U.S. 252, 264–65 (1886).

[102] *Compare Slaughter House Cases*, 83 U.S. 36, 74–75 (1873) (holding that the privileges and immunities clause only protects federal citizenship rights), *with Presser*, 116 U.S. at 265 (holding that the Second Amendment only protects citizens from infringement by Congress).

> contended that States may not ban such groups . . . *Presser* said nothing about the Second Amendment's meaning or scope, beyond the fact that it does not prevent the prohibition of private paramilitary organizations.[103]

In *Miller v. Texas*, like in *Presser,* the Court held that the Second Amendment does not apply to the States through the Privileges or Immunities Clause of the Fourteenth Amendment.[104] Miller, after being arrested, tried, and convicted of murder, appealed his conviction, asserting that he had a Second Amendment right to carry a weapon.[105] The Court determined that even if Miller's claims were valid, "it is well settled that the restrictions of these amendments operate only upon the Federal power, and have no reference whatever to proceedings in state courts."[106]

In *United States v. Miller*, the Court held that the National Firearms Act of 1934—which, among other things, required the registration of firearms and implemented an excise tax on manufacturing and transferring particular firearms—was constitutional under the Second Amendment.[107] *Miller* specifically dealt with particular types of weapons, such as short-barreled shotguns (sometimes referred to as "sawed-off shotguns").[108] This fact was used in later cases to hold that the "Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[109] To be sure, such an assertion could certainly be a slippery slope for gun rights advocates depending upon the type of firearm in question.

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[103] District of Columbia v. Heller, 554 U.S. 570, 620–21 (2008).

[104] 153 U.S. 535, 538 (1894).

[105] *See id.* at 535 (describing Miller's argument that the statute, by which the jury was instructed to find a violation of law if the jury first found that he was carrying a pistol, was in violation of his Second Amendment right).

[106] *Id.* at 538.

[107] National Firearms Act, Pub. L. 73-474, §§ 2(a)–(b), 48 Stat. 1236, 1237 (1934); United States v. Miller, 307 U.S. 174, 175, 178 (1939).

[108] *Miller*, 307 U.S. at 178.

[109] District of Columbia v. Heller, 554 U.S. 570, 625 (2008).

D. District of Columbia v. Heller

Handgun possession in Washington, D.C. has historically been illegal.[110] At the time that *Heller* was decided, although it was illegal for a person to carry a gun without a license, the chief of police could issue short-term (one year) licenses.[111] The gravamen in *Heller*, however, was Washington, D.C.'s regulation that all firearms must be kept "'unloaded and dissembled or bound by a trigger lock or similar device' unless they are located in a place of business or are being used for lawful recreational activities."[112] Respondent, Heller, worked as a special police officer and lawfully carried a firearm as part of his official duties.[113] Heller's application for a registration certificate for a home-use firearm was denied.[114] He subsequently filed suit in the U.S. District Court for the District of Columbia seeking "to enjoin the city from enforcing the bar on the registration of handguns, the licensing requirement insofar as it prohibits the carrying of a firearm in the home without a license, and the trigger-lock requirement insofar as it prohibits the use of 'functional firearms within the home.'"[115]

The district court dismissed the action for failure to state a claim.[116] The Court of Appeals for the District of Columbia Circuit reversed, holding that "the Second Amendment protects an individual right to possess firearms and that the city's total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right."[117]

The Supreme Court affirmed the D.C. Circuit, holding that the Second Amendment provides a right to possess a firearm for lawful uses, such as for self-defense within one's home.[118] However, the Court noted

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[110] *Id.* at 574. Strangely, carrying a firearm that was not registered was illegal, but so was handgun registration. *Id.* at 574–75.

[111] *Id.* at 575.

[112] *Id.* (quoting D.C. CODE § 7-2507.02 (2006))

[113] *Id*. A special police officer is anyone who is commissioned to serve as a police officer in a limited territorial jurisdiction where that officer has been hired to protect such premises and may carry a firearm during the performance of such duties. *See* D.C. CODE § 5-129.02 (LexisNexis, LEXIS through Jan. 28, 2020 legis.) (describing the conditions under which special police officers are appointed); *id.* § 22-4505(a)(2) (LEXIS) (excluding special police officers from criminal liability for carrying a firearm).

[114] *Heller*, 554 U.S. at 575.

[115] *Id.* at 576.

[116] *See id.* (citing Parker v. District of Columbia, 311 F. Supp. 2d 103, 109 (D.D.C. 2004)) (stating that there is no individual right to bear arms).

[117] *Id.* (citing Parker v. District of Columbia, 478 F.3d 370, 399–401 (D.C. App. 2007)).

[118] *Id.* at 592, 628–29.

that the right to keep and bear arms is not unlimited.[119] The Court reasoned that concealed carry "prohibitions have been upheld under the Amendment or state analogues" and that the decision did not inhibit restrictions on possession of firearms by felons, the mentally ill, or on carrying firearms in sensitive locations such as schools or government buildings.[120]

Finally, the Court held that the Second Amendment invalidates both the ban and the trigger-lock requirement, reasoning that the ban on possessing handguns at home prohibits the very class of arms that Americans primarily choose for self-defense.[121] As the lawful defense of self, family, and property is of greatest import in the home, the D.C. prohibition failed each of the standards of scrutiny applied by the Court to enumerated constitutional rights.[122] Additionally, the trigger-lock requirement was unconstitutional because it rendered citizens incapable of using arms for the purpose of self-defense.[123]

E. McDonald v. City of Chicago

In *McDonald*, there was a law "effectively banning handgun possession by almost all private citizens."[124] In light of *Heller,* Petitioners filed an action alleging that "[Chicago's] handgun ban has left them vulnerable to criminals," in violation of the Second Amendment and the Fourteenth Amendment, as applied to the states.[125] The district court dismissed, reasoning that it was bound to follow precedent as "the Seventh Circuit had 'squarely upheld the constitutionality of a ban on handguns a quarter century ago,'" and noting that "'*Heller* had explicitly refrained from 'opin[ing] on the subject of incorporation'" of the Secondment Amendment to the states.[126] The Seventh Circuit then affirmed the district court's decision.[127]

The Supreme Court held that the Second Amendment applies to the states by virtue of the Fourteenth Amendment.[128] Specifically, the Court held that the laws in question are at odds with the key holding of *Heller*,

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[119] *Id.* at 626.
[120] *Id.* at 626–27.
[121] *Id.* at 629–30.
[122] *Id.* at 628–29.
[123] *Id.* at 628–30.
[124] McDonald v. City of Chicago, 561 U.S. 742, 750 (2010).
[125] *Id.* at 751–52.
[126] *Id.* at 752.
[127] *Id.*
[128] *Id.* at 791.

noting that the effect of Respondents' position was to ask the Court to consider the right to keep and bear arms as "a second-class right" subject to different standards of incorporation than the other rights contained in the Bill of Rights.[129]

F. Kachalsky v. County of Westchester[130]

Petitioners in *Kachalsky* challenged New York's "may-issue" concealed carry scheme.[131] The scheme, much like California's in *Peruta*,[132] bans the open carry of all firearms and allows concealed carry by the public only upon showing "a special need for self-protection distinguishable from that of the general community."[133] The Second Circuit Court of Appeals upheld the law because individuals have a diminished interest in carrying firearms in public in comparison with the "zenith" of the Second Amendment interest, which is enjoyed within a person's home.[134] The Zenith Test assumes that *Heller* considered that the Second Amendment is at its zenith inside the home and anything outside the home is properly considered under intermediate scrutiny.[135] The Supreme Court denied certiorari on April 13, 2013.[136]

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[129] *Id.* at 780.

[130] Full disclosure: The author of this Article is related to one of the plaintiffs in this case.

[131] *See* Kachalsky v. Cty. of Westchester, 701 F.3d 81, 83–84 (2d Cir. 2012) (describing how the plaintiffs were denied concealed carry permits because they failed to demonstrate particularized need); *see also* Daniel Peabody, Comment, *Target Discrimination: Protecting the Second Amendment Rights of Women and Minorities*, 48 ARIZ. ST. L.J. 883, 900 (2016) (clarifying that the statute at issue in *Kachalsky* was a "may-issue statute").

[132] *See infra* Part IV.

[133] *Kachalsky*, 701 F.3d at 86 (quoting Klenosky v. N.Y.C. Police Dep't, 428 N.Y.S.2d 256, 257 (N.Y. App. Div. 1980)).

[134] *Id.* at 89, 101.

[135] *See id.* at 89, 93–94 (2d Cir. 2012) ("[W]e believe that applying less than strict scrutiny when the regulation does not burden the 'core' protection of self-defense in the home makes eminent sense in this context . . . ."); District of Columbia v. Heller, 554 U.S. 570, 628–29 (2008) ("The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute.").

[136] Kachalsky v. Cacace, 569 U.S. 918 (2013) (mem.).

G. Woollard v. Gallagher

Petitioners in *Woollard*—as in *Kachalsky*[137] and *Peruta*[138]—also challenged a statutory scheme that rejected concealed carry permits absent a showing of good cause.[139] In *Wollard*, a Maryland law stated that "permit eligibility . . . necessitates the [Maryland State Police] Secretary's finding, following an investigation, that the applicant 'has good and substantial reason to wear, carry, or transport a handgun, such as a finding that the permit is necessary as a reasonable precaution against apprehended danger.'"[140] The Fourth Circuit Court of Appeals upheld the decision, reasoning that the statute met intermediate scrutiny because the restriction was "reasonably adapted to a substantial governmental interest."[141] The Supreme Court denied certiorari on October 15, 2013.[142]

H. Moore v. Madigan

The task of petitioners in *Moore v. Madigan* was even more insurmountable than that of petitioners in *Kachalsky* and *Woollard* because Illinois had a *no issue* regulatory scheme that prohibited individuals from carrying firearms in public absent a few limited exceptions.[143] Specifically, the Illinois statute in question forbade individuals from carrying loaded firearms outside the confines of their homes or property;[144] it primarily provided exceptions for "police and other security personnel, hunters, and members of target shooting clubs."[145]

The Seventh Circuit Court of Appeals held that Illinois' no issue scheme violated the Second Amendment, noting that the Amendment grants an individual right to self-defense outside of the home.[146] The court reasoned that the right to "bear" arms is unlikely to refer to possessing a

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[137] *See supra* Part II.F.

[138] *See infra* Part III.A.

[139] Woollard v. Gallagher, 712 F.3d 865, 868–89 (4th Cir. 2013).

[140] *Id.* at 869 (quoting MD. CODE ANN. PUB. SAFETY § 5-306(a)(6)(ii) (LexisNexis, LEXIS through Jan.7, 2020 legis.)).

[141] *Id.* at 876, 882 (quoting United States v. Masciandaro, 638 F.3d 458, 471 (4th Cir. 2011)).

[142] Woollard v. Gallagher, 571 U.S. 952 (2013).

[143] *See* Moore v. Madigan, 702 F.3d 933, 934 (7th Cir. 2012) (explaining that under the statute, most individuals were unable to carry firearms ready for use unless they qualified for one of a limited class of exceptions).

[144] *Id.*

[145] *Id.* at 942.

[146] *Id.*

firearm inside a home but instead implies a right to "carry a loaded gun outside the home."[147] Further, the court offered a common-sense historical approach to address the absurdity of the assumption that an individual right to self-defense ends at the front door of one's home. It reasoned that in the Eighteenth Century, individuals living in territory with hostile native Americans would have needed to travel to a nearby trading post to obtain supplies and would face at least as much, if not more danger, if unarmed as one would face if left unarmed at home.[148] An appeal to the Supreme Court became moot when the Illinois General Assembly voted the same month as *Moore* was decided to enact legislation that granted *shall issue* status to Illinois residents.[149]

I. Palmer v. District of Columbia

In *Palmer*, the plaintiff challenged Washington, D.C.'s ban on carrying handguns in public—a statute enacted after the Supreme Court's holding in *Heller*.[150] The District Court for the District of Columbia ruled that the Second Amendment protects the right to carry a pistol in public for self-defense.[151] The court accepted the reasoning of *Heller* that the individual right to carry a firearm for protection in case of possible confrontation, as guaranteed by the Second Amendment, "means nothing if not the general right to carry a common weapon outside the home for self-defense."[152] It found that "if self-defense outside the home is part of the core right to 'bear arms' and the [District of Columbia's] regulatory scheme prohibits the exercise of that right, no amount of interest-balancing under a heightened form of means-end scrutiny can justify [the District of Columbia's] policy."[153] The appeal to the D.C. Circuit was dismissed on April 2, 2015.[154]

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[147] *Id.* at 936.

