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ESSAY

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ESSAY

MAKING SENSE OF THE NEW FINANCIAL DEAL

David Skeel[†]

I. INTRODUCTION

A few years ago, a poet friend of mine wrote a poem called "The Game Changed," which concludes with a line about a "continuity in which everything is transition."[1] He was talking about 9/11 in particular, but the same thing is true anytime there is a fundamental social shift. We are in the middle of a fundamental shift. For all of us, and especially for those of you who have just graduated from law school, the game has changed.

You see this all around you. If you were applying for jobs last fall, you entered a law firm recruiting world that has been transformed. I was talking with a partner in a big city law firm the week before I gave the talk on which this Essay is based. She said she loves the new world. In the old days, she said, it was hard to get a young associate's attention; there was a general air of entitlement. But now they want to know how they can help, if there is anything they can do for you. This is not a bad attitude to have, but it reflects a deep uncertainty about the job situation.

We have just had a transformative election, just two years after another transformative election.[2] What does this mean? It may simply mean that transformative elections are not what they used to be. It probably also means that there will not be any more massive legislation anytime soon, and thus that we now have to play with the cards we have been dealt over the last two years. So this is a good time to ask where we are right now in the financial world.

[†] S. Samuel Arsht Professor of Corporate Law, University of Pennsylvania. This Essay began its life as a talk delivered at Liberty University School of Law on November 18, 2010. My thanks to Dan Yamauchi and the Liberty University Law Review; Jason Heinen and Liberty University School of Law Chapter of the Federalist Society; and to the audience for their hospitality. I am grateful to them and to participants at the "Corporate Governance and Business Ethics in a Post-Crisis World" conference at Notre Dame Law School for helpful comments.

1. LAWRENCE JOSEPH, *The Game Changed*, *in* INTO IT: POEMS 63, 65 (2005).

2. I refer, of course, to the sweeping Republican victories in Congress and in state governors' elections in 2010, which came just two years after the election of Barack Obama, America's first black president, and a Democratic sweep in 2008.

To answer this question, I will begin by briefly reviewing the causes of the crisis. By now, this is a very familiar story, so I will keep this part of the discussion especially brief.

This will set the stage for our principal topic, the new financial reforms known as the Dodd-Frank Act.[3] Like it or not, the new law will shape the regulatory landscape for the next generation, so it is important to start thinking about it sooner rather than later. One of my main themes here will be that our financial world is just as prone to bailouts after Dodd-Frank as it was before, and that it would have made a lot more sense to focus on bankruptcy as the solution of choice for troubled financial institutions.

I will then discuss the CEOs and bonuses that have gotten so much attention in the press.[4] I will use this as a segue into a discussion about how Christians might think about issues like financial regulation that seem so far removed from the Gospel.

II. CAUSES OF THE CRISIS

The context for our discussion of the new regulatory regime is the financial crisis that began in 2007 and climaxed with the collapses of Fannie Mae, Freddie Mac, Lehman Brothers, Merrill Lynch, AIG, and others in the fall of 2008.[5]

When people first asked me what I thought the real causes of the 2007-2008 financial crisis were, I used to say: "I'm just a country law professor, not an economist, so I really am not qualified to opine on this." But I long ago stopped letting the limits of my expertise interfere with the opportunity to express an opinion—I am, after all, a law professor—and I now tend to give the following answer: "It's really quite simple," I say:

- We now know that the Panic was caused by the Bush administration's Ownership Society—the administration

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3. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376-2223 (codified as amended in scattered sections of U.S.C. titles: 2, 5, 7, 11, 12, 16, 18, 19, 20, 22, 25, 26, 28, 29, 30, 31, 41, 42, 44, 49, 112) [herinafter the "Dodd-Frank Act"].

4. *See, e.g.*, Edward Hadas, Martin Hutchinson & Antony Currie, *American Wages out of Balance*, N.Y. TIMES, Nov. 11, 2009, at B2.

5. These developments have been the focus of many good, popular-level books. Among the best are WILLIAM D. COHAN, HOUSE OF CARDS: A TALE OF HUBRIS AND WRETCHED EXCESS ON WALL STREET (2009); ANDREW ROSS SORKIN, TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM FROM CRISIS—AND THEMSELVES (2009); DAVID WESSEL, IN FED WE TRUST: BEN BERNANKE'S WAR ON THE GREAT PANIC (2009).

was so obsessed with expanding home ownership that no one paid any attention to whether the home buyers could actually afford the loans they took out to buy the homes.[6]

- Except that it was caused by Congressman Barney Frank's stubborn resistance to reforming Fannie Mae and Freddie Mac, the two giant, government-sponsored (and since September 2008, government-owned) entities that buy or guaranty a large percentage of the nation's home mortgages.[7]
- But the real reason for the mess was the Federal Reserve's monetary policy—the Federal Reserve kept interest rates so low, for so long, that they fueled the speculative bubble in the real estate markets.[8]
- Except that this would not have been such a problem if it were not for securitization—the exotic process by which mortgages were transferred to newly created entities, repackaged, and interests in the new entities sold to institutions and investors. Lenders who once might have held onto the mortgages they received from their borrowers immediately sold them and made more loans, without

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6. Raghuram Rajan offers an intriguing version of this thesis. Rajan argues that politicians (in the Clinton Administration as well as its successors in the Bush Administration) consciously or unconsciously pushed for "easy money" to deflect concerns about rising income inequality. "[I]f somehow the consumption of middle-class householders keeps up," he writes, "perhaps they will pay less attention to their stagnant monthly paychecks." RAGHURAM G. RAJAN, FAULT LINES: HOW HIDDEN FRACTURES STILL THREATEN THE WORLD ECONOMY 8-9 (2010).

7. Peter Wallison of the American Enterprise Institute was an early critic of Fannie Mae and Freddy Mac, arguing that they were highly politicized and could become an enormous problem if they threatened to fail. For a more recent retrospective, see PETER J. WALLISON & CHARLES W. CALOMIRIS, THE LAST TRILLION-DOLLAR COMMITMENT: THE DESTRUCTION OF FANNIE MAE AND FREDDIE MAC (2009). Wallison also sounded this theme in his dissent to the report of the Financial Crisis Inquiry Commission, as described in note 15 *infra*.

8. Early on, the Federal Reserve's policy of keeping interest rates low after the dot com bubble collapsed in 2000 was widely viewed as brilliant—as part of Alan Greenspan's magical touch. *See, e.g*, BOB WOODWARD, MAESTRO: GREENSPAN'S FED AND THE AMERICAN BOOM (2000). Most commentators now question the policy, and its continuation by Greenspan's successor, Ben Bernanke.

paying any attention to the credit-worthiness of their borrowers.[9]

- And yet the credit rating agencies could have blown the whistle before it was too late by refusing to give the new mortgage-backed securities the high ratings that enabled insurance companies, pensions and other institutions to buy them; but the credit rating agencies faced such serious conflicts of interest, and so poorly understood the securities they were rating, that they handed investment grade ratings to nearly every new securitization that was presented to them.[10]
- And there surely were too many corrupt mortgage brokers who nudged homeowners toward innapropriate or overpriced loans.
- But homeowners and investors were the ones who agreed to these loans. They were not all simply victims. Many people signed documents with misleading information or even bald lies, and many were hoping to make easy profits from real estate speculation.[11]
- And Wall Street compensation practices made everything worse, by encouraging the executives of the largest banks to

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9. Securitization and the further repackaging of mortgage-backed securities in Collateralized Debt Obligations (CDOs) and synthetic CDOs are a focus of Michael Lewis's engaging book on the crisis. MICHAEL LEWIS, THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE (2010). The heroes of Lewis's story are a handful of oddball investors who recognized the looming disaster and placed large bets against the real estate market.

10. The credit rating agencies faced a conflict of interest because the mortgage-backed securities were presented for rating by the banks that had created them, and the same bank paid the cost of the rating. The inherent conflict in this system—known as issuer pays—was exacerbated after Fitch Ratings entered the market, which increased ratings competition. Because a bank that was unhappy with a proposed rating could take its business elsewhere, the rating agencies had strong incentives to give high ratings. This problem is described and modeled in Patrick Bolton et al., *The Credit Ratings Game*, (Nat'l Bureau of Econ. Research, Working Paper No. 14712, 2009), *available at* http://www.nber.org/papers/ w14712.pdf. The Dodd-Frank Act does not eliminate the issuer pays framework, but it requires regulators to remove the references to SEC-approved rating agencies from a wide range of laws. *See* Dodd-Frank Act § 939.

11. Bill Cohan has written that "one of the dirty little secrets of the financial crisis is that one homeowner after another signed mortgage-loan documents that were filled with inaccurate information about his or her net worth, assets, salaries and ability to make monthly mortgage payments." William D. Cohan, *The Elizabeth Warren Fallacy*, N.Y. TIMES OPINIONATER, (Sept, 30, 2010, 9:00 PM), *available at* http://opinionator.blogs.nytimes.com/ 2010/09/30/the-elizabeth-warren-fallacy/.

push the banks towards high risk, high reward strategies—like creating and holding mortgage-backed securities.[12]

- And there might not have been a real estate bubble at all had it not been for a glut of savings in Asia, which Asian countries responded to by buying American treasury bonds, thus providing ever more liquidity for the real estate market.[13]

Conventional wisdom says that all of these factors contributed to the crisis. To be sure, conventional wisdom has hardly been an infallible guide. One of its most deeply ingrained "facts" attributes the market chaos in the fall of 2008—the Panic of 2008—to Lehman Brothers' bankruptcy filing on September 15, 2008. In my view, the claim that Lehman's bankruptcy was the catalyst of the crisis is almost completely mistaken.[14] Still, the general story about the reasons for the real estate bubble and its bursting is more or less accurate.[15]

In short, we had a very complicated problem, with mortgage related securities and the real estate market at its heart. How about the solution? This takes us to the new Dodd-Frank Act, which President Obama signed into law in July 2010.

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12. My colleagues Bill Bratton and Michael Wachter point to the sharp spike in the value of bank stocks during the 2000s as evidence of managers' increasing emphasis on shareholder value. William Bratton & Michael Wachter, *The Case Against Shareholder Empowerment*, 158 U. PENN. L. REV. 653, 718 & Fig. 2 (2010). The emphasis on stock price seems to have been encouraged, at least in part, by pervasive use of stock and stock options to compensate managers.

13. For a discussion of the role of Asian investment in, among other things, U.S. Treasury bonds, see Franklin Allen, Ana Babus, & Elena Carletti, *Financial Crises: Theory and Evidence*, ANN. REV. FIN. ECON. (2009), *available at* http://finance.wharton.upenn.edu/~allenf/download/Vita/Papers.htm.

14. For critiques of the Lehman Myth, see, Kenneth Ayotte & David A. Skeel, Jr., *Bankruptcy or Bailouts?*, 35 J. CORP. L. 469, 489-91 (2010); David Skeel, *Give Bankruptcy a Chance*, WEEKLY STANDARD, June 29, 2009.

15. My summary of the conventional wisdom tracks in many respects the dissent of three members of the Financial Crisis Inquiry Commission to the report filed by the majority. Like the dissenters, I believe that the majority report overemphasizes the culpability of bank executives and the failures of regulators, while the Peter Wallison dissent lays too much at the doorstep of Fannie Mae, Freddie Mac and housing policy. *See* FIN. CRISIS INQUIRY COMM'N, 112TH CONG., THE FIN. CRISIS INQUIRY REP. (Comm'n Print 2011), *available at* http://fcic.law.stanford.edu/report (last visited Apr. 26, 2011).

III. THE DODD-FRANK ACT

Contrary to rumors that the Dodd-Frank Act is an incoherent mess, the Wall Street reform portion of its 2,319 pages (a mere 800 or so if the margins are squeezed and the type face shrunk) has two very clear objectives. The first is to limit the risk of the shadow banking system by more carefully regulating the key *instruments* and *institutions* of contemporary finance. By "instruments," I mean derivatives[16] and other financial innovations; and by "institutions," the giant, systemically important financial firms like Citigroup or AIG.[17] The second objective is to limit the damage in the event one of these giant institutions fails. The Dodd-Frank Act thus has two simple goals—limiting risk before the fact and trying to minimize damage if a giant financial institution nevertheless falters.[18]

The Dodd-Frank Act also has a recurring theme: partnership between the government and the largest banks. This partnership, in which the government locks arms with a small group of dominant institutions, looks a lot like the European style of regulation that is known as corporatism.[19]

As a historical matter, the new government-big bank partnership is a little surprising. Traditionally, American debates over how to regulate our major financial institutions have pitted one group, who contend that the biggest institutions should be broken up if they begin to dominate American finance, against another, who believe that giant institutions are inevitable and that the government should simply make sure it has the tools to control them.

In the 1930s, Louis Brandeis was the leader of the small-is-beautiful view, while Columbia University professors Rex Tugwell and Adolf Berle advocated the big-is-okay strategy.[20] Both were important Franklin D.

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16. A derivative is simply a contract whose value is based on an interest rate, currency price or nearly anything else, or on the occurrence of a specified event such as a default on a company's debt. *See, e.g.*, BLACK'S LAW DICTIONARY 475 (8th ed. 2004) ("A financial instrument whose value depends on or is derived from the performance of a secondary source such as an underlying bond, currency, or commodity.").

17. This characterization and many of the details of this section are drawn from DAVID SKEEL, THE NEW FINANCIAL DEAL: UNDERSTANDING THE DODD-FRANK ACT AND ITS UNINTENDED CONSEQUENCES (2011).