[148] *Id.*

[149] 430 ILL. COMP. STAT. 66/10 (West, Westlaw through P.A. 101-628) (stating that a concealed carry permit shall issue if an individual can show they met modest qualifications, submitted the proper documentation, and paid the requisite fee).

[150] Palmer v. District of Columbia, 59 F. Supp. 3d 173, 175–76 (D.D.C. 2014)

[151] *Id.* at 182–83.

[152] *Id.* at 181.

[153] *Id.* at 182.

[154] Palmer v. District of Columbia, No. 14-7180, 2015 WL 1607711, at *1 (D.C. Cir. April 2, 2015).

J. Friedman v. City of Highland Park

In *Friedman v. City of Highland Park*, petitioners challenged the city's ban on "manufacturing, selling, giving, lending, acquiring, or possessing many of the most commonly owned semiautomatic firearms, which the City branded 'Assault Weapons.'"[155] The Seventh Circuit held the ban constitutional, considering "whether a regulation bans weapons that were common at the time of ratification or those that have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'"[156]

The Supreme Court denied certiorari on December 7, 2015.[157] Justice Thomas, with whom Justice Scalia joined, dissented from the certiorari denial, noting that the Seventh Circuit grounded its decision in public policy speculation about whether a ban on many common semiautomatic firearms "may increase the public's sense of safety."[158] Although the Seventh Circuit conceded that handguns, rather than "assault weapons," are involved in a majority of U.S. gun violence,[159] the dissent further noted that *Heller* prevents subjecting the crux of the Second Amendment "to a freestanding 'interest-balancing' approach."[160] Thus, the dissent argued, if a firearm ban could be justified on mere "conjecture that the public might feel safer (while being no safer at all), then the Second Amendment guarantees nothing."[161] Ultimately, the dissent reasoned that the majority was willing to allow lower courts not to follow its precedent in Second Amendment cases—a decision that stood in "marked contrast to the Court's willingness to summarily reverse courts that disregard [its] other constitutional decisions."[162]

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[155] Friedman v. City of Highland Park, 136 S. Ct. 447, 447 (2017) (Thomas, J., dissenting).

[156] Friedman v. City of Highland Park, 784 F.3d 406, 410 (7th Cir. 2015) (citations omitted).

[157] Friedman v. City of Highland park, 136 S. Ct. 447, 447 (2015) (Thomas, J. dissenting).

[158] *Id.* at 449.

[159] *Id.*

[160] *Id.* (citations omitted) (quoting *Friedman v. City of Highland Park*, 784 F.3d 406, 411–12 (7th Cir. 2015)).

[161] *Id.* (citations omitted) (quoting *District of Columbia v. Heller*, 554 U.S. 570 (2008)).

[162] *Id.* at 449–50.

K. Caetano v. Massachusetts

In *Caetano v. Massachusetts*, the petitioner was a woman who was in an abusive relationship and received a "stun gun" for protection against her abusive boyfriend.[163] In Massachusetts, however, it was illegal to possess a stun gun.[164] Caetano was arrested, tried, and convicted after threatening to use the stun gun against her boyfriend in response to his threat to hurt her.[165] Not only did a Massachusetts trial court enter judgment against Caetano, but the Massachusetts Supreme Judicial Court upheld the decision against her as well.[166]

The Massachusetts Supreme Judicial Court held that stun guns were not protected by the Second Amendment because they were not in common use in 1789.[167] However, the United States Supreme Court declared this holding to be "inconsistent with *Heller*'s clear statement that the Second Amendment 'extends . . . to . . . arms . . . that were not in existence at the time of the founding.'"[168]

Later, the Massachusetts Supreme Judicial Court held that stun guns were not "readily adaptable to use in the military."[169] Again, however, the United States Supreme Court vacated this decision,[170] declaring the Massachusetts court's subsequent opinion as inconsistent with *Heller* and explicitly rejected the proposition that the only protected weapons are those used for warfare.[171]

III. PERUTA'S FACTS AND PROCEDURAL HISTORY

A. Facts

Broadly speaking, California has a regulatory scheme that prevents most people from carrying either a concealed or openly displayed firearm in public, with openly carried firearms nearly exclusively prohibited except in certain circumstances.[172] As to conceal-carried firearms, a

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[163] 136 S. Ct. 1027, 1028 (2016) (Alito, J., concurring) (per curiam).

[164] *Id.* at 1029.

[165] *Id.*

[166] *Id.*

[167] Massachusetts v. Caetano, 26 N.E.3d 688, 691–92 (Mass. 2015).

[168] Caetano v. Massachusetts, 136 S. Ct. 1027, 1028 (2016) (quoting *Heller*, 554 U.S. 570, 582 (2008)).

[169] *Caetano*, 26 N.E.3d at 693.

[170] *Id.* at 1033.

[171] *Caetano*, 136 S. Ct. at 1032 (quoting *Heller*, 554 U.S. at 624).

[172] Peruta v. California, 137 S. Ct. 1995, 1996 (2017) (citing CAL. PENAL CODE §§ 25850, 26350, 26361 (West 2012).

resident must "obtain a license by showing 'good cause,' among other criteria," to the sheriff of the county where they reside.[173] As discussed previously, this scheme further authorizes California's individual counties to set their own rules for showing good cause.[174]

Edward Peruta was a resident of San Diego, California. The San Diego county sheriff "interpreted 'good cause' to 'require an applicant to show that he has a particularized need, substantiated by documentary evidence, to carry a firearm for self-defense.'"[175] This policy indicated that concern for personal safety alone could not satisfy the good cause requirement;[176] instead, it required an applicant to show "a set of circumstances that distinguish the applicant from the mainstream and cause him to be placed in harm's way."[177] This interpretation suggests that an ordinary citizen in fear of his own safety "by definition—cannot distinguish himself from the mainstream."[178] Thus, because of the county's good cause policy, Peruta was unable to obtain a concealed carry permit; furthermore, because of the general prohibition on open carry, he was not able to carry a weapon in public at all.[179] Peruta filed a claim under 42 U.S.C. § 1983, "alleging that this near-total prohibition on public carry violates their Second Amendment right to bear arms."[180]

B. District Court Ruling

The District Court for the Southern District of California granted the State's motion for summary judgment.[181] In its order, the court ruled that under intermediate scrutiny, the sheriff's policy did not violate the Second Amendment right to bear arms.[182]

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[173] *Id.* (citing CAL. PENAL CODE §§ 26150, 26155).
[174] *Id.* (citing CAL. PENAL CODE § 26160).
[175] *Id.*
[176] *Id.* (quoting Peruta v. Cty. of San Diego, 742 F.3d 1144, 1148 (9th Cir. 2014)).
[177] *Id.* (quoting *Peruta*, 742 F.3d at 1169).
[178] *Id.* (quoting *Peruta*, 742 F.3d at 1169).
[179] *Id.*
[180] *Id.*
[181] Peruta v. Cty. of San Diego, 758 F. Supp. 2d 1106, 1121 (S.D. Cal. 2010).
[182] *Id.* at 1117–18.

C. Ninth Circuit Panel Holding

The Ninth Circuit panel reversed the district court and remanded.[183] It held that carrying a functioning "handgun outside the home for the lawful purpose of self-defense, though subject to traditional restrictions, constitutes 'bear[ing] Arms' within the meaning of the Second Amendment."[184] The court reasoned that the statute's "good cause" requirement did not allow law-abiding citizens to "bear arms in public for the lawful purpose of self-defense."[185] As such, San Diego County's restriction on bearing arms was "hardly better" than Washington, D.C.'s "near-total prohibition on keeping arms" struck down in *Heller*.[186]

D. Motion for en banc Hearing Denied

After the initial Ninth Circuit holding that reversed the district court's ruling, the State of California moved to intervene.[187] The Ninth Circuit denied this motion,[188] holding that the state did "not me[e]t the heavy burden of demonstrating 'imperative reasons' in favor of intervention."[189] It further held that the state did not possess the right of intervention under either a federal statute or the Federal Rules of Civil Procedure.[190]

E. En Banc Hearing and En Banc Reversal

Subsequently, the Ninth Circuit issued a sua sponte order for an en banc rehearing.[191] The en banc Ninth Circuit reversed the previous Ninth Circuit panel,[192] holding that the State of California was entitled to intervene as a matter of right.[193] It further held that the Second Amendment right to keep and bear arms does not include, "in any degree, the right of a member of the general public to carry a concealed weapon in public."[194]

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[183] *Peruta*, 742 F.3d at 1179.
[184] *Id.* at 1150–53.
[185] *Id.* at 1169.
[186] *Id.* at 1169–70.
[187] Peruta v. Cty. of San Diego, 771 F.3d 570, 572 (9th Cir. 2014).
[188] *Id.* at 576.
[189] *Id.* at 573–74 (quoting Bates v. Jones, 127 F.3d 870 (9th Cir. 1997)).
[190] *Id.* at 574, 576.
[191] Peruta v. Cty. of San Diego, 781 F.3d 1106, 1106–07 (9th Cir. 2015) (en banc).
[192] Peruta v. Cty. of San Diego, 824 F.3d 919, 942 (9th Cir. 2016) (en banc).
[193] *Id.* at 940–41.
[194] *Id.* at 939.

F. Writ of Certiorari Denied

Peruta petitioned the Supreme Court for a writ of certiorari on January 12, 2017.[195] A circuit split had formed between the Seventh Circuit, which held that Illinois' no-issue scheme was in violation of the Second Amendment in *Moore v. Madigan*,[196] and the Second and Fourth Circuits, which upheld New York and Maryland's good cause permit schemes in *Kachalsky*[197] and *Woollard*, respectively.[198]

The Court denied certiorari in *Peruta* on June 26, 2017.[199] Justice Thomas, with whom Justice Gorsuch joined dissented from the Court's denial.[200] In his dissent, Justice Thomas argued that the Court should have granted certiorari because "[t]he approach taken by the en banc court is indefensible, and the petition raises important questions that this Court should address."[201] He outlined three essential reasons for his argument; first, he indicated that the "en banc court's decision to limit its review to whether the Second Amendment protects the right to concealed carry—as opposed to the more general right to public carry—was untenable." [202] Thomas claimed this is because the en banc Ninth Circuit's decision was neither "justified by the terms of the complaint, which called into question the State's regulatory scheme as a whole[,]"[203] nor by the history of the litigation itself, which called into question California's entire regulatory scheme from the initial district court filing.[204]

Next, Justice Thomas argued, "[h]ad the en banc Ninth Circuit answered the question actually at issue in this case, it likely would have been compelled to reach the opposite result."[205] He suggested that this is because the Supreme Court had already indicated that the issue of possession of a weapon in "public in *some* fashion" had already been

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[195] Petition for Writ of Certiorari, Peruta v. Cty. of San Diego, 137 S. Ct. 1995 (2017) (No. 16-894).

[196] 702 F.3d 933, 934, 942 (7th Cir. 2012). However, the Illinois legislature thereafter instituted a "shall-issue" permit law, which rendered appeal to the Supreme Court moot. *See supra* note 149 and accompanying text.

[197] Kachalsky v. Cty. Of Westchester, 791 F.3d 81, 101 (2nd Cir. 2012).

[198] Woollard v. Gallagher, 712 F.3d 865, 882 (4th Cir. 2013).

[199] Peruta v. Cty. of San Diego, 137 S. Ct. 1995, 1996 (2017) (mem.).

[200] *Id.* (Thomas, J., dissenting).

[201] *Id.* at 1997–98.

[202] *Id.*

[203] *Id.*

[204] *Id.* ("'[T]he heart of the parties' dispute' is whether the Second Amendment protects 'the right to carry a loaded handgun in public, either openly or in a concealed manner.'" (quoting *Peruta*, 758 F. Supp. 2d, 1106 at 1109 (S.D. Cal. 2010))).

[205] *Id.* at 1998.

decided in *Heller*.[206] Furthermore, he argued that although "most acute" in the home, the right to self-defense includes the public sphere as well.[207]

Justice Thomas's final and perhaps most compelling argument was the disagreement between the lower courts: "[t]wenty-six states have asked us to resolve the question presented and the lower courts have fully vetted the issue."[208] Justice Thomas concluded his dissent by warning that the denial of cert reflected the concerning trend of "the treatment of the Second Amendment as a disfavored right."[209] He warned that the Constitution did not favor particular rights and that the Court should not impose a "hierarchy by selectively enforcing its preferred rights."[210] He noted that the Court had not heard a Second Amendment case in seven years but had considered 35 cases concerning the First Amendment and 25 cases involving the Fourth Amendment, a jurisprudential discrepancy he condemned as "inexcusable."[211]

IV. ANALYSIS

A. Standards of Review

At issue here is whether the Second Amendment prevents California from denying a regular, law-abiding citizen the ability to carry a weapon in public. In assessing the constitutionality of a state law, the Supreme Court must consider whether that particular law, rule, or government action comports with the Constitution. In conducting this assessment, the Court must consider two primary questions: (1) does the Constitution allow the federal government to do a particular action, including prohibiting someone from performing a particular action?; and (2) does the Constitution prohibit a state from allowing or disallowing a particular action?

Any federal action or prohibition not authorized by the Constitution is unconstitutional.[212] After all, America is a nation of limited and

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[206] *Id.* (emphasis added).

[207] *Id.* ("I find it extremely improbable that the Framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen.").

[208] *Id.* at 1999 (citations omitted).

[209] *Id.* (citations omitted).

[210] *Id.* (citations omitted).

[211] *Id.* (citations omitted).

[212] McCulloch v. Maryland, 17 U.S. 316, 405 (1819).

> This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its

enumerated powers.[213] Only when a private action intersects with an individual's liberty may the government properly intervene.[214] Likewise, as originally conceived by the Founders, the Tenth Amendment affirms that states possess the authority to act unless the Constitution otherwise empowers the federal government to do so.[215] Any state action that

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> enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted.

Id.

[213] *Id.*; *see also* United States v. Lopez, 514 U.S. 549, 552 (1995) ("We start with first principles. The Constitution creates a Federal Government of enumerated powers. As James Madison wrote: 'The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.'" (quoting THE FEDERALIST NO. 45, at 241 (James Madison), *supra* note 41 (citation omitted))).

> The Ninth Amendment, like its companion, the Tenth, which this Court held 'states but a truism that all is retained which has not been surrendered' was framed by James Madison and adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the *Federal* Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual States.

Griswold v. Connecticut, 381 U.S. 479, 529–30 (1965) (Stewart, J., dissenting) (quoting *United States v. Darby,* 312 U.S. 100, 124 (1941)).

[214] *See, e.g.,* ISIAH BERLIN, TWO CONCEPTS OF LIBERTY 9 (Clarendon Press, ed. 1958) ("Men are largely interdependent, and no man's activity is so completely private as never to obstruct the lives of others in any way. 'Freedom for the pike is death for the minnows'; the liberty of some must depend on the restraint of others."). For example, imprisoning or otherwise restraining someone's freedom as punishment for murdering someone else, thereby removing that victim's freedom, is not a violation of the murder's liberty. *See also* THE FEDERALIST NO. 2 (John Jay), *supra* note 41 at 6 ("Nothing is more certain than the indispensable necessity of Government, and it is equally undeniable, that whenever and however it is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers.").

[215] *Id.; see also* United States v. Sprague, 282 U.S. 716, 733 (1931) ("The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people."). See Garcia v. San Antonio Transit Auth., 469 U.S. 528, 560–61 (1985) (Blackmun, J., dissenting), for a discussion on state authority:

> [T]he extent to which the States may exercise their authority, when Congress purports to act under the Commerce Clause, henceforth is to be determined from time to time by political decisions made by members of the Federal Government, decisions the Court says will not be subject to judicial review. I note that it does not seem to have occurred to the Court that it—an unelected majority of five Justices—today rejects almost 200 years of the understanding of the constitutional status of federalism. In doing so, there is only a single passing reference to the Tenth Amendment. Nor is so much as a dictum of any court cited in support of the view that the role of the States in the federal system may depend upon the grace of elected federal officials, rather than on the Constitution as interpreted by this Court.

conflicts with the Constitution, however, is unconstitutional.[216] This is very simple; everything else is essentially dicta.

Undoubtedly, the Supreme Court should have granted certiorari in *Perut*. One can only speculate about the reasons for the Court's denial.[217] Regardless, the issues outlined in *Peruta* can and should still be subjected to a constitutional analysis.[218]

The Supreme Court has many tests to determine whether a law or action is constitutional. However, the waters have become muddied concerning which tests are employed, when certain tests should be used, whether each test is actually different, and whether each test has been correctly applied. For example, one can challenge a law by raising a facial[219] or "as-applied" challenge,[220] or by asserting that the law is

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[216] *Griswold*, 329 U.S. at 529–30.

[217] For example, the Rule of Four lacked Justice Scalia, who passed away in February 2016; he likely would have been the first vote. Ira Robbins, *Justice by the Numbers: The Supreme Court and the Rule of Four—or is it Five?* 26 SUFFOLK L. REV. 1, 12 (2002); Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES, Feb. 13, 2016, https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html. Scalia was an avid hunter and firearms enthusiast. Mark Sherman, *U.S. Supreme Court Justice Antonin Scalia Dies at 79*, PBS, Feb. 13, 2016, https://www.pbs.org/newshour/nation/u-s-supreme-court-justice-antonin-scalia-dies-at-79. Justice Gorsuch, a well a known firearms enthusiast, took his place on the Court. Lois Becket, *NRA Cheers Nomination of Neil Gorsuch, Seen as Gun Rights Defender*, GUARDIAN, Feb 1, 2017, https://www.theguardian.com/law/2017/feb/01/neil-gorsuch-gun-rights-nra. Justice Thomas would have made the second. Linda Greenhouse, *A Call to Arms at the Supreme Court*, N.Y. TIMES, Jan. 9, 2009, https://www.nytimes.com/2019/01/03/opinion/guns-second-amendment-supreme-court.html.

The two other conservative justices, Roberts and Alito, grew up in the Northeast—New York and New Jersey, respectively. *Biographies of Supreme Court justices*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/biographies.aspx (last visited Feb. 11, 2020). Carrying weapons in public is not nearly as common in New York and New Jersey—perhaps because of the stifling gun control law in both states. *See Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2012) (holding New York's equivalent of a "good cause requirement" constitutional; *see also* N.J. STAT. ANN. § 2C:39-1 (West, Westlaw through L.2020, c. 17) (New Jersey's "assault weapon" ban). So, while Roberts and Alito voted with the majority in both *Heller* and *McDonald*, neither of those cases' bans involved carrying a weapon in public.

[218] *See, e.g.*, Stephen L. Wasby, *Intercircuit Conflicts in the Courts of Appeals*, 63 MONT. L.R. 119, 148 (2002) (noting how conflicts not resolved by the Supreme Court may still be analyzed by the inferior courts).

[219] United States v. Salerno, 481 U.S. 739, 745 (1987).

[220] Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657, 657 (2010) ("[C]ourts define an as-applied challenge as one 'under which the plaintiff argues that a statute, even though generally constitutional, operates unconstitutionally as to him or her because of the plaintiff's particular circumstances.'" (quoting Tex. Workers' Comp. Comm'r v. Garcia, 893 S.W.2d 504, 518 n.16 (Tex. 1995))); *see also* Gonzalez v. Carhart, 550 U.S. 124, 167 (2008) (holding that the Partial Birth Abortion Act, while facially constitutional, may be subject to as-applied challenges to carve out medical exceptions); FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 481–82 (2007) (holding that as applied, the Bipartisan Campaign Reform Act is constitutional only regarding ads

unconstitutionally vague,[221] or "unduly burdensome."[222] Moreover, one may challenge a law because it restricts either a fundamental right[223] or it negatively affects a suspect class,[224] at which point it may be subject to one of three levels of scrutiny.

The first test, a facial challenge, seems reasonable. After all, what if a state created a law that said, "Henceforth, the police never need a warrant to enter a resident's home"? Obviously, there is no set of circumstances in which a state could create that law and it not be in violation of the Fourth Amendment.[225] This is a rudimentary example; this test actually requires the challenging party to overcome an extremely high burden.[226]

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expressly advocating for the election or defeat of a candidate); Nat'l Endowment for the Arts v. Finley, 524 U.S. 566, 589–590 (1998) (holding that "decency" statute was not void as applied to plaintiffs' circumstances).

[221] Connally v. Gen. Const. Co., 269 U.S. 385, 391 (1926) ("That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.").

[222] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992).

[223] United States v. Carolene Products Co., 304 U.S. 134, 155 n.4 (1938). It is generally understood that a "fundamental right" is one found in the first eight amendments to the Constitution; however, jurisprudence has shown that courts infer fundamental rights from other sources in the Constitution. *See, e.g.*, Washington v. Glucksberg, 702 U.S. 702, 719–20 (1997) (listing fundamental rights that have been recognized in addition to those enumerated in the first eight amendments).

[224] Susannah W. Pollvogt, *Beyond Suspect Classification*, 16 UNIV. OF PA. J. OF CONST. L. 739, 742 (2014).

[225] U.S. CONST. amend. IV; *see also* Riley v. California, 573 U.S. 373, 382 (2014) ("In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement"); Payton v. New York, 445 U.S. 573, 586 (1980) ("It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." (quoting Coolidge v. New Hampshire, 403 U.S. 443, 486 (1971))). There are certainly exceptions to when the police may need a warrant, but a blanket law that exempts the police from obtaining a warrant to enter a home is clearly—and facially—in violation of the Fourth Amendment. *See, e.g.*, *Coolidge*, 403 U.S. at 465 (1971) (exception for plain view); Warden v. Hayden, 387 U.S. 294, 298 (1967) (exception for "hot pursuit" of a suspect); Carroll v. United States, 267 U.S. 132, 153 (1925) (exception for a motor vehicle). *But see* Kylo v. United States, 533 U.S. 27, 40 (2001) (using a FLIR device to see inside one's home requires a search warrant); Katz v. United States, 389 U.S. 347, 351, 353 (1967) (holding that because the Fourth Amendment protects "people, not places", a warrant is required for eavesdropping on a telephone conversation).

[226] *See* United States v. Salerno, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully.").

In an as-applied challenge, the Court creates a unique test for that particular situation.[227] However, an as-applied challenge and a facial challenge may be extremely similar with the only difference being that one may merely require a multipart test while the other may not.[228] After all, if the as-applied challenge is popular enough, the scheme in question could be rendered unconstitutional in a *de facto* sense.[229]

In other modes of analysis, the Court has taken a more activist approach to constitutional interpretation. In abortion cases, for example, the Court created a new method for constitutional challenges—the undue burden test.[230] "An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[231]

Even before the undue burden test, however—and really since the New Deal era—the Supreme Court began developing its most famous method of review: judicial scrutiny.[232] In this approach, the Supreme Court will generally apply one of three levels of scrutiny to a particular case involving the exercise of an individual's fundamental right: rational basis scrutiny, intermediate scrutiny, and strict scrutiny.[233]

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[227] *See generally* Kreit, *supra* note 220 at 661–62 (noting that courts must look at each discrete case in as-applied challenges to determine the constitutionality of an act). For example, the "Dole Test" is used to determine valid use of the Spending Clause and its relation to the Tenth Amendment. First, the spending must be in pursuit of the general welfare. Second, any condition on the state must be clearly made so the state may make a knowing choice. Third, conditions must be related to a specific federal interest in the national program or project sought. Fourth, it must not violate other constitutional provisions that would bar the conditional grant of federal funds. South Dakota v. Dole, 483 U.S. 203, 207–08 (1987).

[228] The facial challenge test, for example, looks to whether there is a single set of circumstances in which the statute could succeed and has aptly been named the "no set of circumstances" test. Kreit, *supra* note 220, at 663–664 (arguing that the distinction between facial and as-applied challenged should be rejected in favor of focusing on the constitutional rights and rules at issue and the proper remedy).

[229] Kreit, *supra* note 220, at 663–64.

[230] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 901 (1992).

[231] *Id.* at 878.

[232] *See generally* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1273 (2004) (identifying the three primary tiers of judicial scrutiny and their corresponding tests). Heightened scrutiny was first suggested in *United States v. Carolene Products Co.*, 304 U.S. 134, 155 n.4 (1938), in a footnote in Justice Harlan Stone's opinion—ubiquitously known as "Footnote Four" or the "most famous footnote in constitutional law." Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 465 S. TEX. L. REV. 163, 165 (2004); *see also* Lincoln Caplan*, Ruth Bader Ginsburg and Footnote Four,* THE NEW YORKER (Sept. 13, 2013) (explaining the historical context from which footnote four was derived).

[233] Fallon, *supra* note 232 at 1273, 1284–85, 1298.