18. *Id.* at 4.

19. European style corporatism is analyzed in detail in FRANKIN ALLEN & DOUGLAS GALE, COMPARING FINANCIAL SYSTEMS (2000).

20. The debates within Roosevelt's "Brains Trust" feature in many accounts of the New Deal. One of the classic treatments is ARTHUR M. SCHLEISINGER, THE COMING OF THE NEW

Roosevelt advisors, and both helped to shape the New Deal corporate and financial legislation.[21] But the Brandeisian view largely won out with reforms like the Glass-Steagall Act that separated commercial and investment banking from the 1930s until 1999.[22]

What was odd about the discussions within the Obama administration that laid the groundwork for the Dodd-Frank Act was that there really was only one side presented, and it was the exact opposite side from the one that emerged in the New Deal. The key administration officials—most importantly, Treasury Secretary Timothy Geithner—all hailed from the big-is-okay side of the traditional divide. There was no strong voice within the administration for the view that perhaps the giant banks should be broken up, or at least scaled back.[23]

Dodd-Frank simply gave regulators more tools to do what they did the first time around. Under Dodd-Frank, the largest financial institutions will be designated as systemically important and subject to special oversight.[24] By singling these institutions out for special treatment, the Act guarantees their continued dominance of the financial services industry. This will make it impossible for smaller financial institutions to compete, and it is likely to stifle innovation in the financial services industry.

I have been talking about the way Dodd-Frank regulates the *institutions* of contemporary finance, and have been very critical. I will be at least as critical when we get to the new Dodd-Frank resolution rules for dealing with financial distress. But before we turn to resolution and then bankruptcy, I should note that I am much more encouraged by Dodd-Frank's regulation of the *instruments* of contemporary finance—derivatives

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DEAL 1933-35 (1958). For a description of the competing perspectives within the administration, see, *id.* at 18-19.

21. *Id.* at 182-84.

22. *See, e.g.*, *id.* at 443 (describing Glass-Steagall).

23. The principal advocate for a more aggressive, Brandesian stance was former Federal Reserve Chairman Paul Volcker. Although he was an important advisor during Barack Obama's presidential campaign, he was excluded from the inner circle during the period when the legislation was devised and promoted. Volcker's implicit banishment is described in detail in John Cassidy, *The Volcker Rule*, NEW YORKER, July 26, 2010. For discussion of Secretary Geithner's propensity for bailouts, see, e.g., Joe Becker & Gretchen Morgenson, *Geithner, as Member and Overseer, Forged Ties to Finance Club*, N.Y. TIMES, Apr. 27, 2009.

24. The treatment of the largest financial institutions is set forth in Title I of the Dodd-Frank Act. As discussed below, the new Financial Stability Oversight Council is authorized to designate nonbank financial institutions as systemically important, while bank holding companies automatically qualify if they have at least $50 billion in assets.

and other financial innovations. Prior to Dodd-Frank, derivatives were almost entirely unregulated, in no small part due to legislation in 2000 that prohibited the CFTC and SEC from regulating most over-the-counter derivatives.[25] This caused a lot of trouble during the crisis because regulators had no idea how much exposure Bear Stearns, Lehman, and AIG had, and were terrified as to what would happen if all these derivatives contracts were terminated at the same time.[26] Dodd-Frank will require that most of them be subject to clearing house arrangements in which a clearing house guarantees the performance of both sides of the contract; it will also require that they be traded on exchanges.[27] There are many uncertainties about how this will work, and a number of potential pitfalls. If one or a small number of clearing houses establishes a dominant share of the market, the clearing houses themselves could be a major source of systemic risk, as many commentators have already warned.[28] But overall, the new derivatives regulation is a vast improvement over what we had before.

It also may be worth noting that I favor the new Consumer Financial Protection Bureau ("Consumer Bureau" or "Bureau"). The new Consumer Bureau got off to a shaky start. Afraid that Elizabeth Warren, who first proposed the new regulator,[29] could not be confirmed as director by the Senate, President Obama circumvented the normal approval process by naming her as an advisor to him and as a special assistant to Treasury Secretary Geithner.[30] While this has called the legitimacy of the Bureau's activities into question during the initial start-up period, the case for giving consumers a designated champion is compelling. Most importantly, the Federal Reserve, which previously had the principal responsibility for

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25. *See, e.g.*, GIOVANNI P. PREZIOSO, THE COMMODITY FUTURES MODERNIZATION ACT OF 2000 3 (2002); Noah L. Wynkoop, Note: *The Unregulables? The Perilous Confluence of Hedge Funds and Credit Derivatives*, 76 FORDHAM L. REV. 3095, 3099 (2008).

26. *See, e.g.*, COHAN, *supra* note 5, at 24 (describing regulators' uncertainty as Bear Stearns collapsed).

27. The clearing house and exchange requirements are set forth in Dodd-Frank Act § 723.

28. *See, e.g.*, Craig Pirrong, *The Clearinghouse Cure*, 31 REGULATION 44 (2008-09).

29. Warren called for a new consumer regulator in Elizabeth Warren, *Unsafe at Any Rate*, 5 DEMOCRACY: A JOURNAL OF IDEAS, (Summer 2007), at 8, and again in Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PENN. L. REV. 1 (2008).

30. Katie Benner, *The Elizabeth Warren End Run*, CNNMONEY.COM (Sept. 16, 2010 12:03 PM), http://finance.fortune.cnn.com/2010/09/16/the-elizabeth-warren-end-run/.

protecting consumers, has a serious conflict of interest.[31] One of the Federal Reserve's foremost tasks is assuring the stability of the banking system.[32] Because practices that harm consumers can be beneficial for banks, the Federal Reserve cannot be expected to vigorously promote consumers' interests at all times.[33] And during the real estate bubble, it did not.[34]

This brings us to the new Dodd-Frank resolution rules.[35] The guiding premise of the resolution rules is that the best strategy for dealing with the failure of a large financial institution is to give the Federal Deposit Insurance Corporation (FDIC) the same powers it has when an ordinary bank falls into distress. When a commercial bank fails, the FDIC arranges a sale of some or all of its assets and liabilities to another bank, closes the bank on a Friday afternoon, and has everything ready to open again first thing Monday morning.[36] The advocates of Dodd-Frank argued that this works really well with ordinary banks, so it is a great template for handling systemically important financial institutions.[37]

The problem with this assumption is that none of the benefits of FDIC resolution apply when it comes to the largest financial institutions. FDIC

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31. BD. OF GOVERNORS OF THE FED. RESERVE SYS., THE FEDERAL RESERVE SYSTEM: PURPOSES & FUNCTIONS 75 (9th ed. 2005), *available at* http://www.federalreserve.gov/pf/pdf/pf_6.pdf.

32. STAFF OF JOINT ECON. COMM., 105TH CONG., REP. ON THE IMPORTANCE OF THE FEDERAL RESERVE (Comm. Print 1997), *available at* http://www.house.gov/jec/fed/fed/fed-impt.pdf (last visited Apr. 26, 2011).

33 *See, e.g.*, Bar-Gill & Warren, *supra* note 30, at 94 (describing Congressional criticism of the Fed's failure to promulgate rules protecting consumers). The Office of the Comptroller of the Currency faced very similar conflicts of interest. *Id.* at 91 (describing OCC intervention on behalf of banks challenging California credit card legislation enacted to protect consumers), 93 (concluding that the "OCC's inaction may also be attributable, at least in part, to its direct financial stake in keeping its bank clients happy").

34. Another problem stemmed from the multitude of different bank regulators. In practice, lenders have a choice as to which regulator will be their primary overseer, and many used this to bargain for lax oversight. The Office of Thrift Supervision, which regulates savings and loans and will be abolished by the Dodd-Frank Act, was notorious in this regard. *See, e.g.*, KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS (2011).

35. The resolution rules come in Title II of the legislation, Dodd-Frank § 201.

36. For a helpful overview of the FDIC's resolution strategies, and the relative frequency of each, see Richard M. Hynes & Steven D. Walt, *Why Banks Are Not Allowed in Bankruptcy* (2009) (unpublished manuscript) (on file with author).

37. *See, e.g.*, *Written Testimony Before the Subcomm. on Commercial & Admin. Law of the H. Comm. On the Judiciary*, 111th Cong. (2009) (testimony of Michael S. Barr), *available at* http://judiciary.house.gov/hearings/pdf/Barr091022.pdf.

resolution is an opaque process that offers no real opportunity to second-guess the FDIC's decisions as to who gets what.[38] It has none of the transparency and rule of law virtues of bankruptcy. This may be justified with the small and medium-sized banks that the FDIC ordinarily handles. The vast majority of the liabilities of these banks are insured deposits.[39] Not only is it important that consumers have access to those deposits at all times, but, because of the deposit guarantee, the government is by far the largest creditor, so it is the government's money that is at stake.

None of this holds true with a large bank holding company, much less with an insurance company, like AIG, or investment bank, like Lehman Brothers. In addition, the FDIC strategy of quick, secret sales is much less effective with large institutions.[40] With a big institution, there often will not be any plausible buyers. If regulators do manage to find a buyer, on the other hand, the sale is likely to make a dominant institution even more dominant. Just look at the size of JP Morgan Chase—over two trillion dollars in assets after its acquisitions of Bear Stearns and Washington Mutual.[41]

The resolution rules give bank regulators the power to take over any systemically important financial institutions that are in trouble (even if the institutions have not been designated as systemically important).[42] Lawmakers added a few bankruptcy provisions—such as the power to retrieve preferences and fraudulent conveyances—to make it look a little more like bankruptcy, but it really is not bankruptcy at all.[43] The FDIC still can pick and choose the creditors it wants to pay, which means that any resolution is likely to end up looking a lot like a bailout.

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38. This argument is made in more detail in SKEEL, *supra* note 17, at 123.

39. For specific details, see Hynes & Walt, *supra* note 36, at 32-33.

40. The FDIC's resolution of IndyMac, the giant S&L that failed in 2008, is a good illustration. The resolution is estimated to have resulted in an eight to nine billion dollar loss, which is widely viewed as much more costly than a more efficient resolution would have been. *See, e.g.*, Binyamin Applebaum, *FDIC Agrees to Sell IndyMac to Investor Group*, WASH. POST, Jan. 2, 2009.

41. *See generally* Roger C. Lowenstein & Jamie Dimon, *America's Least Hated Banker*, N.Y. TIMES MAG., Dec. 1, 2010 (profiling JP Morgan Chase head Jamie Dimon and describing the bank's expansion in the crisis).

42. The rules for initiating a resolution are set forth in Dodd-Frank Act § 203.

43. *See, e.g.*, Dodd-Frank § 210(a)(11).

IV. WHY NOT BANKRUPTCY?

In my own little involvement in the debates over the financial reforms, I made no secret of my belief that bankruptcy is almost always the best strategy for resolution of the financial distress of a large financial institution.[44] Bankruptcy is not perfect, of course, but I do think Chapter 11 is a surprisingly effective response to the failure of a large financial institution. It could be even better with a few small changes to the bankruptcy rules. (I also think bankruptcy may be a good solution to the sovereign debt problems in Greece and Europe, and to California's debt crisis; but I will save that for other work.)[45]

So why did bankruptcy not figure more prominently in the thinking on the new financial reforms? One reason is that the same people who masterminded the 2008 bailouts were also the architects of the financial reforms. Treasury Secretary Geithner in particular has long been a defender of bailouts, as discussed earlier, and has never seriously considered bankruptcy as an alternative.[46]

The second reason is the bankruptcy phobia that seemed to afflict lawmakers and regulators during the recent financial crisis.[47] Although corporate reorganization has been used to restructure troubled firms for well over a century—since the railroad failures of the late 1800s—and it has proven remarkably adaptable to changing conditions, many people still seem to imagine that bankruptcy is a synonym for death or, in the epithet that was repeatedly invoked by advocates of bailouts, "disorderly failure."[48] There was reluctance in some quarters to consider bankruptcy-oriented solutions during the crisis.[49]

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44. *See, e.g.*, Francis X. Diebold & David A. Skeel, Jr., *Geithner is Overreaching on Regulatory Power*, WALL ST. J., Mar. 27, 2009; David Skeel, *Give Bankruptcy a Chance*, WEEKLY STANDARD, June 29, 2009.

45. For an argument that Congress should enact bankruptcy rules for states, see David Skeel, *Give States a Way to Go Bankrupt*, WEEKLY STANDARD, Nov. 29, 2010, at 22. Europe appears to be edging toward the adoption of at least a few bankruptcy-like strategies for dealing with debt crises. *See, e.g.*, Charles Forelle, David Gauthier-Villars, Brian Blackstone & David Enrich, *As Ireland Flails, Europe Lurches Across the Rubicon*, WALL ST. J., Dec. 28, 2010, at A1 (discussing the Deauville pact to impose losses on bondholders of European Union countries that become insolvent in 2013 or later).

46. *See supra* note 24 and accompanying text.

47. I have written about this phenomenon elsewhere. *See* David A. Skeel, Jr., *Bankruptcy Phobia*, 82 TEMPLE L. REV. 333 (2009).

48. The relevant history is discussed in DAVID A. SKEEL, JR., DEBT'S DOMINION (2001).

49. *See, e.g.*, Skeel, *supra* note 47.