For cases that do not burden a fundamental right, or act as an outright ban on such a right, the Court will generally apply a rational basis test.[234] This is appropriate "for those equal protection and substantive due process cases least likely to implicate important issues of equal protection and substantive due process."[235] In order for an action to pass a rational basis review, it must be rationally related to a legitimate government interest.[236] For cases that restrict, hamper, or impugn certain activities or rights, the Court may use intermediate scrutiny,[237] which considers whether a law or action furthers an important government interest by means that are substantially related to that interest.[238] And then, for the most serious of cases, when a "fundamental right" is restricted or a "suspect class" is involved, the highest level of scrutiny—strict scrutiny—may be used.[239] In applying strict scrutiny analysis, a court must determine whether there is a compelling government interest at stake and whether the law or action is narrowly tailored to further that interest.[240] Notably, however, strict scrutiny has never been applied in Second Amendment cases.[241]

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[234] Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627 (2016); *see also* Aaron Belzer, *Putting the "Review" Back in Rational Basis Review*, 41 W. ST. U. L. REV. 339, 344–45 (2014) (describing rational basis scrutiny's origins in *Carolene Products*); Malia Kim, Comment, *Give Me Back My Big Gulp! The Constitutionality of Obesity Regulations Under the Due Process Clause*, 80 TENN. L. REV. 847, 852–53 (2013) (explaining that a statute passes rational basis review when it is rationally related to a state's legitimate interests).

[235] Nachbar, *supra* note 234, at 1629.

[236] *See* Washington v. Glucksberg, 521 U.S. 702, 728 (1997) (stating that to pass rational basis scrutiny, a regulation must be "rationally related to legitimate government interests").

[237] Wa. State Grange v. Wa. State Republican Party, 552 U.S. 442, 452 (2008).

[238] Craig v. Boren, 429 U.S. 190, 197 (1976) (defining intermediate scrutiny).

[239] *See* Fallon, *supra* note 232, at 1268–69 (noting that statutes that discriminate against individuals on the basis of race and other suspect classifications or fundamental rights such as speech are subject to strict scrutiny).

[240] *See, e.g.*, Fisher v. Univ. of Texas, 570 U.S. 297, 307–08 (2013) (holding that Equal Protection and racial discrimination subject to strict scrutiny); Citizens United v. FEC, 558 U.S. 310, 340 (2010) (holding that political speech bans are subject to strict scrutiny); Boos v. Barry, 458 U.S. 312, 321 (1988) (requiring a regulation on a content-based restriction on political speech in a public forum to be narrowly drawn to meet a compelling state interest).

[241] Elke C. Meeus, Note, *The Second Amendment in Need of a Shot in the Arm: Overhauling the Courts' Standards of Scrutiny*, 45 W. ST. L.R. 29, 54–55(2017).

B. Practical Considerations

Finally, apart from any legal analysis (and really from a common sense perspective), the technology is here: the mechanism of a firearm[242] has been around in some fashion for over 1,000 years.[243] Even if somehow all firearms were banned, the means to create a single- or double-action pistol is relatively simple. As well, new technology, like 3D printing, allows almost anyone the ability to make a gun.[244] Thus, ordinary citizens are put further at risk, thereby fulfilling the *good caus*e requirement that a citizen must show a demonstrable need for protection. Without giving its citizens the means to protect themselves from an attack by firearm, the state of California is putting all of its hope in the idea that a "gun free zone" means no one will have a gun; and because of that, no one will need to worry about defending themselves. If Californians believe that, the rest of the country (except maybe New York and New Jersey) has a carbolic smoke ball for sale.

C. Legal Analysis

1. California's "Good Cause" Requirement for Issuing Carry Permits Is Unconstitutional on Its Face Because There Are No Circumstances Under Which a State Can Require Someone to Show Good Cause as to Why They Should Be Able to Defend Themselves

The first step in a facial challenge should be to determine whether the action violates the Constitution on its face. That is, a court must ask whether there is *any set of circumstances under which this action could be constitutional*.[245] If the answer is yes, the case may be subject to an as-applied challenge that applies the appropriate level of scrutiny, or

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[242] *See* JOHNSON ET AL., *supra* note 35, at 5–6 (providing a brief description of how a firearm works).

[243] *See Firearms*, HISTORY, (Aug. 21, 2018), https://www.history.com/topics/inventions/firearms (describing the history of firearms, beginning with the Chinese invention of gunpowder).

[244] Josh Blackman, *The 1st Amendment, 2nd Amendment, and 3D Printed Guns*, 81 TENN. L.R. 479, 486 (2014); Sean Hollowwa, Note, *Betamax, the iPhone, and Beyond: Privacy, Secondary Liability, and the Regulation of the 3-D Printed Gun Industry*, 32 REGENT U.L. REV. 111, 113–15 (2019).

[245] United States v. Salerno, 481 U.S. 739, 745 (1987).

other tests, as the subject matter may require.[246] But, if the answer is no, the action is facially unconstitutional.[247]

In *Peruta*, there was no circumstance under which California's good cause requirement could be constitutional because the Second Amendment guarantees the right to protect oneself at all times—not just at those times that a California sheriff determines to be permissible.[248] As the *Peruta* Petition for Certiorari rightly observes, the Court settled the debate over the nature of the Second Amendment's right to keep and bear arms in *Heller* by holding that the Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation," not a collective right only reserved to the Militia, because the "'core lawful purpose' of the Second Amendment, the Court confirmed, is 'self-defense.'"[249] The right is composed of two distinct parts, the "right to 'keep arms' and the right to 'bear arms.'"[250] While the former concerns having and keeping weapons, the latter means the ability to "'wear, bear, carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.'"[251]

Peruta did not concern a case in which one's right to protect oneself is limited, whether by a lawful limitation or not; it was a case in which one's right to self-defense was banned outright.[252] Thus, those that cannot

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[246] *See, e.g.*, Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008) ("[A] facial challenge must fail where the statute has a 'plainly legitimate sweep." (quoting Washington v. Glucksburg, 521 U.S. 702, 739–40 & n.7 (1997) (Stevens, J., concurring))); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, HARVARD L. REV. 1321, 1336–37 (2000) ("[T]he application of [legal] doctrine—including the process of reasoning necessary to resolve the dispute—will sometimes unmistakably, even necessarily, yield the conclusion that the statute is invalid, not merely as applied to the facts, but more generally or even in whole. In such cases, facial invalidation occurs as an outgrowth of as-applied adjudication."); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U.L. REV. 359, 459 (1998) (discussing "the necessity of application-specific constitutional scrutiny" in the abortion context).

[247] *See Salerno*, 481 U.S. at 745 (stating that to be successful, a facial challenge to the constitutionality of a statute must generally show that there are no circumstances under which the statute could be valid).

[248] *See* District of Columbia v. Heller, 554 U.S. 570, 630 (2008) (indicating that citizens must be allowed to use firearms for the "core lawful purpose of self-defense"); *see also* Petition for Writ of Certiorari at 5–6, 20–22, 24, Peruta v. California, 137 S. Ct. 1995 (2017) (No. 16-894) (describing California's requirement that permit applicants demonstrate "good cause" to carry firearms and arguing that such a requirement is unconstitutional because "[t]he Second Amendment plainly protects the right to bear arms outside the home for self-defense").

[249] Petition for Writ of Certiorari, *supra* note 248, at 21.

[250] *Id.* at 20.

[251] *Id.* at 20–21 (quoting *Heller*, 554 U.S. at 584).

[252] *Peruta*, 137 S. Ct. at 1996 (Thomas, J., dissenting).

show a particularized need in San Diego cannot carry a weapon in public to defend themselves.[253] If there would be no question as to facial unconstitutionality if California required good cause to vote;[254] no question as to facial unconstitutionality if California required good cause to perform an abortion;[255] and no question as to facial unconstitutionality if California required good cause to not be subject to an established religion,[256] why, then, is good cause necessary to exercise one's right to self-defense? Especially in California, the most populous state in the United States,[257] where in Los Angeles, California's most populous city,[258] the average police emergency response time is 6.1 minutes.[259] Even if police response times were half that of Los Angeles's, it only takes a few seconds for an attacker to kill someone. California's idea that one must either show good cause or wait 6.1 minutes for a police officer to respond to neutralize the threat is ridiculous at best, deadly at worst, and unconstitutional on both counts.

Courts ought to employ facial challenges as often as a situation dictates. Limiting the Court's ability to pursue a particular course of action stigmatizes that action, even when such a course is the correct legal recourse.[260] Facial challenges are a tool used to strike down

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[253] *Id.*

[254] *See* U.S. CONST. amend. XV (giving all U.S. citizens the right to vote).

[255] *See* Roe v. Wade, 410 U.S. 113, 164 (1973) (holding that there is a fundamental right to abortion "prior to approximately the end of the first trimester").

[256] *See* Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947) ("The First Amendment, as made applicable to the states by the Fourteenth commands that a state 'shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .'" (citations omitted)).

[257] Hans Johnson, *California's Population*, PUB. POL'Y INST. OF CAL. (Mar. 2017), https://www.ppic.org/publication/californias-population/ (stating that according to 2016 population estimates, California was the most populous state in the United States, with a population of over 39 million).

[258] *See* Press Release, State of Cal. Dep't of Fin., New State Population Report: California Grew by 335,000 Residents in 2016 (May 1, 2017) (showing that as of January 1, 2017, Los Angeles was the most populous city in California with a population of 4,041,707).

[259] Craig Clough, *Rising Los Angeles Crime Rate Prompts Plan for More LAPD Patrols*, PATCH (Feb. 22, 2017, 6:26 PM), https://patch.com/california/northridge/rising-los-angeles-crime-rate-prompts-plan-more-lapd-patrols.

[260] *See generally Patel,* 135 S. Ct. at 2449–51 (stating that "facial challenges . . . are not categorically barred or especially disfavored" and discussing a variety of situations in which the Court has upheld facial challenges).

unconstitutional law; however, scholars[261] and the Court[262] appear reluctant to pursue such challenges, perhaps because facial challenges subvert the democratic process itself.[263] Opponents of judicial activism would be wise to consider how advocating for facial challenges may invite more judicial activism.[264] However, even the most ardent opponent of judicial activism should support a facial challenge against a law that forbids individuals from taking steps to protect themselves against violence in public—a place where many violent confrontations occur.[265]

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[261] *See* Fallon, *supra* note 246, at 1321 ("Traditional thinking has long held that the normal if not exclusive mode of constitutional adjudication involves an as-applied challenge."); Kreit, *supra* note 220, at 658 ("Facial challenges, on the other hand, should be used sparingly and only in exceptional circumstances."); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 361 (1998) ("As the Supreme Court has made clear on numerous occasions, facial challenges are appropriate, if at all, only in exceptional circumstances."). *But see* Fallon, *supra* note 246, at 1322 (describing the views of some scholars who believe facial challenges are becoming and should continue to be more common).

[262] *See, e.g.*, Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 328–30 (2006) (discussing the Court's preference for as-applied challenges); Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449–50 (2008) (same). *But see* City of Los Angeles v. Patel, 135 S. Ct. 2443, 2449 (2015) (holding "that facial challenges under the Fourth Amendment are [neither] categorically barred [n]or especially disfavored").

[263] *See Wash. State Grange*, 552 U.S. at 451 ("[F]acial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.").

[264] *See id.* at 450 ("Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" (quoting Ashwander v. TVA, 297 U.S. 288, 346–47 (1946) (Brandeis, J., concurring))).

[265] *See* Edward Whelan, *The Face-Off over Partial-Birth Abortion*, ETHICS & PUB. POL'Y CTR. (April 23, 2007), https://eppc.org/publications/the-face-off-over-partial-birth-abortion/. In his article, Edward Whelan describes how prevailing on a facial challenge generally requires the challenger to show that the law at issue is invalid in every conceivable circumstance. *Id.* This encourages judicial restraint, as judges must defer to the legislature if there is any circumstance under which the law could be valid. *Id.* If an individual desired to purchase a machine gun despite the fact that a federal law completely banned private ownership of firearms, the challenger would need to demonstrate that the Second Amendment protects ownership of all firearms in order to prevail on a facial challenge. *Id.* Even advocates for judicial restraint should support facial challenges to such laws so that individuals are able to defend themselves in public, where many violent confrontations occur.