The final reason—the most depressing, but I suspect the most important—was the arcane realities of congressional committee jurisdiction. The financial reforms were handled by Senator Christopher Dodd, who oversaw the Senate banking committee, and Congressman Barney Frank, the then-chair of financial services in the House. If lawmakers had included a significant bankruptcy component in the reforms, Dodd and Frank would have been forced to cede a significant portion of their control to the Judiciary Committee. The importance of this fact was brought home for me by an email I got during the debates from a top staffer for an important Senator. "We feel strongly that bankruptcy can and would work for most financial institutions," she wrote, "but have stumbled onto the difficult challenge of the . . . jurisdiction issues between Judiciary and Banking."[50] There was no way Dodd or Frank were going to let go of their baby.

So it turned out that the deck was stacked against bankruptcy.[51] What emerged instead was a regulatory framework that relies on a partnership between the government and the largest banks, and is likely to require bailouts if any of the banks runs into trouble.

V. WHAT ABOUT THOSE CEOS?

The one piece of the puzzle I have not yet discussed is the role of the CEOs of the big financial institutions. Nearly everyone agrees that they were a key part of the problem.[52] In the new afterward to the paperback edition of *Too Big to Fail*, a popular book about the recent crisis, Andrew Ross Sorkin concludes by quoting an op-ed by Elizabeth Warren:

> This generation of Wall Street CEOs could be the ones to forfeit America's trust. When the history of the Great Recession is written, they can be singled out as the bonus babies who were so shortsighted that they put the economy at risk and contributed to the destruction of their own companies. Or they can

50. Email from Senate Staffer to David Skeel and two others (Feb. 2, 2010). The email says "Bankruptcy" rather than "Banking;" this is a typo.

51. I think a few small amendments to the Bankruptcy Code would significantly increase the likelihood that it, rather than the new resolution rules, would generally be the strategy of choice for resolving the financial distress of large financial institutions in the coming decades. The most important of these changes would reverse the special treatment that derivatives currently receive in bankruptcy. *See, e.g.*, David Skeel & Thomas Jackson, *Transaction Consistency and the New Finance in Bankruptcy*, COLUM. L. REV. (forthcoming 2012).

52. As briefly noted earlier. *See supra* note 12 and accompanying text.

> acknowledge how Americans' trust has been lost and take the first steps to earn it back.[53]

Although these sentiments are widely shared, the bank executives have not been poster children for the crisis to nearly the extent that the CEOs of the scandal-prone companies of 2001 and 2002 were. After Enron collapsed, everyone knew exactly what Ken Lay looked like. But most people cannot identify people like Jimmy Cayne of Bear Stearns or Richard Fuld of Lehman Brothers.

Why are the bank CEOs so much more anonymous? The most obvious reason, in my view, is that these CEOs do not seem to have committed fraud, or at least blatant fraud of the kind committed by Enron and WorldCom. The problems were more complicated—and frankly, harder to understand—because they stemmed from a variety of legal and structural factors, in addition to the outside pressures I discussed at the beginning of this Essay.

Two structural factors stand out. The first is a dramatic shift in the investment banking industry in the past thirty years. In the old days, investment banks were partnerships, which meant that each partner was potentially liable for all of the debts of the partnership.[54] They were very cautious as a result, and made their money by underwriting—that is, selling—a company's stock or bonds and providing various kinds of advice. Over the past several decades, thanks to computers and the insights of new financial theory, those old businesses became less lucrative and it became much more profitable for the banks to trade for their own accounts—to buy or sell derivatives, mortgage back securities, or nearly anything else. This is the "proprietary trading" that has now been banned in commercial banks by the "Volcker Rule" enacted as part of the Dodd-Frank Act.[55] To raise the huge amount of money they need to engage in this trading, nearly every

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53. ANDREW ROSS SORKIN, TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM—AND THEMSELVES 555 (2010) (internal quotes omitted)

54. The transformation I discuss in this paragraph is ably documented in ALAN D. MORRISON & WILLIAM J. WILHELM, JR., INVESTMENT BANKING: INSTITUTIONS, POLITICS, AND LAW 267-80 (2007).

55. The Volcker Rule, which was championed by former Federal Reserve Chairman Paul Volcker, was enacted in Dodd-Frank Act § 619. As enacted, the ban is narrower than the version advocates originally proposed. Rather than prohibiting commercial banks from holding stakes in hedge funds and equity funds, for instance, it limits the stakes to three percent. 12 U.S.C. § 1851(d)(4)(B)(ii)(I). In addition, it remains to be seen whether regulators will be able to prevent banks from disguising their proprietary trading as market making or trades for clients, both of which are permitted.

investment bank has converted into a corporation so that it could sell its own stock to investors.[56]

The other factor was that the tax laws create an incentive to pay executives in stock rather than in cash. Under a provision put in place in 1993, and which was designed to *reduce* executive compensation, a corporation cannot deduct any cash salary to an executive that exceeds one million dollars per year, but stock and stock options were exempt from this limitation.[57]

Together, these factors created very large incentives for the CEOs of the big banks to take risks and to generate big returns for their stockholders.[58] And the limited liability the CEOs have as executives of a corporation, rather than a partnership, removed the most important structural incentive investment bankers once had to be cautious.

What has Dodd-Frank done to address this? The main thing the new financial reforms do is try to make it harder for CEOs and their banks to take risks by requiring more capital—that is, a bigger buffer on the bank's balance sheet; limiting the amount of leverage, or debt; and inviting regulators to limit banks' use of short term debt.[59] These provisions may not help much unless regulators really crack down, which they have not often done well in the past.[60]

Some experts think we need to take much more ambitious steps to rein in bank CEOs. Bill Cohan, the author of *House of Cards*, the book about Bear Stearns, proposed in the *New York Times* that the top 100 executives in each of the big banks should be required to commit their entire net worth to a bond that would default if their bank failed. If their bank failed, they would fail.[61] I am not sure whether he was being altogether serious, but experts from Alan Greenspan to a number of scholars have proposed that executives or all shareholders of a bank be liable for some of its debts if the

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56. One of the last to convert was Goldman Sachs. For a laudatory account of Goldman's conversion from a Goldman insider, see LISA ENDLICH, GOLDMAN SACHS: A CULTURE OF SUCCESS (2000).

57. I.R.C. § 163 (2010).

58. To the extent the banks were too big and interconnected to fail, their creditors didn't have adequate incentives to rein them in.

59. *See* Dodd-Frank Act § 165 (heightening capital requirements for systemically important firms) and § 165(g) (authorizing limits on short-term debt).

60. The one curb on compensation that tries to curb risk taking is a provision that gives regulators the power to disallow any provision in executives' contracts that they think is problematic. Dodd-Frank Act § 956. But it's far from clear exactly what this will mean in practice.

61. William D. Cohan, *Make Wall Street Risk It All*, N.Y. TIMES, Oct. 8, 2010.

bank fails.[62] The goal is to go back to the old days when bankers were more cautious. None of these ideas seem very realistic to me,[63] but they do put their finger on a real problem—a problem that I will return to in just a minute.

VI. A CHRISTIAN PERSPECTIVE ON THE NEW FINANCIAL DEAL?

How should a Christian—those of us who look to Jesus Christ as our Savior—think about these issues? I would like to think I have been trying to answer that question already, and that everything I have said thus far has reflected thinking from a Christian perspective. I am reminded of C.S. Lewis's statement many years ago, which I believe to be still true, that: "What we want is not more little books about Christianity, but more little books by Christians on other subjects—with their Christianity *latent*."[64] But let me be more explicit about faith and finance and make five basic points.

The first is that we always need to be careful about how much we expect from secular law. Law is essential in a fallen world, but it cannot save us and can be used to oppress. It is important to be modest about our aspirations for law.[65] This is true with social issues like abortion and gambling, and it is true with economic issues like credit and banking.

Second, with this caveat in mind, the most useful contribution that legal reform can make is often to fix rules that have the unintended consequence of encouraging people to misbehave. The implicit governmental subsidy enjoyed by banks that are "too big to fail" has this kind of effect, since it invites risk-taking, as does the tax treatment of executive compensation described earlier. The Dodd-Frank Act does take aim at the first of these

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62. For an especially interesting proposal along these lines, see Peter Conti-Brown, *Solving the Problem of Bailouts: A Theory of Elective Shareholder Liability*, 64 STAN. L. REV. (forthcoming 2012).

63. Other scholars have proposed new forms of executive compensation that might discourage excessive risk-taking. *See, e.g.*, Jeffrey N. Gordon, *Executive Compensation and Corporate Governance in Financial Firms: The Case for Convertible Equity-Based Pay* (2010) (unpublished manuscript), *available* at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1633906. Some of these proposals are more realistic than eliminating limited liability, but it would, in my view, be a mistake to impose them by law.

64. C.S. LEWIS, *Christian Apologetics*, in GOD IN THE DOCK: ESSAYS ON THEOLOGY AND ETHICS 89, 93 (1970).

65. This theme is developed in much more detail in David A. Skeel, Jr. & William J. Stuntz, *Christianity and the Modest Rule of Law*, 8 U. PA. J. CONST. L. 809 (2006).

distortions, although the efficacy of its solutions is far from clear, as we have seen.[66]

Third, I believe that the income inequality that we hear so much about—the enormous gap between the income at the highest level and income at lower levels—is a genuine issue with obvious Christian implications. The real estate bubble disguised the gap between those in the executive suites and ordinary Americans by encouraging Americans to buy and live beyond their means.[67] And we are now suffering the hangover from this. I do not think the solution is trying to micromanage executives' salaries. (Unfortunately, the new financial reforms may invite some of this).[68] It is more likely to involve rethinking some of the policies that fueled the bubble—including the special tax advantages we give to mortgages—and renewing our emphasis on the obligations that come with material wealth.

A century ago, Walter Rauschenbusch, who was the leader of a movement known as the social gospel, compared corporate managers to the stewards in Jesus's parables. "In the parables of the talents and pounds," Rauschenbusch wrote, Jesus "evidently meant to define all human ability and opportunity as a trust."[69] "His description of the head servant who is made confident by the continued absence of his master," Rauschenbusch continues, "is meant to show the temptation which besets all in authority to forget the responsibility that goes with power."[70] I personally am not a big fan of the social gospel, which tended to focus so heavily on transformative

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66. As noted earlier, the Dodd-Frank Act instructs regulators to impose higher capital requirements and limit a bank's short-term debt. The former would force the bank (and its executives and shareholders) to bear more of the costs of risk-taking, and the later would limit the risk of a sudden failure. Both are only as effective as the regulators and regulation that ultimately implement them.

67. For an insightful analysis of this point, see RAJAN, *supra* note 6.

68. As noted earlier, Dodd-Frank Act § 956(b) authorizes regulators to disallow provisions in the compensation contracts of executives of systemically important institutions that the regulators believe will increase risk taking.

69. WALTER RAUSCHENBUSCH, CHRISTIANITY AND THE SOCIAL CRISIS IN THE 21ST CENTURY 308 (Paul Rauschenbusch ed., 2007). In the parable of the talents, which is recounted in *Matthew* 25, a master gives ten, five and one talents to three of his servants. While the recipients of ten and five talents each double the master's money by investing it, the third servant buries his single talent in the ground. The master chastises him for failing to put his master's money to profitable use. The parable of the "pounds" is a similar parable in *Luke* 19. In the parable of the pounds—or minas—a nobleman gives ten minas to each of ten slaves for trading.

70. RAUSCHENBUSCH, *supra* note 69, at 308. In the parable of the head servant, the head servant abuses the master's servants, and when the master finally sends his son, thinking the son will be respected, kills the son. *Matthew* 21:33-46.

social change that its proponents neglected Christ's teachings about our personal sinfulness and need for redemption. But I do think Rauschenbusch is right that these parables can tell us something about the proper role of executives. Here, as throughout the Bible, Scripture repeatedly warns about the importance of economic morality.

Rauschenbush's own conclusion was that many of the giant corporations of his era should be taken over by the government and nationalized. "It is probably only a question of time," he wrote, "when the private management of public necessities will be felt to be impossible and antiquated, and the community will begin to experiment seriously with the transportation of people and goods, and with the public supply of light and heat and cold."[71] This solution seems to me to trade one problem for another, responding to the excessive power of the giant corporations of his era by giving excessive power to the government to run business. I fear that, by singling out the largest banks for special treatment, the Dodd-Frank Act could carry us a little too far in this direction. This leads to my fourth point, which is closely related to arguments I have made throughout this Essay. I think Congress would have done far more to make the biggest banks and their executives more accountable—and more responsible—if it had taken serious steps to downsize them, and had looked to bankruptcy as the strategy of choice if they fail.

My fifth point concerns the moral consequences of the crisis and the legislative response. Regulators are widely—and in my view accurately—seen as having bailed out Wall Street in 2008, while providing little genuine relief for the millions of homeowners whose houses were or are worth less than they owe under their mortgages as a result of the bursting of the real estate bubble.[72] While the treatment of the largest financial institutions seems far removed from the moral decisions each of us face in our individual lives, I believe there is an important connection between the two. Let me give a simple illustration. A friend recently told me about friends of his who are wrestling with the question whether to repay their mortgage. Although they can afford to pay, it would be a struggle, and the house is seriously underwater. A strategic default—that is, simply handing the keys to the bank or whoever holds the mortgage and walking away—would be much simpler, and would save a great deal of money. Why should they struggle to make good on their obligations, the friends asked, when the giant banks were not held responsible for theirs? This is only anecdotal evidence, of course, but experimental evidence seems to confirm the

71. RAUSCHENBUSCH, *supra* note 69.

72. *See* Skeel, *supra* note 46.

cultural cost of the recent bailouts, suggesting that the bailouts may have made homeowners less hesitant to default on their own home loans.[73]

The Dodd-Frank Act may actually make this problem worse. True, the legislation purports to hold the largest financial institutions responsible in the future by preventing new bailouts and requiring that these institutions be liquidated if they fall into distress. But almost no one believes that the legislation will forestall future bailouts. The claim that it will is not credible, and could reinforce Americans' skepticism about the fairness of financial regulation. When we calculate the costs of the crisis, and consider whether the Dodd-Frank Act should be amended, we need to keep these moral costs prominently in view.

VII. CONCLUSION

Let me conclude by briefly answering the same question we have been considering—how might a Christian think about these issues—in one last way.

In the wake of the crisis and reforms, I cannot help but think of the famous statement made by Rahm Emanuel, the former Obama adviser who is now mayor of Chicago. He said, "A crisis is a terrible thing to waste."[74] What he meant, I think, is that a crisis is a great opportunity to pass major legislation that would never get through Congress during ordinary times. I believe that crisis is a great opportunity for Christians too, particularly those of us who are lawyers, law professors, and law students, but in a very different way. One of the greatest periods in the history of the church came during the plagues that afflicted Rome during the first several centuries after Christ. Everyone who could flee to the countryside to try to escape the pestilence did flee. But the Christians stayed behind, and ministered to those in need.[75] They were not like everyone else. In a very real way, Christians were the body of Christ.[76]

Our circumstances are obviously not as dire as Rome during the plagues, but this period too is an opportunity for Christians to be different. We can be available for those who are struggling to find a job or unsure how they

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73. A fascinating new study by my colleague Tess Wilkinson-Ryan finds that 24.8% of the subjects in her experimental survey reported that they would default at a higher value—that is, while their house was less under water—if their bank had been bailed out than if it had not been. Tess Wilkinson-Ryan, Breaching the Mortgage Contract: The Moral Psychology of Strategic Default 22 (2011) (unpublished manuscript) (on file with author).

74. Jack Rosenthal, *A Terrible Thing to Waste*, N.Y. TIMES MAG., Aug. 2, 2009.

75. PETER R. S. MILWARD, APOSTLES AND MARTYRS 115 (1997).

76. *See 1 Corinthians* 12:12-27.

will ever pay off their student loans. If we are struggling ourselves, we can use our struggles as a way to minister to others. As I think about these issues and the recent crisis more generally, I am reminded of an old hymn called, "They Will Know We Are Christians by Our Love." In the past several decades, those of us who call ourselves Christians have not always distinguished ourselves in public life by our love. In my view, there could not be a better time for us to bring the words of the old hymn back to life.

ARTICLE

CHRISTIANITY AND THE FRAMERS: THE TRUE INTENT OF THE ESTABLISHMENT CLAUSE

Patrick N. Leduc[†]

"Our Constitution was made only for a religious and moral people. It is wholly inadequate to the government of any other."[1]

I. INTRODUCTION

There was a time not long ago, and well within the lifetime of a late middle-aged American, where prayer in school was not uncommon. School plays during the holidays had Christmas music and themes, Christmas trees were called just that, and Good Friday was not just good because school was closed. Nativity scenes and Ten Commandment monuments were regularly seen in public locations, and no one considered the words "under God" in the pledge, "In God we Trust" on coin, or the National Day of Prayer to be matters of controversy. Religion, and specifically Christianity, was part and parcel of every day public life.

Without question, the historical place concerning the influence of Christianity and the modern day impact of the Judeo-Christian ethic on the nation have been under attack for some time. In recent years, the attacks on religion in the public square have become more overt and widespread.[2]

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1. President John Adams, Address at West Point (Oct. 11, 1798).

2. For example, a variety of stories covering religious issues over the past few years have reported, *inter alia*, the holding of a high school graduation at a Connecticut mega-church is unconstitutional. Nathan Black, *Graduations at Conn. Church Ruled Unconstitutional*, THE CHRISTIAN POST (June 1, 2010, 10:49 AM), http://www.christianpost.com/news/graduations-at-conn-church-ruled-unconstitutional-45382/. Another example concerns lawsuits against the National Day of Prayer. Caroline Shively, *President Intends to Recognize Nat'l Day of Prayer, Despite Lawsuit*, FOX NEWS (Apr. 16, 2010), http://politics.blogs.foxnews.com/2010/04/16/president-intends-recognize-natl-day-prayer-despite-lawsuit. In another instance, senior citizens were told they could not pray before a meal. *Senior Citizens Told They Can't Pray Before Meals*, TIFTON GAZETTE (May 8, 2010), http://tiftongazette.com/local/x1989607915/Senior-citizens-told-they-cant-pray-before-meals. A Christian evangelical group that works to improve the lives of underprivileged children for twenty years has been prohibited from conducting Bible study classes in public housing projects in Tulsa. James Osborne, *Evangelical Group Banned From Tulsa Housing Projects, Chapter Leader Says*, FOX NEWS (June 8, 2009), http://www.foxnews.com/story/0,2933,525424,00.html. Finally, school officials in Florida

Because of the ever-changing culture, one can observe great changes in the public's view of religion's place in open society. Some view religion as divisive. Others hold the more widely accepted view that religious matters should neither be imposed nor supported by those in the public arena.[3] Further still, the idea that Christianity would be celebrated, publicized, or promoted in the public arena, has become an increasingly foreign concept to the average American. Based on today's culture, it would seem absurd to suggest that the United States is a "Christian" nation.[4] On April 4, 2009, *Newsweek* declared on its cover "The Decline and Fall of Christian America." Jon Meachem, editor of the newsweekly, noted that: "This is not to say that the Christian God is dead, but that [H]e is less of a force in American politics and culture than at any other time in recent memory."[5]

It might surprise most Americans to know that the United States Supreme Court found the United States to be a "Christian nation" in the case of *Holy Trinity Church v. United States*.[6] Specifically, the Court found that the nation was a "Christian Nation" as an essential element when

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have been threatened with imprisonment for leading a prayer before luncheon dedicating a school building. Katie Tammen, *School officials may be jailed for prayer*, NEWS HERALD (Aug. 5, 2009, 5:14 PM), http://www.newsherald.com/articles/high-76368-administrators-pensacola.html. These stories simply scratch the surface of the ongoing disputes over religion's place in America.

3. In the past few years, several Atheists produced best selling books. *See* RICHARD DAWKINS, THE GOD DELUSION (2006); CHRISTOPHER HITCHENS, GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING (2007).

4. A recent Harris Interactive Poll found the following: A little more than a third of Americans believe all the text in the Old Testament or all the text in the New Testament represent the Word of God, however, a slightly larger percentage believed in UFO's (36%). Other relevant findings included: 80% believe in God and 71% that Jesus is God or the Son of God; 68% believed in the survival of the soul after death; Hell (62%), the Virgin birth (61%), the devil (59%), and Darwin's theory of evolution (47%). *Poll: Belief in UFOs Matches Belief in OT, NT as Word of God*, FREEWARE BIBLE BLOG (Dec. 12, 2008), http://www.freewarebible.com/blog/?p=276. A poll conducted by researchers at Trinity College in Hartford, Connecticut, surveyed 54,000 people between February and November of 2008. The survey showed that the percentage of Americans identifying themselves as Christians dropped to 76% of the population, down from 86% in 1990. Barry A. Kosmin & Ariela Keysar, *American Religious Identification Survey 2008—Summary Report* (Mar. 2009), *available at* http://www.americanreligionsurvey-aris.org/reports/ARIS_Report_2008.pdf

5. Jon Meachan, *The End of Christian America*, NEWSWEEK (Apr. 4, 2009). Mr. Meachem's article relied on an American Religious Identification Survey where the percentage of self-identified Christians fell by ten percentage points since 1990, from eighty-six to seventy-six percent. *Id.*

6. Holy Trinity Church v. United States, 143 U.S. 457 (1892).

arriving at its decision. Justice David Brewer, writing for a unanimous Supreme Court, found that a Federal law prohibiting the employment of foreign workers was not intended to cover a minister who was from England.[7] In its decision, the Court spent over half of its discussion supporting its analysis that Congress could not have intended the legislation that prohibited the hiring of foreign workers to include ministers by tracing how the United States was a Christian nation. The Court noted that "But, beyond all these matters, no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation."[8]

The Court traced the impact of Christianity on the nation starting with Columbus. It proceeded through the various charters that established the separate colonies. It then considered and reviewed the nation's founding documents. The Court declared that "There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning. They affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons. They are organic utterances. They speak the voice of the entire people."[9]

The Court further concluded that the evidence of the United States being a Christian nation went well beyond just the founding documents of the country. It was manifest in how the nation carried on its affairs. The Court then summed up the totality of Christianity's impact on the nation by stating:

> If we pass beyond these matters to a view of American life, as expressed by its laws, its business, its customs, and its society, we find everywhere a clear recognition of the same truth. Among other matters note the following: The form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words of all wills, "In the name of God, amen;" the laws respecting the observance of the Sabbath, with the general cessation of all secular business, and the closing of courts, legislatures, and other similar public assemblies on that day; the churches and church organizations which abound in every city, town, and hamlet; the multitude of

7. *Id.*

8. *Id.* at 465.

9. *Id.* at 470.

> charitable organizations existing everywhere under Christian auspices; the gigantic missionary associations, with general support, and aiming to establish Christian missions in every quarter of the globe. These and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation.[10]

Notwithstanding, to the modern secularist, the notion of America being described as a "Christian nation" is foolhardy. In the secularist view, the nation was established with a new and unique form of government, one in which organized religion was intended to play no role.[11] The modern secularist's general position is that with all matters concerning government and any entity that receives public financial support, church and state are to

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10. *Id.* at 471 (emphasis added). Some secularists argue that this part of the opinion was merely dicta and not essential to the holding of the case. However, the issue before the Court was whether congressional legislation that clearly intended to limit the hiring of foreign workers was also intended to deny the hiring of a foreign pastor by a Christian church. The statute at issue provided exceptions for "professional actors, artists, lecturers, singers, and domestic servants" but not preachers. *Id.* at 458-59. To reach its decision, it was essential for the Court to trace the country's Christian roots, from Columbus through the Constitution. The view that the Court's statement—that the United States was indeed a Christian nation—was central to the decision was later supported by Justice Kennedy:

> The Court overrode the plain language, drawing instead on the background and purposes of the statute to conclude that Congress did not intend its broad prohibition to cover the importation of Christian ministers. The central support for the Court's ultimate conclusion that Congress did not intend the law to cover Christian ministers is its lengthy review of the "mass of organic utterances" establishing that "this is a Christian nation," and which were taken to prove that it could not "be believed that a Congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation.

Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 474 (1989) (Kennedy, J., concurring) (quoting Holy Trinity Church v. U.S., 143 U.S. 457, 471 (1892)).

11. To support this position, secularists point to the writings of some of the Founding Fathers. They also look to language in the First Amendment, which states in part that "Congress shall make no law respecting an establishment of religion," otherwise known as the Establishment Clause, as evidence of the Framers' secular intent. In addition, they point to the some of the nation's founding documents, which they argue testify that the Framers intended a "wall of separation" between the State and religion. *See About the Foundation FAQ*, FREEDOM FROM RELIGION FOUNDATION, http://www.ffrf.org/faq/about-the-foundation/why-is-the-foundation-concerned-with-state-church-entanglement/ (last visited Mar. 28, 2011); *Frequently Asked Questions About Americans United*, AMERICANS UNITED FOR SEPERATION OF CHURCH AND STATE, http://www.au.org/about/faqs/ (last visited Mar. 28, 2011).

be, and must remain, permanently separate.[12] Even if one were to argue about the past religious history of the country, secularists point out that modern America is now too pluralistic on religious and moral questions, and that the public interest is best served by the government remaining completely neutral on religious questions and totally separate from religious activities.[13] Therefore, one could surmise that no one could now accurately and intelligently describe the United States as a "Christian nation."[14]

While one may accurately contend that most aspects of Christianity have been effectively taken out of large areas of modern "public life," there is still evidence of state support for religion. For example, "In God we Trust" still appears on our coins,[15] oaths of office still invoke the "help" of God, and in 2001, President Bush established the White House Office of Faith-Based and Neighborhood Partnerships by executive order.[16] And yet, to the

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12. Organizations such as the Freedom from Religion Foundation, Americans United for Separation of Church and State, People for the American Way, and the American Civil Liberties Union have all worked tirelessly to achieve a complete separation between government and religion. *See* Press Release, ACLU, ACLU and Americans United Demand Connecticut School District Stop Holding Graduation at Christian Church (Nov. 18, 2009), http://www.aclu.org/religion-belief/aclu-and-americans-united-demand-connecticut-school-district-stop-holding-graduation; *see also* Does v. Enfield Sch. Dist., 716 F. Supp. 2d 172, 201 (D. Conn. 2010) (granting the ACLU's motion for preliminary injunction and stating that holding a public high school graduation ceremony at a church violates the Establishment Clause).

13. *See* Press Release, ACLU, *supra* note 12.

14. President Barack H. Obama, during a news conference in a March 2009 visit to Turkey, stated, "One of the great strengths of the United States is . . . we have a very large Christian population—we do not consider ourselves a Christian nation or a Jewish nation or a Muslim nation. We consider ourselves a nation *of citizens who are bound by ideals and a set of values*." Michael Lind, *America is not a Christian nation*, SALON.COM (Apr. 14, 2009 6:43 AM), http://www.salon.com/news/opinion/feature/2009/04/14/christian_nation (emphasis added).