2. Intermediate Scrutiny Is Not the Correct Type of Review for Issues that Are Tantamount to an Outright Ban on the Exercise of One's Constitutional Rights

A court should not utilize scrutiny at all in *Peruta*'s case because it functions as a total ban.[266] But, if a court is going to use scrutiny to analyze the statute at issue in *Peruta*—or any other regulation that acts as a tantamount ban on a fundamental right, for that matter—it must use strict scrutiny.[267]

Intermediate scrutiny determines whether the challenged law or policy (1) furthers an important government interest and (2) does so by means that are substantially related to that interest.[268] It has sometimes been used in cases that (1) deal with gender discrimination[269] and (2) deal with time, place, and manner restrictions of free speech.[270] As to its relation to incidental restrictions upon speech, even the cases that applied intermediate scrutiny to certain First Amendment restrictions held that if the restrictions became an outright ban on speech or were content-based, those restrictions should be subject to strict scrutiny,[271] if not facially unconstitutional.[272] Moreover, intermediate scrutiny as used

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[266] *See, e.g.*, Heller v. District of Columbia, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."); *see also supra* notes 184–186 and accompanying text.

[267] *See* Young v. Hawaii, 896 F.3d 1044, 1070 (9th Cir. 2018) (noting that any law that "amounts to a destruction" of the Second Amendment's core right of "carry[ing] a firearm openly for self-defense" is invalid, even if applied under the strictest scrutiny).

[268] *See supra* notes 237–238 and accompanying text.

[269] *See* United States v. Virginia, 518 U.S. 515, 532–33 (1996) (stating that in gender discrimination cases, the government must show that the classification "serves 'important governmental objectives'" and is "'substantially related'" to these objectives (quoting Wengler v. Druggists Mut. Ins., 446 U.S. 142, 150 (1980)).

[270] *See, e.g.*, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 791 (1994) (finding that intermediate scrutiny is the appropriate level of analysis for "'time, place, and manner regulations' of speech" (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983))).

[271] *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 798–800 (restrictions that resemble a ban on particular speech are examined under a higher level of scrutiny); *see also* Boos v. Barry, 485 U.S. 312, 321 (1988) ("[C]ontent-based restriction[s] on political speech . . . must be subjected to the most exacting scrutiny.").

[272] *Ward*, 491 U.S. at 793 (stating that facial challenges are proper when a law gives "unbridled discretion [to] a government official over whether to permit or deny [speech or] expressive activity" (quoting Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 755 (1988))); *see also infra* note 284 and accompanying text.

for time, place, and manner restrictions on speech all have the same goal: to regulate speech in a way that still protects an individual's freedom.[273]

Here and in similar cases, courts do not make such a rational correlation.[274] Incidental restrictions upon one's ability to carry a weapon in public becomes an outright ban in California when someone is unable to show good cause for why they should be able to exercise their fundamental, constitutional right; yet states still employ intermediate scrutiny.[275] If the intermediate scrutiny test were applied to the right to bear arms as it is applied to time, place, and manner restrictions, courts should consider alternatives to "good cause," such as requiring permit applicants to complete special training in order to use their firearm.[276] Moreover, the mere application of intermediate scrutiny should not preclude a court's ability to consider other viable methods to assess the constitutionality of the statute, as *Kachalsky* suggests.[277] If the *Peruta* court had applied intermediate scrutiny in the spirit of a time, place, and manner analysis, the court would have been able to explore alternatives to a "good cause" requirement, as the Supreme Court observed in *Ward v. Rock Against Racism*.[278]

At first glance, the idea of using intermediate scrutiny when deciding *Peruta* may seem logical. After all, California's good cause law does not say "no one can carry a gun in public."[279] The law may be compared with time, place, and manner restrictions in free speech cases, in which the

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[273] *See id.* at 798–800.

[274] *But see* Jackson v. City & Cty. of San Francisco, 746 F.3d 953, 961 (9th Cir. 2014) ("In analyzing . . . the extent to which a . . . prohibition burdens the Second Amendment right, we are . . . guided by First Amendment principles.").

[275] Peruta v. Cty. of San Diego, 824 F.3d 919, 942 (9th Cir. 2016) (Graber, J., concurring) (noting that three other circuits "have upheld ['good cause'] restrictions under intermediate scrutiny").

[276] *Id.* at 951 (Callahan, J., dissenting) (stating that, under proper Second Amendment analysis, a district court should be presented evidence concerning any existing "alternative channels to bear arms for self-defense"); *see also infra* Part IV.C.

[277] Kachalsky v. Cty. of Westchester,701 F.3d 81, 97 (2d Cir. 2012) (noting that unlike with strict scrutiny, intermediate scrutiny does not require that the chosen means is the least restrictive one available in pursuing the governmental interest). While this does not necessarily depart from established jurisprudence, narrow tailoring is still considered in intermediate scrutiny challenges involving time, place, or manner speech issues. *Ward*, 491 U.S. at 791.

[278] As discussed, in *Ward*, the fourth prong of the test is to determine whether regulations of speech "leave open ample alternative channels for communication." *See infra* Part IV.C; *see also Ward*, 491 U.S. at 791 ("[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided . . . that they leave open ample alternative channels for communication of the information.").

[279] *See supra* notes 172–178.

Court fully instituted intermediate scrutiny[280]—though that was "[pulled] out of thin air" in *Craig v. Boren*.[281] Regarding time, place, and manner restrictions, the Supreme Court has said that intermediate scrutiny is appropriate because the government does not ban the speech but rather regulates when, where, and how it may be said.[282] However, as referenced above, if the supposed time, place, and manner restrictions were tantamount to a ban on the basis of content, they would receive a more exacting review,[283] and may even be subject to the overbreadth doctrine.[284]

Peruta is problematic because the good cause requirement, if left unsatisfied, effectuates a tantamount ban on carrying a weapon in public.[285] That ban eliminates an individual's ability to exercise his or her right to self-defense, as guaranteed by the Second Amendment through *Heller*[286] and made applicable to the states in *McDonald*.[287]

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[280] *See supra* note 270 and accompanying text.

[281] 429 U.S. 190, 220 (1976) (Rehnquist, J., dissenting) ("The Court's conclusion that a law which treats males less favorably than females 'must serve important governmental objectives and must be substantially related to achievement of those objectives' apparently comes out of thin air. The Equal Protection Clause contains no such language, and none of our previous cases adopt that standard. I would think we have had enough difficulty with the two standards of review which our cases have recognized . . . .").

[282] *See Ward*, 491 U.S. at 797–800 (discussing the increased scrutiny given to content-based prohibitions on speech as compared to the lower standard for restrictions on the location, means, and time of speech).

[283] *See Ward*, 419 U.S. at 798–800 (reviewing restrictions that resemble a ban on particular speech under a heightened level of scrutiny).

[284] The overbreadth doctrine is unique to free speech analysis. It is a hybrid challenge, combining aspects of both facial and as-applied challenges. Where a facial challenge asserts a law is always unconstitutional and an as-applied challenge is unconstitutional because it violates *an individual's rights*, a statute is overbroad and thus facially unconstitutional where the facts as applied to the challenge could chill all future speech. *See* United States v. Williams, 553 U.S. 285, 292 (2008).

> According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs. On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep.

Id. (internal citation omitted); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 380–81 (1992) (holding that an anti-bias statute that prohibits activity that "arouses anger, alarm or resentment in others" is unconstitutionally overbroad).

[285] Peruta v. California, 824 F.3d 919, 946 (9th Cir. 2016) (Callahan, J., dissenting).

[286] *Id.* at 945–48; District of Columbia v. Heller, 554 U.S. 570, 595, 628–29, 635 (2008).

[287] McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).

Furthermore, the courts in *Peruta* and *Kachalsky*[288] misapplied the Zenith test by using intermediate scrutiny.[289] This incorrect reasoning for applying intermediate scrutiny—the "Zenith test"—is inconsistent with *Heller*'s notion of the "right to . . . carry weapons in case of confrontation."[290] For whatever reason, the *Kachalsky* court and others have used this as justification for intermediate scrutiny instead of strict scrutiny,[291] which is applied in virtually every other case where the exercise of a fundamental right is in question.[292] After all, *Heller* indicates that the Second Amendment guarantees a *fundamental* right to self-defense.[293] In fact, in *Kachalsky*, the court wrote the following chilling statement:

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[288] *See* Kachalsky v. Cty. of Westchester, 701 F.3d 81, 93–94, 96–101 (2d Cir. 2012) ("Because our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public, we conclude that intermediate scrutiny is appropriate in this case.").

[289] *See Peruta*, 824 F.3d at 942 ("Even if we assume that the Second Amendment applies, California's regulation of the carrying of concealed weapons in public survives intermediate scrutiny . . . ."); *Kachalsky*, 701 F.3d at 93, 96–97 (finding that intermediate scrutiny should apply to cases concerning the carrying of weapons outside the home). In *Peruta*, the Court failed to consider the issue of openly carried weapons and determined only that carrying a *concealed* weapon was not covered by the Second Amendment. 824 F.3d at 927 ("We do not reach the question whether the Second Amendment protects some ability to carry firearms in public, such as open carry. That question was left open by the Supreme Court in *Heller*, and we have no need to answer it here. Because Plaintiffs challenge only policies governing concealed carry, we reach only the question whether the Second Amendment protects, in any degree, the ability to carry concealed firearms in public."). The petitioners, however, questioned the prohibition on both concealed and open carry. Peruta v. California, 137 S. Ct. 1995, 1996–97 (2017). But, in a concurring opinion, Judge Graber found that even if the Second Amendment applied to the incorrect concealed carry issue at hand, it would survive intermediate scrutiny. *Peruta*, 824 F.3d at 942, 945 (Graber, J., concurring).

[290] *See Heller*, 554 U.S. at 592; *Kachalsky*, 701 F.3d at 89. The Zenith test assumes that anything outside the home, where *Heller* held the Second Amendment at is zenith, is fair game for intermediate scrutiny. *Kachalsky*, 701 F.3d at 89, 93–94 ("[W]e believe that applying less than strict scrutiny when the regulation does not burden the 'core' protection of self-defense in the home makes eminent sense in this context . . . ."); *Heller*, 554 U.S. at 628–29 ("The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute.").

[291] *See, e.g., Kachalsky*, 701 F.3d at 93–94 ("We do not believe, however, that heightened scrutiny must always be akin to strict scrutiny when a law burdens the Second Amendment."); Gould v. Morgan, 907 F.3d 659, 672–73 (1st Cir. 2018) ("[W]e find that a law or policy that restricts the right to carry a firearm in public for self-defense will withstand a Second Amendment challenge so long as it survives intermediate scrutiny.").

[292] *See, e.g.,* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting) ("If a statute invades a 'fundamental' right or discriminates against a 'suspect' class, it is subject to strict scrutiny.").

[293] *See* McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) ("[A] provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized

> Plaintiffs counter that the need for self-defense may arise at any moment without prior warning. True enough. But New York determined that limiting handgun possession to persons who have an articulable basis for believing they will need the weapon for self-defense is in the best interest of public safety and outweighs the need to have a handgun for an unexpected confrontation. New York did not run afoul of the Second Amendment by doing so.[294]

In other words, although the court appreciates "that anyone could be in danger at any time, . . . the state decides when it is permissible to defend [one]self." This is a demurrer to survival.

The *Peruta* court, like many others including the *Kachalsky* court, also mistakes *Heller*'s judicial restraint for the notion that *Heller* did not intend the Second Amendment to protect an individual right to possess a firearm outside the home by only considering the issue of possession of a weapon within one's home.[295] To be sure, governments may regulate *some* activity that falls within the Second Amendment, as was suggested in *Kachalsky*: "The Second Amendment does not foreclose regulatory measures to a degree that would result in 'handcuffing lawmakers' ability to prevent armed mayhem in public places.'"[296] This Article certainly agrees. However, applying that logic to an ordinary citizen engaging in mundane public activity takes the issue of the *time, place, and manner* realm to which *Kachalsky* alluded.[297] *Kachalsky* provides that the government has the ability to prevent "armed mayhem," which is a

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in *Heller*." (citation omitted)); *Heller*, 554 U.S. at 592, 628 (discussing the significance of the right guaranteed by the Second Amendment).

[294] 701 F.3d at 100.

[295] Peruta v. Cty. of San Diego, 824 F.3d 919, 927–29 (9th Cir. 2016); *Kachalsky*, 701 F.3d at 88–89; *Gould*, 907 F.3d at 667–68.

[296] *See Kachalsky*, 701 F.3d at 88–89 ("There was no need in *Heller* to further define the scope of the Second Amendment or the standard of review for laws that burden Second Amendment rights."); *Peruta*, 824 F.3d 919, 927–29 (9th Cir. 2016) ("The Court concluded that the 'pre-existing right' to keep and bear arms preserved by the Second Amendment was in part an individual right to personal self-defense . . . . [but] was careful to limit the scope of its holding."); *Gould*, 907 F.3d at 667–68 ("Even so, the *Heller* Court never presumed 'to clarify the entire field' of permissible Second Amendment regulation.").