15. "In God we Trust" has been the subject of litigation. *See* Aronow v. United States, 432 F.2d 242, 243 (9th Cir. 1970) (stating that the use of the phrase "is of patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise"); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 17-18 (2004) (holding that a non-custodial parent does not have standing to bring suit on behalf of his daughter to challenge the constitutionality of using "under God" in the Pledge of Allegiance as an impermissible government endorsement of religion).

16. Exec. Order No. 13199, 66 Fed. Reg. 8499 (Jan. 29, 2009). Faith-based organizations are eligible to participate in federally administered social service programs to the same degree as any other group, although certain restrictions have been created. Faith-based organizations may not use direct government funds to support inherently religious activities such as prayer, worship, religious instruction, or proselytization. Any inherently religious activities that these organizations may offer must be offered separately in time or

mild frustration of some religious conservatives, courts have recently noted that these public statements of recognition of God have no religious significance whatsoever. Rather, they represent mere cant or "ceremonial deism" that are deemed to have lost their fundamental religious character due to their longtime, customary use.[17]

The courts have played a tremendous role in removing religion from areas of the nation's public life that have any relationship to the government. To varying degrees, court decisions have banned religious expression in public schools,[18] at public parks or buildings,[19] or any other entity[20] that might find any tangential taxpayer support. Many of these court

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location from services that receive federal assistance, and faith-based organizations cannot discriminate on the basis of religion when providing federally supported services.

17. Lynch v. Donnelly, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting) (using the term "ceremonial deism" for the first time and stating that certain religious expressions have lost their religious content because of their rote repetition in a secular context). *See also Nedow*, 542 U.S. at 41 (O'Connor, J., concurring) ("[O]ur continued repetition of the reference to 'one Nation under God' in an exclusively patriotic context has shaped the cultural significance of that phrase to conform to that context. Any religious freight the words may have been meant to carry originally has long since been lost.").

18. *See* Lee v. Weisman, 505 U.S. 577, 587 (1992) (holding that the government may not coerce students to participate in a religious exercise and that an invocation at a public school graduation ceremony violates the Establishment Clause); Edwards v. Aguillard, 482 U.S. 578, 585-86 (1987) (holding that a statute requiring the teaching of creation science and banning the teaching of evolution is unconstitutional because it is based entirely on a desire to advance a particular religious belief); Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (holding that requiring a period of silent prayer is unconstitutional if it is motivated entirely by a desire to advance religion and lacks any secular purpose); Chamberlin v. Dade Cnty. Bd. of Pub. Instruction, 377 U.S. 402, 402 (1964) (per curiam) (invalidating a Florida statute requiring regular recitation of the Lord's Prayer and daily Bible reading); Engel v. Vitale, 370 U.S. 421, 424 (1962) (holding that requiring students to recite a specific prayer at the beginning of the school day was entirely inconsistent with the Establishment Clause).

19. *See* ACLU v. Schundler, 168 F.3d 92, 107-08 (3d Cir. 1999) (holding that a holiday display including religious symbols does not violate the Establishment Clause if it is part of a larger holiday display); Allegheny Cnty. v. ACLU, 492 U.S. 573, 598-600 (1989) (holding that the inclusion of religious symbols depends upon the setting and that an entirely religious display would violate the Establishment Clause); *Lynch*, 465 U.S. 668, 671, 687 (1984) (holding that the inclusion of a crèche as one element of a holiday display does not violate the Establishment Clause if other secular elements are included).

20. *See* McCreary Cnty. v. ACLU, 545 U.S. 844, 860 (2005) (holding that the display of the Ten Commandments in a county courthouse violates the Establishment Clause); Stone v. Graham, 449 U.S. 39, 41-42 (1980) (stating that requiring the posting of the Ten Commandments on the walls of public school classrooms is undeniably aimed at advancing religion and is unconstitutional). *Contra* Van Orden v. Perry, 545 U.S. 677, 690 (2005)

decisions limiting religion in the public square have simply failed to apply the Framers' intent correctly concerning the Establishment Clause for a variety of reasons, and all have left a lasting legacy removing Christianity from public view. A common feature of many of the decisions concerning religion's place in American society has been an increasing failure to appreciate fully what our Founding Fathers intended to accomplish with the Establishment Clause as it relates to religious expression in the public square. The failure of the courts to apply the Framers' original intent in their decision making process goes deeper than just having an inadequate understanding of that intent. It is critical to understand that beneath every decision made by the Founding Fathers concerning religion's place in society, and particularly concerning the Establishment Clause, was an underlying goal that was energized and motivated by their particular view of man and the world.

Instead, secularists have been increasingly empowered by the courts' failure to recognize, acknowledge, and appreciate the nuanced religious goals of our Founding Fathers concerning religion's place in the public square. We are now in a situation where secularists, in attempts to remove all aspects of religion from public life, can point to an ever-growing body of case law for support.[21] What has been lacking from many court decisions that analyze the Establishment Clause's relation to the proper place of religion in public affairs is an accurate review of the life, times, personal history, philosophy, and beliefs of the Founding Fathers.[22] In our modern society, there has become a general ignorance concerning what exactly our

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(holding that a passive display of the Ten Commandments is permissible because of its historical significance).

21. These court decisions have now been translated into wide ranging political principles which serve to severely limit any religious expression that might have any relationship, no matter how tangential, to public support. Secular principals, supported by court decisions, and embodied by the phrase "separation of Church and State," are now confirming the ever-increasing popular view that the United States was, is, and should be a secular society. Furthermore, secularists look to build an ever increasing and enlarging "wall of separation" between the State and Church.

22. *See* PHILLIP HAMBURGER, SEPARATION OF CHURCH AND STATE 5 (2002) (discussing the historical basis and development of Church and State separation). Dr. Hamburger is a professor of law at Columbia University whose provocative and brilliant treatise will certainly be used as a reference by courts in future Church and State relation cases. His work is an incisive historical look at the Establishment Clause. Dr Hamburger intricately explores the view that before the early 19th century, few argued for religious liberty in terms of "Separation of Church and State." To the contrary, advocates for religious liberty rejected that phrase, seeking rather to establish religious liberty via disestablishment of State religion, not "Separation" as the term has become popularly known and used today.

Founding Fathers were attempting to achieve with respect to religion in general, and Christianity in particular. Until and unless we, as a nation, begin to pay proper respect to what the Framers intended to accomplish, the courts will continue to misconstrue the Establishment Clause, and the nation will arrive at a place completely devoid of any public expression of religion in any form. This article attempts to explore what the Framers intended to accomplish with the Establishment Clause. It will also detail where the courts have incorrectly applied their reasoning on issues concerning the place of religion in the public square, and what should be the way forward in light of our increasingly diverse religious culture. Finally, this article will determine the correct place for religion within the public square.

II. PHILOSOPHICAL BACKGROUND OF THE FRAMERS

Most of the Founding Fathers had what could be accurately described as a typical colonial education. This education took place at home and at church run schools. The basic texts were the Bible and the New England Primer.[23] While the style of education of the Framers differed depending upon the region from which they came, it is certain that Bible reading was a universal and essential aspect of that education.[24] As the Founding Fathers went on to higher education, certain political thinkers and philosophies tended to dominate the political landscape of that era. Accordingly, these early political writers had a great influence upon the Framers and their influence can be seen in the Framers' writings and in the nation's founding documents.

As noted, the Bible was a book read by all of our Founding Fathers[25] as part of their educational backgrounds. Other than the Bible, the most quoted

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23. THOMAS A. BAILEY ET AL., THE AMERICAN PAGEANT 335 (Patricia A. Coryell ed., 11th ed. 1998). In 1783, Noah Webster published the first speller, which emphasized patriotic and moral values while teaching correct spelling and grammar. It is reported that Webster's Speller sold over twenty-four million copies and quickly became a standard text in American schools.

24. *Id.* at 95. Puritan New England, largely for religious reasons and consistent with the Calvinist belief that one should be able to read and interpret the Scriptures, was more zealously interested in education than any other colonial region. The Massachusetts Act of 1642 and 1647 made education compulsory and required villages with more than fifty homes to establish a school and hire a teacher. Throughout the colonies, a large percentage of schools were established by the Congregational Church, which stressed the need for Bible reading by the individual worshippers.

25. Donald Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 192 (1984) (referencing a study

source used by our Founding Fathers to support their writings was Baron Charles Montesquieu, who was cited by the Framers in 8.3% of their writings.[26] Montesquieu was a conservative Catholic whose main work, *Spirit of the Law*, stressed some of his most basic tenets.[27] Montesquieu declared that a government based on Christianity is superior because Christianity promotes a more moderate form of government.[28] Montesquieu

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of thirty thousand writings of the Framers and finding that of all the quotations, the Framers' primary source was the Bible). The book of the Bible quoted most often was Deuteronomy, which deals with the law of God that governed the Jewish nation, and was written by Moses. Since most of the writings of the Framers were political writings dealing with the formation of government, the use of the book of Deuteronomy is self-evident. *See also* DVD: Institute on the Constitution: Uncovering the Foundations: The American Vision of Law and Government (Eidsmoe 1995).

26. Eidsmoe, *supra* note 25.

27. Beastrabban, *The Bible, Judaism and Christianity and the Origins of Democracy: Part 2*, BEASTRABBAN'S WEBLOG (July 6, 2008, 1:22 PM), http://beastrabban.wordpress.com/2008/07/06/the-bible-judaism-and-christianity-and-the-origins-of-democracy-part-2/. There is no doubt that St. Augustine heavily influenced Montesquieu. St. Augustine's work *City of God* was and still is a tour de force. St. Augustine had developed concepts that led to a separation of Church and State more fully than anyone to that point in history. St. Augustine had a negative view of Government. While St. Augustine accepted that State power derived from the people, he denied that justice or fairness would be its ultimate outcome. St. Augustine asserted that justice derived from God and lay beyond the state. Accordingly, man's duty to God superseded his duty to any earthly power. JOHN EIDSMOE, INSTITUTE ON THE CONSTITUTION: STUDY GUIDE 22-23 (1995) (accompanying DVD series Eidsmoe, *supra* note 25). Montesquieu acknowleged that all law must come from God. However, because man has free choice, he may make his own law; but, all man-made law must be in conformity with God's law. Montesquieu argued that all the planets follow the "Laws of Nature" to the letter; but, man, due to his sinful nature, cannot run his own affairs in the same clockwork-like manner. Montesquieu attributed this deficiency in man's abilities to the finite and sinful nature of man. For example, see *Romans* 13:1-4:

> Obey the rulers who have authority over you. Only God can give authority to anyone, and he puts these rulers in their places of power. People who oppose the authorities are opposing what God has done, and they will be punished. Rulers are a threat to evil people, not to good people. There is no need to be afraid of the authorities. Just do right, and they will praise you for it. After all, they are God's servants and it is their duty to help you.

28. Beastrabban, *supra* note 27. The early Church served as an indicator of the type of government with which Christianity was consistent. For example, membership in the early Church was open to everyone, regardless of gender, wealth or nationality. The establishment of a Church hierarchy contained elements of democratic institutions in the election of its Bishops and even laypersons during the early church period. However,

> although the early Church recognized that human society required authority, philosophers and theologians such as St. Augustine and Theodoret believed

indicated Islam is more in conformity with a totalitarian form of government, whereas Protestant Christianity follows along the lines of a republican form of government.[29] Montesquieu felt that due to the sinful nature of man, the power of government must be limited.[30] The best way to limit the power of government was to develop a system of government which separated the powers of government into a legislative, executive, and judicial branch.[31] Montesquieu was the first person to articulate the idea of separation of powers within government as a way to ensure liberty.[32] He demonstrated that without a governmental separation of powers, man's sinful nature would result in a tyrannical form of government, because those that ruled would seek and eventually accumulate absolute power.[33]

After Montesquieu, the Framers most often quoted Sir William Blackstone, who accounted for 7.3% of all the quoted material used by the Framers.[34] His most famous work, *Commentary on the Common Law of England*, was said to have sold more copies in the colonies than it did in England.[35] Blackstone repeatedly stressed that judges had the responsibility

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> that the sole rightful purpose for such authority was to maintain order and promote harmony and tranquility. As rulers derived their authority ultimately from God, individuals motivated solely by a desire to rule, rather than promote justice, had no rightful authority.

Id.

29. Eidsmoe, *supra* note 25. Montesquieu indicated that Catholicism was more in line with a monarchial form of government, which makes some sense given the nature of the Church during the period of time in which he lived. However, the early Church had developed many democratic principals, to include the idea that freedom should be limited in the interest of ensuring equality for all. The concepts of free will and choice, associated with original sin, were not foreign concepts to the early Church, and provided a basis by which the Framers developed their concepts of consent.

30. EIDSMOE, *supra* note 27, at 23.

31. *Id. See also* JOHN R. WHITMAN, AMERICAN GOVERNMENT: WE ARE ONE 97 (1987).

32. WHITMAN, *supra* note 31, at 97.

33. EIDSMOE, *supra* note 27, at 23.

34. *Id.* Blackstone, who lived from 1723-1780, was a law professor and a conservative Anglican.

35. *Id.* Blackstone's main contribution to the American legal system was his systemization of the English common law. His commentaries on the laws of England served as the backbone for many of the colonial legal and judicial systems. MELVIN I. UROFSKY, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 75 (1988). During the colonial period, many judicial proceeding could be settled by appealing to Blackstone. Sir William Blackstone essentially cataloged British Common Law into four volumes that had consistent themes. Book I covered the "Rights of Persons," a sweeping examination of British government, the clergy, the royal family, marriage, children, corporations and the "absolute rights of individuals." *Id.* Book II, on the "Rights of Things," should more

to apply the existing law to a matter before them and not make law outside of that framework to justify a decision.[36] Judges were to simply apply the law that God had made and the legislature had codified.[37] He felt that the law must be in accordance with the Law of Nature and the Revealed Law, which Blackstone described as that law which is found in the biblical Scriptures.[38] This theme, that man's law must conform to God's law, is seen repeatedly in the works of those writers upon which our Founding Fathers placed great reliance.

John Locke was the third most cited philosopher by the Framers. He lived from 1623-1704.[39] He was a Christian and Biblicist, though slightly unorthodox.[40] He wrote many works, frequently quoting the Bible in many of his volumes.[41] In his *Two Treatises on Civil Government*, he quoted from the Bible eighty-four times, primarily from the Old Testament book of Genesis.[42] In that work, Locke developed the concept of the "social

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properly have been called the "Rights that People Have in Things." *Id.* It begins with the observation that "[t]here is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property." *Id.* In hundreds of pages of arcane analysis he then disproves the point. Book III covers "Private Wrongs," today known as torts. *Id.* Book IV covers "Public Wrongs," crimes and punishment, including offenses against God and religion. *Id.*

36. EIDSMOE, *supra* note 27, at 24.

37. UROFSKY, *supra* note 35, at 75-76 (stating that Blackstone introduced the concept of *stare decisis* to the American colonies, the concept of the moral aspect to law, and that "[l]aw is that which commands what is right and prohibits that which is wrong").

38. EIDSMOE, *supra* note 27, at 23-24. Blackstone stated that both forms of law came from God. Blackstone argued that there existed at all times a higher law than the law of man, which he referred to as the Law of Nature. Eidsmoe, *supra* note 25. Thomas Jefferson was directly quoting Blackstone when, in writing the Declaration of Independence, he spoke of the "laws of nature and Nature's God." Blackstone explains that while God's law was revealed through nature, man's total depravity and evil character made him fallible and unable to correctly interpret God's law as shown in nature. Accordingly, Blackstone reasoned that God inspired the writing of His law in the Holy Scriptures to act as a guidepost. Therefore, he described God's written law as the Revealed Law. Blackstone argues that since fallible man cannot correctly interpret Nature's law, that the Revealed Law takes precedence, because it is knowable, ascertainable and clearer. Blackstone concludes that upon these two foundations, the Law of Nature and the Revealed Law, all human law depends and all law must act in accordance therewith.

39. EIDSMOE, *supra* note 27, at 24

40. *Id.*

41. Eidsmoe, *supra* note 25.

42. *Id.*

compact."[43] Locke stressed two concepts that became very important to the framers: the concepts of Natural Laws and natural rights; and the doctrine of consent. Natural rights were categorized into three parts: life, liberty, and property.[44] Locke also articulated a clear doctrine of consent that would limit the power of governmental institutions' to the consent of the governed. He argued that consent of the governed would guarantee the concepts of representative government.[45] Locke felt that it was important to establish a line of demarcation between the State and the Church. He stated, "I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other."[46] Locke's influence on the Framers can be found extensively in the Declaration of Independence. It was in that document that Thomas Jefferson discussed at length natural rights and the social compact, which formed the colonies' justifications to the world to break with Great Britain.[47]

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43. *Id.* Locke stressed that in a state of nature, man has no government. However, due to man's sinful and finite nature, he cannot operate in anarchy. Humans need some organization or something to restrain their sinful nature. Accordingly, man needs to establish government to ensure that the depraved nature of man is restrained. To establish government, people enter into a pact in which individuals give up a certain amount of their personal liberties to government, which then in turn protects those same citizens from the tyranny of others who might infringe upon the liberties of all. Thus the development of the "social compact," the basic concept of which is that "we the people" give certain individual freedoms to the government, and in return, government will have the strength to protect its citizens from those who would impose tyranny. In *Civil Government*, Locke quotes extensively from Genesis chapter nine where God makes a pact with Noah prior to the flood. It is from Locke's study of the Book of Genesis that he forms the foundation for his writings on the social compact between man and government.

44. Locke's foundations for natural rights was explicitly Biblical. As found in the Ten Commandment's, God's command that "Thou shalt not kill," conveyed an individual right to life. In the Mosaic Law there were prohibitions against stealing property and kidnapping; this embodies a right to personal liberty. Finally, in the Ten Commandments, the commandment "thou shalt not steal" clearly conveys a right to property ownership. These natural rights were part of the social compact between government and its people. Governments had the obligation to ensure that these natural rights were protected.

45. WHITMAN, *supra* note 31, at 96.

46. John Locke, *A Letter Concerning Toleration*, *in* 35 GREAT BOOKS OF THE WESTERN WORLD 2 (Hutchins 1952).

47. Eidsmoe, *supra* note 25. Several individuals influenced the Framers. Hugo Grotius, 1583-1645, is known as the father of international law. He was a Dutch Reformed theologian and a statesman. Grotius stressed that God's law higher in priority than the law of men. His writing stressed firmly the laws of nations and the concept of international law. Samuel von Pufendorf, 1632-1694, argued that the law of nature is the basis for international law, and

Nearly all the writers during this early colonial period stressed Natural Law and the law of nature's God as a higher law than that of man's law. Furthermore, God revealed this law through different ways. One way is through the Holy Scriptures, better known as revealed law. Another way is through nature itself. Even in areas of the world where revealed law did not exist, the people still had an innate knowledge of right and wrong.[48] The consensus view was that God revealed right and wrong through the human conscience. However, the nature of man is inherently evil, and eventually perverts the law that God reveals through nature.[49] Thus, since the human conscience can be overcome, there remained a need for some control to contain man's evil nature. Furthermore, these political philosophers stressed the need for a system of separation of powers so that the power of government could be restrained from becoming tyrannical.[50]

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therefore, the law of nature applies to non-Christian nations as well. Emmerich de Vattel, 1714-1767, a German diplomat and son of a Protestant minister, stressed the concept that all must live according to God's law and that all nations must live on an equal footing. This concept furthered not only the equality of nations, but to the Framers, the equality of man. EIDSMOE, *supra* note 27, at 25.

48. Eidsmoe, *supra* note 25. This was view that the Framers ascertained from Biblical principals. This concept is best illustrated by the Apostle Paul in his letter to the Romans:

> Those people who don't know about God's Law will still be punished for what they do wrong. And the Law will be used to judge everyone who knows what it says. God accepts those who obey his Law, but not those who simply hear it.
>
> Some people naturally obey the Law's commands, even though they don't have the Law. This proves that the conscience is like a law written in the human heart. And it will show whether we are forgiven or condemned.

Romans 2:12-15 (Contemporary English Version).

49. This concept that man's nature is evil can been seen throughout the Bible. For example, *Romans* 1 states:

> For God's wrath is revealed from heaven against all godlessness and unrighteousness of people who by their unrighteousness suppress the truth, since what can be known about God is evident among them, because God has shown it to them. From the creation of the world His invisible attributes, that is, His eternal power and divine nature, have been clearly seen, being understood through what He has made. As a result, people are without excuse. For though they knew God, they did not glorify Him as God or show gratitude. Instead, their thinking became nonsense, and their senseless minds were darkened. Claiming to be wise, they became fools.

Romans 1:18-22 (Holman Christian Standard).

50. EIDSMOE, *supra* note 27, at 25. These men, among others, were a highly representative sample of the political thinkers upon whom the Framers placed great reliance. There were also some political writers of that day who were not Christians, including Voltaire and Jean Rousseau of France, David Hume of Scotland, and Thomas Hobbes of

Of all of the early political scientists and philosophers, who could be called the true author of this great republic? To start, one would need to look to the person whose thoughts and concepts held the greatest influence upon the political scientists that most influenced the Framers. This search leads to John Calvin,[51] the humble reformer from the shores of Lake Geneva, who was best able to put into modern practical thought the varying concepts that came from the likes of St. Augustine, Theodoret, and other varying biblical authorities. The puritans who left for the shores of Massachusetts during the reign of James the First could be said to be his children. George Van Droph, one of the leading scholars of American history during the 1800s, calls Calvin the "Father of America."[52] "He who would not honor the memory and respect the influence of Calvin, knows little of the origin of American liberty."[53]

England. Eidsmoe, *supra* note 25. Jean Jacques Rousseau, (1712-1778) is often spoken fondly of in school textbooks, but was utterly rejected by the Framers. He was an atheist who rejected the concept of sin, the need for redemption, and stressed the overall goodness of man. Rousseau blamed human institutions for existence of evil. Clearly this point of view clashed with the general consensus of the Founding Fathers, that man's nature was sinful and inherently evil, and it was this nature that must be restrained by government, whose own powers were separated and restrained by a series of checks and balances. However, the Framers were aware of these men and their writings, and they were either rejected or cited in the negative by the Framers. For example, David Hume, an agnostic, was dismissed by John Adams as a learned fool. ZOLTÁN HARASZTI, JOHN ADAMS & THE PROPHETS OF PROGRESS 214 (1964). Adam's even stated that Hume was worse than the French radicals, Voltaire and Rousseau. *Id.*

51. EIDSMOE, *supra* note 27, at 25.

52. *Id.*

53. *Id.* One might think, "what does Calvin have to do with liberty?" When one thinks of a Calvinist, a stern disciplinarian certainly would come to mind. *Id.* One might also find a Calvinist as a person who might try to regulate the lives of others based on a moral code in an effort to deny practices that others might consider enjoyable. *Id.* There is much in Calvinism, however, which lends itself to the concepts of liberty. *Id.* First, Calvin believed in the total depravity of human nature. *Id.* In his view, humans are sinful and need to be restrained by civil government. *Id.* Second, because all humans are totally depraved, rulers are also sinful and cannot be trusted with unlimited power. *Id.* Therefore, there is a need for balance to restrain human nature. *Id.* The necessary balance is one in which government would have the power to govern, but would still be restrained to prevent tyranny. *Id.* These principles became the foundation for our form of government. *Id.* The original emphasis for the development of our educational system was derived from Calvinist principles. *Id.* The belief that every citizen needed to be able to read and interpret the Scriptures as a basis of all knowledge and understanding provided the impetus for the first systems of state education and help to establish the country's first colleges and universities. The importance of the ability to read the Holy Scriptures served as the foundation for universal education in Protestant countries throughout Europe, and especially, the New England states. *Id.*

The Calvinists believed government has such power only as God granted to it through the people.[54] Mr. Jefferson stated this principle succinctly in the Declaration of Independence:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. —That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . .[55]

When government goes beyond these limited powers, Christians have a duty to resist.[56] The colonists used a slogan during the Revolution, which they borrowed from the Calvinists, to reiterate this point: "Rebellion against tyrants is obedience to God."[57]

The concepts developed by the aforementioned political scientists greatly influenced the Framers. Our system of government developed as a natural extension of those writers' concepts of natural law, separation of powers, and the social compact between citizens and government. These concepts are overwhelmingly based on Christian biblical principles, gathered from both the Old and New Testament Scriptures, and were developed by men who were practicing, devout Christians. It is ironic that some of the greatest political thinkers that ever lived were educated using a book that, for all practical purposes, has been eliminated from the public square. Those who put our nation on its course would scarcely recognize the strange and winding road we have followed to get where we are now.

III. THE RELIGIOUS AND POLITICAL BELIEFS OF THE FRAMERS

For most of the early colonists who lived prior to 1740, the choice of religious practice remained narrow, compared to what England allowed.[58]

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54. *Id.*

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

56. *See* Eidsmoe, *supra* note 25, at *Lecture 3: The Religious Beliefs of the Founding Fathers*. The Pope and early church leaders often asserted their authority in running church affairs and resisted governmental authorities interfering with such affairs. The early church directly contradicted and attacked the idea of absolutism by declaring that the state was subordinate to God and the church.

57. *Id.*

58. *See* JOHN M. MURRIN, *Religion and Politics in America from the First Settlements to the Civil War*, *in* RELIGION AND AMERICAN POLITICS: FROM THE COLONIAL PERIOD TO THE 1980S 19, 25 (Mark A. Noll ed., 1990).

However, the pattern of a lack of religious choice would change irrevocably in large part due to the First and Second Great Awakenings, which occurred both before and after the American Revolution from 1775-1783.[59] These events had the effect of creating the most important denominational reshuffling in American history.[60] In denominational terms, this shift meant that the three prevailing branches prior to 1740—Congregationalists in New England; Anglicans in the South; and the Quakers and their sectarian German cousins in the Delaware Valley—would lose influence to three newcomers:[61] the Baptists, Methodists, and to a lesser extent, the Presbyterians.[62]

Because of the widening diversity in the religious marketplace, the Framers who came to Philadelphia in the summer of 1787 had a varied religious background. Furthermore, before and just after the Revolutionary War, the Christian churches in America had seen a revival that was unparalleled in Europe. Indeed, one of the important reasons for America's commitment to religious freedom was in large part to protect the diversity of churches on the American landscape at that time. So as the leaders began to create what became our present form of government and its institutions, they brought religious as well as political differences to the bargaining table. The 1787 Constitutional Convention in Philadelphia included members from the following church backgrounds:[63] twenty-eight Episcopalians, eight Presbyterians, seven Congregationalists, two Lutherans, two Dutch Reformed, two Methodists, two Roman Catholics, three Deists,[64] and one of an unknown religious preference.[65]

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59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *See* Eidsmoe, *supra* note 27, at 16 (citing DR. M. E. BRADFORD, A WORTHY COMPANY: BRIEF LIVES OF THE FRAMERS OF THE UNITED STATES CONSTITUTION (1982)).