[297] *See Kachalsky*, 701 F.3d at 96 ("Because our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public, we conclude that intermediate scrutiny is appropriate in this case."); Ward v. Rock Against Racism, 491 U.S. 781, 798–99 n.6 (finding that time, place, and manner restrictions should be evaluated under a less restrictive standard than strict scrutiny).

specific course of action.[298] Compare that action with that of *Ward v. Rock Against Racism*, in which the Supreme Court held that *time, place, and manner* restrictions were acceptable when content neutral and only deserved intermediate scrutiny.[299] Unlike "armed mayhem," a member of the populous carrying a concealed handgun in public is not engaged in conduct that is specific enough for the government to regulate in such a manner that deserves intermediate scrutiny.

3. Even If the Court Were to Find That Intermediate Scrutiny Is the Correct Type of Review, Peruta Fails Because California Overreached in Furthering Its Interest by Arbitrarily Banning All Private Citizens from Possessing or Carrying Firearms in Public

An intermediate scrutiny test may result in an incidental burden but should not result in an outright ban. If intermediate scrutiny determines whether a challenged law or policy furthers an important government interest by means substantially related to that interest,[300] a law that still results in an outright ban has failed that test. Since the right to keep and bear arms is enumerated in the Constitution, courts are required to implement a standard of review more exacting than that of mere rational basis review.[301] Intermediate scrutiny, though less exacting than strict scrutiny, still requires that the restriction not burden the fundamental right at issue substantially more than is necessary to advance the interest in question.[302] However, by applying intermediate scrutiny in the Second Amendment context, courts have required individuals to show "good cause," which amounts to requiring ordinary individuals to demonstrate a special need to possess a weapon in public.[303] Such a requirement essentially amounts to a ban on public possession of firearms for ordinary citizens,[304] which substantially burdens the right more than necessary to protect the governmental interest.[305]

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[298] *Id.*

[299] *Ward*, 491 U.S. at 798–99 n.6. Specifically, that the restriction (1) be "content neutral"; (2) be "narrowly tailored"; (3) "serve a significant governmental interest"; and (4) "leave open ample alternative channels for communication." *Id.* at 791 (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

[300] *Kachalsky*, 701 F.3d at 96.

[301] District of Columbia v. Heller, 554 U.S. 570, 628 n.27 (2008).

[302] Turner Broad. Sys. v. FCC, 520 U.S. 180, 186 (1997).

[303] Young v. Hawaii, 896 F.3d 1044, 1060–61 (9th Cir. 2018).

[304] Peruta v. Cty. of San Diego, 824 F.3d 919, 945–46 (9th Cir. 2016) (Callahan, J., dissenting).

[305] Wrenn v. District of Columbia, 864 F.3d 650, 667 (D.C. Cir. 2017) (explaining that the District of Columbia's good cause law was a near total ban on the typical citizen's ability

Instead, an incidental burden such as a training requirement would satisfy intermediate scrutiny by protecting public safety through means substantially related to that interest. For example, a state could require a course in handgun safety and proper use similar to the training police officers receive. While this training need not be as thorough as police officers' training, it could be thorough enough to ensure the person applying for the carry permit knows how to use his or her weapon in the event of an emergency.[306] Requiring such training is not a ban on possessing a firearm—it is an incidental rule that is not arbitrary or capricious.[307] However, requiring one to provide a host of reasons explaining the need to be able to protect oneself undermines public safety and is itself arbitrary and capricious.[308]

4. There May Be Inherent Inequity in the Application of California's May Issue Law Such That Due Process Requires It to Be Rendered Unconstitutional

The nexus between "procedural due process" and "substantive due process" is controversial.[309] But one thing is certain: the Fourteenth

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to exercise his or her Second Amendment rights and that the District of Columbia's good cause law was unconstitutional regardless of the good interests the government had in enacting it).

[306] Ezell v. Chicago, 651 F.3d 684, 704–05 (7th Cir. 2011).

[307] Adam Benforado, *Quick on the Draw: Implicit Bias and the Second Amendment*, 89 OR. L. REV. 1, 63 (2010) (arguing that a mandatory training requirement will not place a heavy burden on gunowners because they will not have to significantly change their behaviors).

[308] *See* Woollard v. Sheridan, 863 F. Supp. 2d 462, 475 (D. Md. 2012), *rev'd by* Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013) ("Maryland's goal of 'minimizing the proliferation of handguns among those who do not have a demonstrated need for them' is not a permissible method of preventing crime or ensuring public safety; it burdens the [constitutional] right too broadly." (citation omitted)).

[309] Opponents to the idea of substantive due process argue that the words of the Fourteenth Amendment, "nor shall any State deprive any person of life, liberty, or property, without due process of law," U.S. CONST. amend. XIV, § 1, cl. 3, only guarantee that the procedure by which the state could deprive someone of life, liberty, or property, must be the same, *see* City of Chicago v. Morales, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting) ("The entire practice of using the Due Process Clause to add judicially favored rights to the limitations upon democracy set forth in the Bill of Rights (usually under the rubric of so called 'substantive due process') is in my view judicial usurpation."). *See also* United States v. Carlton, 512 U.S. 26, 39 (1994) (Scalia, J., concurring) ("If I thought that 'substantive due process' were a constitutional right rather than an oxymoron, I would think it violated by bait-and-switch taxation."); Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1999) (explaining that substantive due process has been heavily criticized because it is not in the text of the Fourteenth Amendment and that it violates principles of self-governance); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120

Amendment absolutely guarantees the right to procedural due process at the state level—that is, the right to be treated fairly by a state.[310]*Peruta* touched upon this in the *en banc* Ninth Circuit holding. The majority, attempting to hedge the dissent, noted that California's decision was reasonable because it empowered local authorities that were best situated to consider the needs of law enforcement and weigh the potential benefits and dangers to a community to issue concealed carry licenses.[311]

However, as the dissent found, this inequity in California's licensing process only further elucidates that courts are applying rational basis instead of heightened scrutiny. The dissent reasoned that although California claims that local officials deserved discretion because they were best situated to determine how applicants should meet the "good cause" requirement, it appeared California sheriffs had not rationally exercised their discretion.[312] It also noted that defendants offered no explanation why it was reasonable for a desire to defend oneself to be insufficient to constitute good cause in Yolo County, with a population of 213,000, when it was sufficient to satisfy good cause in neighboring Sacramento County, with 1.5 million people.[313] Thus, no reasonable fit existed if a good cause requirement was applied arbitrarily between counties absent an explanation accounting for the differences.[314]

If a citizen has difficulty showing "good cause" in one county but that same individual easily passes in another county or does not have to demonstrate "good cause," is there enough inequity to show a constitutional violation? Does the as-applied challenge to the statute's minutiae succeed?

YALE L.J. 408, 411 (2010) (identifying the concept of substantive due process is one of the most controversial subjects in American law).

[310] *See In re* Gault, 387 U.S. 1, 19–20 (1967) ("Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise."); see also

[311] Peruta v. Cty. of San Diego, 824 F.3d 919, 945 (9th Cir. 2016) (en banc).

[312] *Id.* at 958 (Silverman, J., dissenting).

[313] *Id.*

[314] *Id.*

5. "Tiered" Levels of Scrutiny may be Improper Methods of Judicial Review

The three tiers of judicial review are not found within the text of the Constitution[315] and their use is arduous, arcane,[316] and inconsistent.[317] Their usage, at least as applied to rational basis review, can result in "limitless and unprincipled usurpation of legislative authority by the judiciary."[318] For example, the rational basis test is a post-*Lochner* era response to legislative deference.[319] On the one hand, the judicial branch should pay great deference to state legislatures and not arbitrarily strike down laws created by an elected body. The *Lochner* Court, for example, overstepped when it struck down a state law regulating employee work hours on the basis that a constitutional right existed to contract for employers and employees.[320] Rational basis review provided the antidote to the *Lochner* era's oversight by allowing the state of New York in *Nebbia v. New York* to regulate the price of milk.[321] There, the Court reasoned that "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation

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[315] *See* Fallon, *supra* note 232, at 1268 (arguing that the levels of judicial scrutiny, especially strict scrutiny, are not based in the text of the Constitution or its original understanding). *See also* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2328 (2016) (Thomas, J., dissenting) ("It is tempting to identify the Court's invention of a constitutional right to abortion in *Roe v. Wade* as the tipping point that transformed third-party standing doctrine and the tiers of scrutiny into an unworkable morass of special exceptions and arbitrary applications. But those roots run deeper, to the very notion that some constitutional rights demand preferential treatment. During the *Lochner* era, the Court considered the right to contract and other economic liberties to be fundamental requirements of due process of law. The Court in 1937 repudiated *Lochner*'s foundations. But the Court then created a new taxonomy of preferred rights." (citation omitted)).

[316] *See* Fallon, *supra* note 232, at 1267 (explaining that the strict scrutiny analysis is vague because it is based upon ambiguous terms).

[317] *See* Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 57–58 (1997) ("But the norms reflecting purposes such as [questions of implementation] are too vague to serve as rules of law; their effective implementation requires the crafting of doctrine by courts. The Supreme Court has responded accordingly."); *see infra* notes 338–343.

[318] Nachbar, *supra* note 234 at 1630.

[319] *See* Ferguson v. Skrupa, 372 U.S. 726, 730–31 (1963) (explaining that after Lochner v. New York, 198 U.S. 45 (1905), the Court has adopted the approach that courts should not attempt to replace the legislature's intent with their own beliefs).

[320] *See id.* at 730–32 (explaining that the Court's scrupulous oversight of state legislatures during the *Lochner*-era has been discarded because courts are not at liberty to evaluate the wisdom of state legislatures' decisions by striking down those laws the courts believe to be unwise).

[321] Nebbia v. New York, 291 U.S. 502, 511–12 (1934).

adapted to its purpose."[322] But at what price? When the Court issued its ruling in *Nebbia*, that the law was rational,[323] was it righting the ship by determining that no fundamental right to contract existed?[324] Or, was it opening the door to hypocrisy? For if the Court in *Nebbia* was correct that it cannot create fundamental rights, such as the Court attempted to do in *Lochner*,[325] then how can it create the right to privacy in *Griswold* (through penumbras)[326] or the right to abort an unborn child in *Roe* (through the Fourteenth Amendment),[327] or the right to marry in *Zablocki v. Redhail*,[328] or the right to custody of one's child in *Stanley v. Illinois*?[329] Certainly, some of these examples of substantive due process are more reasonable than others,[330] but, again—at what cost? If the Court does not favor economic substantive due process, how can it promote other forms of substantive due process?[331]

Unfortunately, it is impossible to entirely remove subjectivity from judicial review. The very nature of judicial review leaves open to interpretation the issues before the Court. For example, even using Alexander Hamilton's idea that the standard of review when striking down a statute should be irreconcilable variance with the Constitution,[332]

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[322] *Id.* at 537; *see also id.* ("[I]t is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise.").

[323] *See, e.g.*, *id.* at 539 (explaining that the legislature is free to adopt laws provided that such laws are neither "arbitrary" nor "discriminatory" and discussing how the courts will weigh these factors when determining whether the law in question is unconstitutional).

[324] *But see* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399–400 (1937) (explaining that the freedom to contract does not abrogate the government's power to restrict such contracts as it reasonably deems necessary); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 876 (1987) (describing *West Coast Hotel* as "the case generally thought to spell the downfall of *Lochner*").

[325] *See Nebbia*, 291 U.S. at 538–39 (declining to declare a fundamental right to be free from legislatively imposed price controls and noting in the process that "[t]he Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large or upon any substantial group of the people").

[326] Griswold v. Connecticut, 381 U.S. 479, 481–86 (1965).

[327] Roe v. Wade, 410 U.S. 113, 152–53 (1973).

[328] 434 U.S. 374, 383–87 (1978).

[329] 405 U.S. 645, 651, 658 (1972).

[330] *See* James W. Hilliard, *To Accomplish Fairness and Justice: Substantive Due Process*, 30 J. MARSHALL L. REV. 95, 112–15 (1996) (noting that critics of substantive due process characterize "judicial descriptions of fundamental rights" as "evanescent," "vaporous," and "too vague" to properly restrain judicial power (quoting Rochin v. California, 342 U.S. 165, 175–77 (1951) (Black, J., concurring))).