64. "Deism" is belief in a God who created the universe and established physical and moral laws for the operation of the universe, but then withdrew from the universe. Deists believe God does not intervene in human affairs, but rather, lets the universe operate on its own according to those physical and moral laws God established. Deists agreed with Christians in emphasizing the Law of Nature as the Law of God. *See* EIDSMOE, *supra* note 27, at 16.

65. *See* EIDSMOE, *supra* note 27, at 16. Benjamin Franklin was not considered a Christian in the traditional sense. In 1790, just about a month before he died, Franklin wrote a letter to Ezra Stiles, president of Yale University, who had asked him his views on religion:

While the Framers were diverse in their religious practices, they shared certain political beliefs. Many of the beliefs have roots in Christianity and repeat many of the same themes discussed earlier. There was a consensus view among the Founding Fathers that God, by His providential care, governs the universe and the affairs of men.[66] They believed that God revealed Himself to man through the Holy Scriptures and through nature, reason, and conscience.[67] They believed in human reason, which was given

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> As to Jesus of Nazareth, my opinion of whom you particularly desire, I think the system of morals and his religion, as he left them to us, the best the world ever saw or is likely to see; but I apprehend it has received various corrupting changes, and I have, with most of the present dissenters in England, some doubts as to his divinity; though it is a question I do not dogmatize upon, having never studied it, and I think it needless to busy myself with it now, when I expect soon an opportunity of knowing the truth with less trouble.

Benjamin Franklin (March 9, 1790), *in* NORMAN COUSINS, "IN GOD WE TRUST:" THE RELIGIOUS BELIEFS AND IDEAS OF THE AMERICAN FOUNDING FATHERS 42 (Norman Cousins ed., 1958).

66. *See* EIDSMOE, *supra* note 27, at 17-19. George Washington represented the majority view and had a strong religious bent. ROBERT L. MADDOX, SEPARATION OF CHURCH AND STATE: GUARANTOR OF RELIGIOUS FREEDOM 37 (1987). He believed that God, Providence, the Author of the Universe, etc. had control of the affairs of men and nations. *Id.* He stated that it was impossible to "rightly" govern without God and the Bible. *Id.* Throughout Washington's life, "he never wavered on the importance of religious liberty." *Id.* Washington's position concerning education was quite revealing. On May 12, 1779, in a speech before the Delaware Indian Chiefs, Washington declared what students would learn in American schools: "above all [is] the religion of Jesus Christ." George Washington, Speech to Delaware Chiefs, *in* NORMAN COUSINS, "IN GOD WE TRUST:" THE RELIGIOUS BELIEFS AND IDEAS OF THE AMERICAN FOUNDING FATHERS 55 (Norman Cousins ed., 1958). Washington wrote to a group of church leaders, defending the lack of religious language in the constitution, saying:

> I am persuaded . . . that the path of true piety is so plain as to require little political direction . . . To the guidance of the ministers of the gospel the important object is, perhaps, more properly committed. It will be your care to instruct the ignorant, and to reclaim the devious, and, in the progress of morality and science, to which our government will give every furtherance, we may confidently expect the advancement of true religion, and the completion of our happiness.

George Washington, Reply to Ministers and Elders Representing the Massachusetts and New Hampshire Churches (Oct. 28, 1789) *in* NORMAN COUSINS, "IN GOD WE TRUST:" THE RELIGIOUS BELIEFS AND IDEAS OF THE AMERICAN FOUNDING FATHERS 60 (Norman Cousins ed., 1958).

67. Eidsmoe, *supra* note 25, at *Lecture 3: The Religious Belief of the Founding Fathers*. Samuel Adams, often referred to as the "Father of the American Revolution" and the last of the Puritans, also held this view. EIDSMOE, *supra* note 27, at 19. Governor Samuel Adams

to man by God as a means of apprehending and understanding objective truths.[68] They all agreed on the imperfection and sinfulness of human nature and that governmental theory must account for this depraved nature to secure basic liberty for mankind.[69] They believed that God ordained earthly

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called the State of Massachusetts to fast with the following statement that best summarizes his views throughout the course of his life:

> I conceive that we cannot better express ourselves than by humbly supplicating the Supreme Ruler of the world that the rod of tyrants may be broken to pieces, and the oppressed made free again; that wars may cease in all the earth, and that the confusions that are and have been among nations may be overruled by promoting and speedily bringing on that holy and happy period when the kingdom of our Lord and Saviour Jesus Christ may be everywhere established, and all people everywhere willingly bow to the scepter of Him who is Prince of Peace.

Samuel Adams, Fast Day Proclamation (March 20, 1797), *in* 4 THE WRITINGS OF SAMUEL ADAMS 407 (Harry Alonzo Cushing ed., 1908).

68. Eidsmoe, *supra* note 25, at *Lecture 4: The Founding Fathers' Five Fold Formula*. John Adams was a Unitarian, who, like his contemporaries at the convention, valued religion for not only itself, but also for its benefits to society. *See* MADDOX, *supra* note 66, at 34. The that religion served as the underpinning for a just and moral government and society was shared by many of the Framers. *Id.* at 37. Though Adams felt no compulsion to develop a theory of church and state, his commitments were certainly in the direction of non-interference by government in a person's religious life and he would certainly have urged churches to fight their own battles concerning moral and religious questions, rather than asking government for help. *Id.* at 38. In a letter Adams described his view on how Christianity impacted the nation:

> The General Principles on which the fathers achieved independence, were the only principles in which that beautiful assembly of young gentlemen could unite, and these principles only could be intended by them in their address, or by me in my answer.
>
> And what were these General Principles? I answer, the general principles of Christianity, in which all those sects were united; and the General Principles of English and American liberty, in which all these young men united, and which had united all parties in America, in majorities sufficient to assert and maintain her independence.
>
> Now I will avow that I then believed, and now believe, that those general principles of Christianity are as eternal and immutable as the existence and attributes of God . . .

Letter from John Adams to Thomas Jefferson (June 28, 1813), *in* 13 THE WRITINGS OF THOMAS JEFFERSON: MEMORIAL EDITION 293 (Albert Ellery Bergh ed., 1905).

69. *See* Eidsmoe, *supra* note 25, at *Lecture 4: The Founding Fathers' Five Fold Formula*. Alexander Hamilton was a Calvinist who believed that strong government was needed to restrain the sinful impulses of the masses. *Id.* Author of fifty-four of the eighty-five Federalist papers, he left an indelible mark on the nation as the country's first Secretary of the Treasury. DR. M.E. BRADFORD, A WORTHY COMPANY: BRIEF LIVES OF THE FRAMERS

governments to restrain sin; that the Law of God was supreme over the law of man; and that man's law must be consistent with God's law.[70]

The Framers believed that the Law of God is revealed through Scriptures and through the Law of Nature, and that human law must conform to the Law of God as it related to securing life, liberty, and property.[71] The Framers believed that international law or the Law of Nations, as it was referred to in that day of age, must also conform to the Law of Nature and Nature's God.[72] The Founding Fathers also believed that government is formed by a social compact with its citizens, where the government only has limited delegated powers given to it by the people through their compact with the government.[73] The Framers agreed that human nature, being inherently evil, would cause rulers to usurp more power until they became tyrannical, unless prevented by a separation of powers. The

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OF THE UNITED STATES CONSTITUTION 49 (1982). Hamilton was an economist and political philosopher who believed in the depravity of man, a view consistent with his Calvinist upbringing. He laid plans to establish the Christian Constitutional Society, but these plans were cut short by his death at the hand of John Burr. *Id.* at 47. He reaffirmed his faith in Christ on his deathbed. *Id.* Alexander stated:

> I have examined carefully the evidence of the Christian religion; and, if I was sitting as a juror upon its authenticity, I should unhesitatingly give my verdict in its favor . . . I can prove its truth as clearly as any proposition ever submitted to the mind of man.

SARAH KNOWLES BOLTON, FAMOUS AMERICAN STATESMEN 126 (New York, Thomas Y. Crowell & Co. 1888).

70. Eidsmoe, *supra* note 25, at *Lecture 4: The Founding Fathers' Five Fold Formula*. Chief Justice, John Jay, certainly reflected the mainstream point of view concerning the view of the fallen nature of man; and as a jurist, he gave great thought to the subject. EIDSMOE, *supra* note 27, 19. Jay was the founder and President of the American Bible Society. *Id.* He was the first Chief Justice of the Supreme Court. *Id.* He also wrote and co-authored some of the Federalist papers with James Madison and Alexander Hamilton. DR. M.E. BRADFORD, A WORTHY COMPANY: BRIEF LIVES OF THE FRAMERS OF THE UNITED STATES CONSTITUTION 47 (1982). John Jay stated:

> By conveying the Bible to people thus circumstanced we certainly do them a most interesting act of kindness. We thereby enable them to learn that man was originally created and placed in a state of happiness, but, becoming disobedient, was subjected to the degradation and evils which he and his posterity have since experienced.

John Jay, Annual Address to the American Bible Society (May 13, 1824), *in* NORMAN COUSINS, "IN GOD WE TRUST:" THE RELIGIOUS BELIEFS AND IDEAS OF THE AMERICAN FOUNDING FATHERS 379 (Norman Cousins ed., 1958).

71. *See* EIDSMOE, *supra* note 27, at 24-26.

72. Eidsmoe, *supra* note 25, at *Lecture 4: The Founding Fathers' Five Fold Formula*.

73. *Id.*

Framers concluded that such a system of checks and balances would work best by separating governmental power into legislative, executive and judicial branches.[74] Finally, the Founding Fathers understood that because human nature includes greed and envy, a free enterprise economy was the best way to develop a national economy.[75]

Clearly nothing mentioned above was a universally held belief amongst all the Framers. There were points of heated disagreement at the convention. But these heated disagreements were political in nature, and not on the moral questions of man's nature or of the Nature of God. Rather, the arguments that did exist among the Framers were centered on how to implement these aforementioned moral principals into a form of governance. The central theme is that these moral principles, on which the overwhelming majority of the Framers based their worldviews and moral references, were founded on Christian biblical teachings. These Christian biblical principles are at the center of our republican form of government and are manifest in the writings of our Founding Fathers.

IV. SEPARATION

The Framers, being men of strong Christian faith, who believed that the laws of man must conform with the laws of God, sought to strengthen Christian-based institutions by getting government out of their way. However, by separating the state away from the church, did the Framers intend to form a secular society, creating as Mr. Jefferson described over a dozen years later a "wall of separation" in which religion, particularly Christianity, should play no role in publicly supported locations or functions? Or was there another goal in mind, one in which the Framers intended to assist and promote the Christian church in its crucial role of underpinning the morals of a democratic society? The Framers strongly believed that the ultimate success or failure of this new constitutional republican form of government would be based upon its citizens' ability to uphold it. Further still, this new government would need to draw its strength from its citizenry.

In order to understand the Framers' intent with respect to religion in the public square, one must understand the nature of the colonial community and the times in which the Framers lived. The Framers brought to Philadelphia not only their personal religious and political beliefs, but also

74. *Id.*

75. *Id.*

the knowledge of the events concerning Christianity during and immediately after the Revolutionary War with Great Britain.

During the Revolutionary War, ardent Christian support of the war effort led in some cases to the compromising of the Christian faith itself.[76] "The righteousness of the American cause often loomed as 'another god' in competition with the God of traditional Christianity."[77] "Wholehearted Christian support of the patriot effort [undercut] Christianity" and its message, thereby decreasing the Christian church's effectiveness at delivering its core message of redemption from sin through Christ.[78] This compromise was problematic because many ardent believers joined their faith securely to the "all or nothing" identification of the Patriot position as the Christian position. Identifying the revolution as a "holy war" demeaned the importance of faith in God by replacing it with a secular purpose: independence from England.[79]

Notwithstanding the negative impact that the Revolutionary War had on the Christian church, the Constitution's effect on the Church was an explosion of fervor and faith that resulted in the second Great Awakening.[80] One should not be surprised by this result, as "it is easy to show the basic compatibility between important Christian convictions and the central features of the Constitution."[81] The rejuvenation of the Christian church during the period after the enactment of the Constitution occurred because of the influence of Calvin and his progeny. Calvin's influence can be seen,

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76. *See* MARK NOLL, ONE NATION UNDER GOD 47-49, 51-52 (1988).

77. *Id.* at 51-52.

78. *Id.* at 52.

79. *Id.* Political differences translated into religious antagonisms. Because of this intense participation, the vitality of Christianity declined during the war. However, after the war, when involvement in political affairs was less intense, the Christian faithenjoyed significant growth and increased diversity. The role of Christianity in the political process that led to the Constitution was quite different from the role the church played during the revolutionary war. Christian rhetoric and organized political action by Christians was largely absent just prior to and during the Convention, at least in comparison to the great amount of overt Christian attention to the war with Britain. Furthermore, the structure of the new constitutional government enhanced an environment in which Christian belief and practice flourished. In contrast, during the Revolutionary War period, overt Christian political action led to the subversion of the faith and its effectiveness in focusing on its mission to preach the Gospel and salvation through a risen Christ. *Id.* at 47-49, 51-52.