[331] *See, e.g.*, Chemerinsky, *supra* note 309, at 1502–08 (discussing the Supreme Court's somewhat inconsistent use of substantive due process, which demonstrates a reluctance to uphold economic legislation but a willingness to protect civil liberties using the doctrine).

[332] THE FEDERALIST NO. 78, *supra* note 41, at 404 (Alexander Hamilton).

a judge can fill in the gaps as to what is or is not reconcilable according to his own feelings. In this way, many judges are accused of judicial activism.[333] To some, a case may have been brilliantly decided; to others, that same decision may be considered mere activism. Justice Kennedy once quipped that "[a]n activist court is a court that makes a decision you don't like."[334] While there is certainly some truth to this, there is also far more that can be done to prevent judicial activism. This Article simply considers how best to restrain that ability and make it nearly impossible for a judge to impart his or her own ideology into the interpretation of the lawin order to comport with *Marbury's* definition of judicial review, which is "to say what the law is,"[335] not what the law ought to be.[336]

The Supreme Court assigns levels of scrutiny arbitrarily. For example, it considers a tantamount ban on the possession of weapons under the Second Amendment worthy only of intermediate scrutiny,[337] while it assigns strict scrutiny to regulations that restrict the free exercise

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[333] *See* Keenan D. Kmiec, Comment, *The Origin and Current Meanings of "Judicial Activism,"* 92 CALIF. L. REV. 1441, 1475–76 (2004) (opining that one of the core meanings of judicial activism is "result-oriented judging," or the idea that judges occasionally have ulterior motives for reaching a certain result).

[334] Matt Sedensky, *Justice Questions Way Court Nominees Are Grilled*, ASSOCIATED PRESS (May 14, 2010), https://web.archive.org/web/20100605163057/http:/www.google.com/hostednews/ap/article/ALeqM5iWhwP-GmuptNw-uw8t8Z_lb1YV2QD9FMQKRG0.

[335] 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[336] Of course, there are those who will say that *Marbury* was the first case of judicial activism because "judicial review" does not appear anywhere in the Constitution. Thus, one is forced to *infer* that the Framers meant for the separation of powers to include the judicial branch's ability to review the other branches' actions for congruence with the Constitution. *See* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 234–35 (2000) (discussing how the Founders understood the concept of judicial review to be very limited because of their historical context and political reality). The problem then becomes that so many other instances of judicial activism can come from an inference; such as the inference that the Constitution grants a right to privacy found in the penumbras of other constitutional protections as in *Griswold v. Connecticut*, 381 U.S. 479, 481–86 (1965). Or, one could again simply look to the Federalist Papers: "A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body." THE FEDERALIST NO. 78, *supra* note 41, at 404 (Alexander Hamilton).

[337] *See* Silvester v. Becerra, 138 S. Ct. 945, 947 (2018) (Thomas, J., dissenting) (discussing how the Courts of Appeal have generally applied intermediate scrutiny in Second Amendment cases).

of religion,[338] the content of speech in public forums,[339] and even the burden on a woman's access to abortion.[340] Likewise, it assigns intermediate scrutiny to regulations involving gender discrimination,[341] but requires that restrictions regarding racial discrimination be evaluated under strict scrutiny.[342] Are not all of these "fundamental rights?" Justice Thomas posits this very dilemma:

> If our recent cases illustrate anything, it is how easily the Court tinkers with levels of scrutiny to achieve its desired result. This Term, it is easier for a State to survive strict scrutiny despite discriminating on the basis of race in college admissions than it is for the same State to regulate how abortion doctors and clinics operate under the putatively less stringent undue-burden test. . . . Likewise, it is now easier for the government to restrict judicial candidates' campaign speech than for the Government to define marriage—even though the former is subject to strict scrutiny and the latter was supposedly subject to some form of rational-basis review.[343]

Perhaps even without these tiers of scrutiny an activist court will still find a way to carry out its activism. Even in *Korematsu v. United States*, a case in which the Court applied an early version of strict scrutiny, the Court still found FDR's executive order interning American citizens of Japanese descent into settlement camps after the attack on Pearl Harbor constitutional.[344] Although strict scrutiny ought to invalidate tantamount

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[338] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) (holding that laws that burden the practice of religion and that are neither neutral nor generally applicable must be evaluated under strict scrutiny).

[339] *See* Boos v. Barry, 485 U.S. 312, 334 (1988) (discussing a "content-based restriction of political speech in a public forum" as not being "narrowly tailored to serve a compelling state interest").

[340] *See* Roe v. Wade, 410 U.S. 113, 163 (1973) (discussing that the government has a compelling interest in unborn life at the end of the first trimester); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 871 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (suggesting that strict scrutiny should be used in all abortion cases).

[341] *See* United States v. Virginia, 518 U.S. 515, 532–33 (1996) (stating that in gender discrimination cases, the government must show that the classification "serves 'important governmental objectives'" and is "substantially related" to these objectives (quoting Wengler v. Druggists Mut. Ins., 446 U.S. 142, 150 (1980)).

[342] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

[343] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2327–28 (Thomas, J., dissenting).

[344] *See* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 356 (describing how Skinner v. Oklahoma, 316 U.S.

burdens to Second Amendment rights, one can envision how an activist court may still attempt to uphold these bans in spite of the rigorous hurdle.

V. SUBSEQUENT CASE LAW

There are four important cases that have emerged across three circuits since *Peruta's* certiorari denial. First, in *Wrenn v. District of Columbia*, the D.C. Circuit held that (1) the Second Amendment guaranteed an "individual right to carry common firearms beyond the home for self-defense," and (2) a "good reason" law—similar to *Peruta*'s—was prevented by the Second Amendment.[345] Next, in *Silvester v. Harris* the Ninth Circuit held that California's waiting period law, whereby a gun purchaser must wait ten days after being approved for purchase in order to purchase a gun, was constitutional.[346] Then, in *Young v. Hawaii* a Ninth Circuit panel held that Hawaii's ban against openly carrying a firearm in public was unconstitutional.[347] Finally, in *New York State Rifle & Pistol Ass'n v. City of New York*, the Second Circuit held that New York's ban on transporting a licensed firearm outside city limits did not violate the dormant commerce clause doctrine or the Second Amendment.[348] Notably, the Supreme Court recently granted certiorari in

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535, 541 (1942) and Korematsu v. United States, 323 U.S. 214, 216 (1944) were the forerunners of the modern strict scrutiny test); *see also* Korematsu v. United States, 323 U.S. 214, 215–18, 223 (1944) (stating that "all legal restrictions which curtail the civil rights of a single racial group . . . [must undergo] the most rigid scrutiny"). Justice Jackson disagreed with the Court's holding and argued that:

> [O]nce a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.

Korematsu, 323 U.S. at 246 (Jackson, J., dissenting).

[345] 864 F.3d 650, 655, 661, 667 (D.C. Cir. 2017).

[346] *See* Silvester v. Harris, 843 F.3d 816, 828 (9th Cir. 2016) (noting that the ten-day waiting period would discourage acts of increased violence and would not impose a substantial burden on the right to defend one's home). Defendant Harris here refers to then-attorney general of California Kamala Harris. *Id.* at 816. Once at the Supreme Court level, Xavier Becerra had become California's attorney general. Silvester v. Becerra, 138 S. Ct. 945, 945 (2018).

[347] 896 F.3d 1044, 1071 (9th Cir. 2018).

[348] 883 F.3d 45, 64, 66 (2d Cir. 2018).

New York State Rifle, marking the first Second Amendment case that the Court has heard in the nine years since *McDonald*.[349]

A. Wrenn v. District of Columbia

After *Heller,* the D.C. City Council enacted a ban on carrying weapons altogether.[350] *Palmer v. District of Columbia* invalidated that law.[351] In response, the D.C. City Council enacted a law allowing individuals to carry handguns in public only if they can prove a "special need for self-defense."[352] The law further instructs the police chief to "promulgate regulations limiting licenses for the concealed carry of handguns (the only sort of carrying the Code allows) to those showing a 'good reason to fear injury to [their] person or property' or 'any other proper reason for carrying a pistol.'"[353] Furthermore, "[t]o receive a license based on the first prong—a 'good reason to fear injury' —applicants must show a 'special need for self-protection distinguishable from the general community as supported by evidence of specific threats or previous attacks that demonstrate a special danger to the applicant's life.'"[354] For the second prong—"other proper reason for carrying"—the law specified that "an applicant's need to carry around cash or valuables as part of her job is sufficient."[355] However, it also states that living or working "'in a high crime area shall not by itself establish a good reason' to carry."[356]

The D.C. Circuit held (1) that the Second Amendment protects an individual's right to carry common firearms outside the home for self-defense purposes, even in populous areas absent a special need for self-defense,[357] and (2) the Second Amendment categorically barred the

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[349] NY State Rifle & Pistol Ass'n v. City of New York, 139 S. Ct. 939 (2019) (mem.); Melissa Quinn, *Supreme Court Takes Up First Second Amendment Dispute in Almost 10 Years*, CBS NEWS (Dec. 2. 2019, 3:33 PM), https://www.cbsnews.com/news/supreme-court-2nd-amendment-case-the-first-taken-on-in-almost-10-years/.

[350] Wrenn v. District of Columbia, 864 F.3d 650, 655 (D.C. Cir. 2017).

[351] 59 F. Supp. 3d 173, 183 (D.D.C. 2014).

[352] *Wrenn*, 864 F.3d at 655–56; D.C. CODE MUN. REGS. tit. 24 § 2333.1–.2 (LexisNexis, LEXIS through D.C. Reg., Vol. 67, Issue 1, Jan. 3, 2020).

[353] *Wrenn*, 864 F.3d at 655 (quoting D.C. CODE § 22-4506(a)–(b) (LexisNexis, LEXIS through Feb. 20, 2020)).

[354] *Id.* (quoting D.C. CODE § 7-2509.11(1)(A) (LexisNexis, LEXIS through Feb. 20, 2020)).

[355] *Id.* at 656 (quoting D.C. CODE § 7-2509.11(1)(B) (LexisNexis, LEXIS through Feb. 20, 2020)).

[356] *Id.* (emphasis omitted) (quoting D.C. CODE MUN. REGS. tit. 24 § 2333.4 (LexisNexis, LEXIS through D.C. Reg., Volume 67, Issue 1, Jan. 3, 2020)).

[357] *Id.* at 661.

"good reason" law.[358] The Court considered Heller's reasoning, along with critical early sources,[359] and reasoned that it seemed "highly doubtful that the [*Heller*] Court would have acted any differently in reviewing a good-reason regulation on possession—one limiting gun ownership to that minority of residents with more-than-common needs for self-defense at home."[360] Additionally, both "possession and carrying—keeping and bearing—are on equal footing. So [*Heller's*] language and logic all but dictate that no tiers-of-scrutiny analysis could deliver the good-reason law a clean bill of constitutional health."[361]

Most importantly, the D.C. Circuit in *Wrenn* determined that scrutiny was not necessarily appropriate because Washington, D.C.'s regulation functioned as a total ban by impinging the core right of the Second Amendment: the right to self-defense,[362] not just the right to self-defense in the home, as the dissent believed was *Heller*'s only holding.[363] The view of the *Wrenn* dissent is diametrically opposed to the Ninth Circuit's holding in *Peruta*.[364] The Washington, D.C. government made the tactical decision not to appeal the *Wrenn* decision to the Supreme Court,[365] likely out of fear that an affirmation of the holding would endanger other gun control jurisdictions, such as California, where this type of action is still considered constitutional.[366] As with previous

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[358] *Id.* at 666.

[359] *Id.* at 661.

[360] *Id.* at 666.

[361] *Id.*

[362] *Id.* at 664, 666.

[363] *Id.* at 668 (Henderson, J., dissenting) ("The sole Second Amendment 'core' right is the right to possess arms for self-defense in the home."). Again, this mistakes *Heller*'s judicial restraint for some type of zenith. *See* Kachalsky v. Cty. of Westchester, 701 F.3d 81, 89 (2d Cir. 2012) ("What we know from these decisions is that Second Amendment guarantees are at their zenith within the home."). The only reason *Heller* stopped at the home is because the regulation in question there required trigger locks in the home. District of Columbia v. Heller, 554 U.S. 570, 575 (2008). If *Heller* went further than to say the Second Amendment protects an individual right to self-defense in the home, it would have been judicial activism. Besides, it is enough to say that the core right in the Second Amendment is self-defense. *Id.* at 630. *Where* it is practiced, at least in the true spirit of *Heller*, is not relevant.

[364] *Compare* Peruta v. Cty. of San Diego, 824 F.3d 919, 926 (9th Cir. 2016) (holding that the right to keep and bear arms extends beyond the four corners of the home), *with Wrenn*, 864 F.3d at 668 (Henderson, J., dissenting) (opining that the Second Amendment protects only the right to self-defense in one's home).

[365] *See* Ann E. Marimow & Peter Jamison, *D.C. Will Not Appeal Concealed Carry Gun Ruling to Supreme Court*, WASH. POST (Oct. 5, 2017), https://www.washingtonpost.com/local/dc-politics/dc-will-not-appeal-gun-law-to-supreme-court/2017/10/05/e0e7c054-a9d0-11e7-850e-2bdd1236be5d_story.html (reporting the city of Washington, D.C.'s decision "not to risk appeal" and including statements of the city's Attorney General Karl A. Racine, who noted that "an adverse decision by the Supreme Court could have wide-ranging negative effects").

[366] *Id.*

cases, this case adds to the circuit split concerning possession of a weapon in public.[367]

B. Silvester v. Becerra

In *Silvester v. Harris*, petitioners challenged California's waiting period law.[368] This law requires—among other things—that gun purchasers wait a certain number of days to purchase a firearm or between purchasing multiple firearms.[369] The Southern District of California overturned the law in what some would call a shocking decision; however, the Ninth Circuit upheld the law as constitutional.[370] The court held that the law should be subject to intermediate scrutiny,[371] even though it also found that "[a] law that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny."[372] The Ninth Circuit simply found that the waiting period law did not burden a Second Amendment right.[373]

The Supreme Court denied certiorari on February 1, 2018.[374] Justice Thomas dissented, claiming the Ninth Circuit only employed a rational basis test:

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[367] *Compare Peruta*, 824 F.3d at 924 (holding that the Second Amendment does not protect the right to bear concealed firearms in a public place), *with Wrenn*, 864 F.3d at 667 (holding that the good cause requirement is unconstitutional and that the Second Amendment protects carrying weapons in public) *and Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (stating that the evidence supports a right to carry a firearm in public for self-defense).

[368] 843 F.3d 816, 818 (9th Cir. 2016), *cert. denied sub nom.* Silvester v. Becerra, 138 S. Ct 945 (2018). On the one hand, a "cool off" period seems like a wise legislative decision and—in the light most favorable to the state—may be at least facially constitutional because it merely places a short time limit on obtaining possession of a firearm rather than entirely prohibiting the possession of such a weapon. In this regard, perhaps an argument for the use of intermediate scrutiny could be made since the law is not an outright ban, but a temporary restriction akin to a time, place, and manner restriction on free speech, which is also subject to intermediate scrutiny. *See Ward v. Rock Against Racism*, 491 U.S. 781, 798–99 (1989) (noting that a restriction on free speech must "promote[] a substantial government interest" and must be "narrowly tailored" to achieve this goal, although it need not be the least restrictive means possible). *But see Boos v. Barry*, 485 U.S. 312, 321 (1988) (emphasis omitted) ("[C]ontent-based restriction[s] on political speech . . . must be subjected to the most exacting scrutiny."). Nevertheless, what about the average person without an emergency exemption? Imagine that John Q. Public applies to purchase a weapon for general self-defense. On the ninth day of Mr. Public's waiting period, he is robbed at gunpoint on a public street and killed. Can his estate claim a constitutional violation?

[369] 843 F.3d at 818–19.

[370] *Id.* at 819, 829.

[371] *Id.* at 819, 823.

[372] *Id.* at 821.

[373] *Id.* at 827.

[374] 138 S. Ct. 945, 945 (2018) (mem.).

> Because the right to keep and bear arms is enumerated in the Constitution, courts cannot subject laws that burden it to mere rational-basis review. But the decision below did just that. Purporting to apply intermediate scrutiny, the Court of Appeals upheld California's 10–day waiting period for firearms based solely on its own "common sense." It did so without requiring California to submit relevant evidence, without addressing petitioners' arguments to the contrary, and without acknowledging the District Court's factual findings. This deferential analysis was indistinguishable from rational-basis review. And it is symptomatic of the lower courts' general failure to afford the Second Amendment the respect due an enumerated constitutional right.[375]

C. Young v. Hawaii

Petitioner in *Young* applied for a permit to carry a weapon in public, either concealed or openly, and was denied twice.[376] In Hawaii, citizens may not generally carry a weapon in public.[377] Hawaii law provides that

> [I]n an exceptional case, when an applicant shows reason to fear injury to the applicant's person or property, the chief of police . . . may grant a license to an applicant . . . to carry a pistol or revolver and ammunition therefor concealed on the person." The chief of police may . . . grant a license for the open carry of a loaded handgun only "[w]here the urgency or the need has been sufficiently indicated" and the applicant "is engaged in the protection of life and property." The County of Hawaii has promulgated regulations to clarify that open carry is proper only when the license-holder is "in the actual performance of his duties or within the area of his assignment."[378]

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[375] *Id.* (Thomas, J., dissenting) (citations omitted).

[376] Young v. Hawaii, 896 F.3d 1044, 1048 (9th Cir. 2018), *reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019).

[377] *Id.*

[378] *Id.* (first quoting HAW. REV. STAT. ANN. § 134-9 (LEXIS, LexisNexis through 2019 Legis. Sess.); then quoting Answering Brief for Defendants-Appellees at 36, *Young*, 896 F.3d 1044 (No. 12-17808)).

The district court dismissed Young's claim[379] and reasoned that the Hawaii law "'does not implicate activity protected by the Second Amendment,' because that Amendment 'establishes only a narrow individual right to keep an operable handgun at home for self-defense.'"[380] However, even if it did implicate Second Amendment protections, the "district court indicated that it would uphold [the law's] open and concealed carry limitations under intermediate scrutiny."[381]

The Ninth Circuit reversed the district court and held that (1) the Second Amendment guarantees the right to openly and publicly carry a firearm for purposes of self-defense,[382] and (2) the statute in question which limited "open carry of firearms to those 'engaged in the protection of life and property'" was unconstitutional on its face.[383] On February 8, 2019, the Ninth Circuit announced that it would rehear the case en banc.[384]

D. New York State Rifle & Pistol Ass'n v. City of New York

New York City prohibits possession of a handgun absent a license.[385] The most common license only allows the license holder to possess the gun at home or to travel to one of seven shooting ranges in the city.[386] Thus, the license prevents its residents from transporting a handgun outside the city limits for any reason, even with a handgun that is unloaded and locked in a separate container from the ammunition.[387] Appellants sought an injunction which the district court for the Southern District of New York denied.[388]

The Second Circuit affirmed the district court's ruling.[389] It held that New York City did not create a substantial burden on core Second Amendment rights, which it determined were only in the home,[390] and

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[379] *Id.* at 1049.
[380] *Id.*
[381] *Id.*
[382] *Id.* at 1068.
[383] *Id.* at 1071.
[384] 915 F.3d 681, 682 (9th Cir. 2019).
[385] Petition for Certiorari at i, N.Y. State Rifle & Pistol Ass'n v. City of New York, 883 F.3d 45 (2018) (No. 18-280) [hereinafter *Pistol Cert.*].
[386] *Id.*
[387] *Id.*
[388] *N.Y. State Rifle & Pistol Ass'n*, 883 F.3d at 52.
[389] *Id.* at 68.
[390] *Id.* at 57, 62.

that the City's licensing scheme was constitutional and only subject only to intermediate scrutiny.[391]

As to the first holding, the Second Circuit found that:

> Even if the Rule relates to "core" rights under the Second Amendment by prohibiting [Appellant] from taking his licensed firearm to his second home, the Rule does not substantially burden his ability to obtain a firearm for that home, because an "adequate alternative[] remain[s] for [Appellant] to acquire a firearm for self-defense."[392]

In other words, the Court held that the appellant could merely purchase another firearm outside of New York City and keep it at his other residence.[393]

As to the second holding, the court assumed arguendo that the "[r]ule approaches the Second Amendment's core area of protection," and thus applied intermediate scrutiny.[394] Further, it reasoned that the restriction did not impose a substantial burden and concluded that the rule did not violate the Second Amendment.[395] Appellants petitioned for certiorari.[396] On January 22, 2019, the Supreme Court granted certiorari and heard oral argument on December 2, 2019.[397] However, in between the time certiorari was granted and the oral argument, the City of New York scrambled to reverse the then-current law in question.[398] This led to the Supreme Court declaring the issue moot in its April 27, 2020 decision. In dissent, however, Justice Alito, with whom Justice Gorsuch and Thomas joined, alluded to an argument that many gun control opponents share—that it is about control, not public safety:

> In the District Court and the Court of Appeals, the City vigorously and successfully defended the constitutionality of its

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391 *Id.* at 61–62.

392 *Id.* at 57 (second and third alterations in original).

393 *Id.* ("[Appellant] presents no evidence that the costs, either financial or administrative, associated with obtaining a premises license for his house in Hancock, or acquiring a second gun to keep at that location, would be so high as to be exclusionary or prohibitive.").

394 *Id.* at 61–62.

395 *Id.*

396 *Pistol Cert.*, *supra* note 385.

397 N.Y. State Rifle & Pistol Ass'n v. City of New York, 139 S. Ct. 939 (2019) (mem.); Transcript of Oral Argument at 1, *N.Y. State Rifle & Pistol Ass'n*, 139 S. Ct. 939 (No. 18-280).

398 New York State Rifle & Pistol Ass'n v. City of New York, 140 S.Ct. 1525, 1527 (2020) (Alito, J., dissenting).

> ordinance, and the law was upheld based on what we are told is the framework for reviewing Second Amendment claims that has been uniformly adopted by the Courts of Appeals. One might have thought that the City, having convinced the lower courts that its law was consistent with Heller, would have been willing to defend its victory in this Court. But once we granted certiorari, both the City and the State of New York sprang into action to prevent us from deciding this case. Although the City had previously insisted that its ordinance served important public safety purposes, our grant of review apparently led to an epiphany of sorts, and the City quickly changed its ordinance.[399]

One can only speculate that the reason this law was changed was to prevent the Court from actually ruling on the issue, much like one could speculate the same was true in *Wrenn v. District of Columbia* when the government did not appeal that decision.

CONCLUSION

There is no doubt that the Second Amendment is an orphaned right, just as Justice Thomas put it. The absurd manner in which individual circuit courts apply failed-logic jurisprudence is almost maddening. To think that a court comprised of some of the smartest attorneys in the country could actually say that a law that prohibits egressing a firearm from a city is constitutionally sound is mind-boggling.

And just as in *Peruta*, is there any scenario whereby completely and arbitrarily banning everyone's ability to possess a firearm in public by forcing them to show "good cause" is constitutional? Of course not. If California required good cause before allowing free speech, this paper would not be necessary. If California required good cause before allowing an abortion, this paper would not be necessary—and there would be rioting in the streets. If California required good cause before issuing a marriage license to same-sex couples, this paper would not be necessary—and there would be more rioting in the streets.

To be sure, the public will never hear about a new law that allows a sheriff to deny an abortion permit for good cause. Nor will they hear about a law requiring "abortion permits." But if they did, a court certainly would not analyze such a law under intermediate scrutiny. Moreover, the moment that one of those hypothetical permits was issued in San

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[399] *Id.* at 1527–28.

Francisco, but denied in conservative Northern California, the Ninth Circuit would declare that inequity an unconstitutional due process violation so quickly that President Trump wouldn't even have time to tweet about it.

Concededly, it is unlikely that a more favorable holding in *New York State Rifle & Pistol Association* would have changed the current uncertainty surrounding an individual's right to carry a weapon in public. And an en banc Ninth Circuit could very likely reverse the previous panel holding in *Young v. Hawaii*. Nevertheless, perhaps in the near future the Court will finally right the ship and at least make an actual, constitutionally explicit, fundamental right—the right to keep and bear arms—analogous to a judicially created, equivocal right to an abortion. And maybe then the Edward Perutas of the country can attempt to save Second Amendment liberty once again.

Erratum

Distinguished Panelists, *Independent Agencies: How Independent is Too Independent*, 32 REGENT U. L. REV. 63, 69 (2019).

There was an error in footnote 51, which read:

> Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 Notre Dame L. Rev. 1599, 1606 (2018) (stating that under Article II the President must have complete control over every aspect of administration of the law).

It should have read:

> Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 Notre Dame L. Rev. 1599, 1606 (2018) (stating that, while the author disagrees with them, many scholars state that under Article II "the President [must] have complete control over every aspect of administration" of the law).

This error is not attributable to the distinguished panelists of the convention or the Federalist Society. The publishers apologize for this error.