80. The Second Great Awakening occurred from 1780 to1830, reflecting a period of great religious revival and widespread Christian evangelism and conversions. 3 John Findling & Frank Thackery, What Happened? The Encyclopedia of Events that Changed America Forever 1 (2011)

81. NOLL, *supra* note 76, at 68.

for example, in the system of checks and balances established by the Constitution, which coincide nicely with the Christian teachings that the nature of man is inherently depraved and sinful. Humans are fallen and need to be restrained in the pursuit of power. This view of man influenced the Framers to form what was considered at that time a unique system of government.

Another aspect of this aforementioned nexus needs greater explanation. The Constitution is, for all intents and purposes, a secular, political document, based on certain Christian principles developed over the course of time. This development can be traced through a series of important Christian political writers who drew their concepts from biblical principles and who greatly influenced the Founding Fathers, who integrated those concepts into our Constitution.[82]

Obviously, the Framers were forming a government, not a theocracy.[83] In that day and age, however, this goal was a virtue. "The Constitution was 'secular,' not in the sense of repudiating religion, but in the sense of being 'of this world.'"[84] The Framers recognized that government was not religion, and that the purpose of government was to promote justice and fairness. They also recognized that in Europe, political tyranny often arose through the agency of state religion or religious persecution by agents of the

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82. Notably, while the Declaration of Independence mentions the word "God" or "Creator" multiple times, "God" is not mentioned in the Constitution, except a single reference in Article VII which states: "In the year of our Lord," a reference to Jesus Christ. *Compare* THE DECLARATION OF INDEPENDENCE (U.S. 1776), *with* U.S. CONST. art. VII. The Declaration of Independence and the Constitution should be read together. The Declaration sets forth the basic ideas and principles upon which the nation is founded, but is silent as to the means to implement them. Eidsmoe, *supra* note 25, at *Lecture 5: 1776–1789: From Independence to the Constitution*. Implementation of these ideas and principles is left to the Constitution. *Id.* As an interesting side note, the French decided to re-number their years beginning with the year of the French revolution in 1789. *Id.* Obviously, the Framers chose not to follow the French lead. *Id.*

83. *See* NOLL, *supra* note 76, at 69. Occasionally one hears accusations that Christian conservatives seek to establish a theocracy. Clearly, the constitutional form of government that was established in this country is not by any definition a theocracy. A theocracy is defined as a "[g]overnment of a state by the immediate direction of God . . . or the state thus governed." BLACK'S LAW DICTIONARY 1478 (3d ed. 1933). *See generally* Eidsmoe, *supra* note 25, at *Lecture 9: An Overview of the Constitution: The Bill of Rights, the First Amendment*. That our country was "[o]ne Nation under God," however, is a view that all of the Framers would have approved. *Id.*

84. NOLL, *supra* note 76, at 69.

government.[85] Further, they knew very well that in Europe, state-supported churches attempted to suppress religious diversity to maintain their monopolies. As a result, these state-supported European churches, in the opinion of the Founding Fathers, lost their fervor for evangelizing a lost world in favor of maintaining their favored state status. "It was an entanglement that, as the founders saw it, always harmed religion and always tempted authorities to exert more power than by nature and the command of God they possessed."[86]

Centuries of religious strife in Europe had left an indelible mark on the mind of the Framers.[87] They were loath to discuss religious issues for fear

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85. *Id.* While the Framers avoided the issue of establishing a national church akin to what many European nations had done, most of the separate states had their own sponsored church. *Id.* This fact motivated the Framers to keep the national government out of the way of religion in deference to the separate states who had already established, for the most part, a favored church at the expense of others. *Id.* This same sentiment led the Baptist minority in Danbury, Connecticut to write a letter to Thomas Jefferson, whose response is now famous for having uttered the words therein "separation of church and State." MADDOX, *supra* note 66, at 27-29.

86. NOLL, *supra* note 76, at 69. Modern historians have noted that Christian expansion in the early United States occurred most dramatically after believers turned from reliance upon overt political means to the organization of voluntary societies. *See* FRED J. HOOD, REFORMED AMERICA, THE MIDDLE AND SOUTHERN STATES, 1783–1837 118 (1980). Lyman Beecher, leader of Connecticut Congregationalists, came to the same conclusion in 1818 after that state severed its ties with his church. He regarded it as a blessing because the church could be more energetic about its proper tasks of proclaiming the gospel and doing deeds of mercy. Madison indicated that, in Virginia, religion flourished in greater purity without the aid of government. These statements, however, stood not for the withdrawal of religion from public life, but rather the much more specific separation of the institutions of the state from the institution of the church. *Id.*

87. *See* MADDOX, *supra* note 66, at 37. The Framers were well aware of the European models concerning state-supported religion. Official government support and funding of Christianity in Europe had been a blight upon the Christian message and had the effect of harming Christianity. NOLL, *supra* note 76, at 65. Government sponsorship of the church had the ultimate effect of corrupting the church. For example, the practice of letting Bishops buy their positions in the Holy Roman Empire led to resentment among the people. MARVIN PERRY, A HISTORY OF THE WORLD 336 (1985). The piety and greed of the clergy ultimately stimulated the Protestant reformation under Martin Luther, and later Calvin. *Id.* at 336-39. Furthermore, the Framers knew that the church was used as to suppress the political and religious freedom of those whose opinions were unpopular with the ruling class. European history is replete with such examples, including the trial and execution of Mary, Queen of Scots, the Spanish inquisition, the trial of Galileo, and the persecution of the Huguenots. *Id.* at 376. Often, the church was used to justify wars, including the war between Philip of Spain and England in 1558, not to mention the Crusades. *Id*. Certainly the framers must have reached the obvious conclusion that state-supported bishops, state-sponsored ecclesiastical courts, and religious tests for public office had all subverted the natural rights of life, liberty

that the Convention would founder on religious dissension.[88] Their goal was to keep government a healthy distance from the church, while ensuring that the church itself was involved in public affairs. The use of national churches in Europe to suppress political and religious freedoms, and the increasing diversity of religious, Christian practice within the various colonies (because of the First Great Awakening) created a consensus among the Founders to avoid conflict on religious issues.[89] Nevertheless, critically important to the analysis of religion's role in modern America, which has become completely lost in the modern discussion, is that all of the Founding Fathers welcomed the influence of religion on public life.[90] Simply put, they wanted the influence of the church to remain an indirect force in guiding public policy rather than an institutionalized agency participating directly in governmental affairs.[91]

The history leading up to the convention and the First Amendment division of church and state also included a strong tradition that opposed religious establishment for Christian, rather than political, reasons.[92] Roger Williams, who was expelled from the Massachusetts Bay Colony in 1630, and who eventually founded Rhode Island, was barred in part because he argued that churches were corrupted by power when they allied themselves

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and property. NOLL, *supra* note 76, at 65. For example, Madison, in his *Memorial and Remonstrance Against Religious Assessments*, argued against a bill which would establish a tax to pay ministers or teachers of the Christian religion:

> Because it will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinion. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease.

James Madison, Memorial and Remonstrance Against Religious Assessment (June 20, 1785), *available at* http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html.

88. MADDOX, *supra* note 66, at 129. The Framers realized that the First Amendment would still allow state-supported churches to continue. They did not wish to affront them. *See generally* Eidsmoe, *supra* note 26.

89. *See* NOLL, *supra* note 76, at 65. "The Founders thought a strict separation between the institutions of the church and the government was essential for the general health of the nation, and the specific promotion of virtue in the population." *Id.*

90. *Id.* at 51-52.

91. *Id.* at 67. *See also* MURRIN, *supra* note 58, at 25.

92. NOLL, *supra* note 76, at 65.

with the state.[93] Williams's viewpoint concerning the corrupting influence that government had on the Christian church had become generally accepted by the time of the Constitutional Convention in 1787.[94] The opposition to the church being recognized as part of the state manifested itself not only in the First Amendment to the Bill of Rights, but also in Article VI, clause 3 of the Constitution, which bans religious tests for political office.[95] The religious test ban was resoundingly criticized during

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93. *Id.*

94. *Id.* at 66. It should be noted that many devout Christians stood for the proposition of religious liberty and the removal of state supported religion. For example, "Thomas Jefferson's statute for religious freedom in Virginia, which was passed in 1785 . . . made the kind of sharp break between the institution of church and state that the First Amendment would later follow." *Id.* It began with the famous words, "Whereas Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion". *Id.* During debate on this law an amendment was proposed to add the words "Jesus Christ" to the language already there, "the holy author of our religion." *Id.* Virginia deists opposed the measure, but so also did several members who, in the words of James Madison "were particularly distinguished test for political office." *Id.* Of organized religious groups, only the Roger Williams Baptists subscribed to the view that religious tests were abhorrent to the concepts of liberty. In their view, they denounced these tests as a "[p]rofane intervention in the sacred relationship between God and man." Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. L. REV. 674, 687 (1987). The argument of these Christians, as Madison summarized it, was "that the better proof of reverence for that holy name would be not to profane it by making it a topic of legislative discussion and . . . making his religion the means of abridging the natural and equal rights of all men, in defiance of his own declaration that his Kingdom is not of this world." NOLL, *supra* note 76, at 66. Christians in Virginia opposed a governmental religion on the grounds that a governmental recognition of Jesus Christ would be a corruption of Christianity. It should not go unnoticed to the reader, however, that during the constitutional period, it was taken for granted that the practice of religion would include the exertion of indirect, rather than overt, influence on public policy. *Id.* at 67. Finally, the debate centered on how best to serve the interest of the Christian church, rather than the concept of a complete "wall of separation." *Id.* at 65. In any event, the debate encompassed whether there should be a state interference in the church, rather than church interference in public affairs.

95. U.S. CONST. art VI, cl. 3. The ban on religious tests came in spite of most groups supporting such tests for office. Only the Baptists, such as Roger Williams, subscribed to the view that religious test were abhorrent to the concepts of liberty. They denounced these tests as a "profane intervention in the sacred relationship between God and man [and] inspired by Jesus' general condemnation of oaths." Bradley, *supra* note 94, at 687. Nevertheless, like most critiques of church-state practices, this was a theological, rather than political, objection. *Id.* at 688. Thomas Jefferson was the most articulate of those individuals who opposed religious tests. *Id.* Jefferson's opinions, however, like those of the Baptists, were not the mainstream point of view. *Id.* Most people believed that a man's belief in God, and

ratification debates by both Federalists and Anti-Federalists alike. The Federalists simply did not consider it discriminatory to limit the holding of public office to good Christians. Anti-Federalists—who argued in favor of recognizing Christianity as the nation's official religion—viewed the lack of such a test nearly the same way the Federalists did.[96] Notwithstanding these critiques, because the separate states would still be allowed to establish their own religions, and the Framers' understanding that Article VI would prevent any one denomination from gaining power over another by means of a religious test for federal office, the religious ban included in Article VI garnered enough support and was passed.[97]

Lastly, a final factor moving the Framers to divide the institutions of government and church was the growing awareness among the Founding Fathers, in part due to the First Great Awakening, that America had become more pluralistic in its practice of the Christian faith.[98] In moving government away from specific religious requirements, the Framers were

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of a future state of rewards and punishments, was profoundly relevant to his fitness for public office. *Id.* Irrespective of the majority view toward religious tests, not even Thomas Jefferson rejected the proposition that the state ought to foster and encourage Christianity, if for no other reason than a belief that the Church was an effective instrument in maintaining societal morals and social control. *Id.* Notwithstanding this popular support, Article VI, clause 3 of the Constitution was passed with little debate by a great majority of the delegates. *Id.* One explanation as to why the Framers were not concerned with religion in general was that the project they were working on was unrelated to it; they were establishing a republican form of government, not deciding a theological debate. *Id.* at 691-92. Another factor may have to do with the Founding Fathers' vision of the future pluralistic society in which we now live, as exhibited by the expansion of Protestant churches after the Great Awakening. Also immensely important to the overall analysis is that the Framers were fully aware that the thirteen separate states, most of which at that time had a sponsored church, would still be allowed to maintain their own state sponsored church if they so chose. *Id.* at 693.

96. *See* Bradley, *supra* note 94, at 709-10. The Federalists eventually supported the clause after Anti-Federalists started to suggest worst-case scenarios that could theoretically happen if the clause failed to pass. The Anti-Federalists suggested that the Pope could become president, or hordes of pagan immigrants might take over government. The logical conclusion was that the test was needed to protect the country from that potentially disastrous result. Another suggestion was that there was a need for recognition of a national religion, preferably Protestant. Because of these exaggerated scenarios, the Federalists began to see the religious ban for the self-protective measure it was. They realized that the use of a general test would cause more harm than good, and could eventually be used against them. *Id.*

97. *See* NOLL, *supra* note 76, at 67-68.

98. *Id.*

establishing that government was of *all* the people—regardless of what religion they might profess.[99]

"In sum, the Founders' desire to put some distance between the institutions of Church and State reflected a desire to respect not only religion, but also the moral choices of citizens."[100] The Establishment Clause was, however, never intended to be used as a provision to remove religion from public life.[101] To the contrary, in the context of the times during which these constitutional conventions took place, these provisions were aimed more at "purifying the religious impact on politics" than at removing it from the public square entirely.[102] Put another way, the issue for the Founding Fathers in the early republic was not separation of religion and public life—as we describe and define the problem today—but rather "a question of critical distance."[103] That distance was lost during the Revolutionary War, and the result was harmful to both Christianity and its message.[104] The proper distance was reestablished during the period just after the enactment of the Constitution; a distance the Constitution itself is partially created. As a result, Christianity flourished and the nation experienced a second period of exponential growth in Christian churches and denominations.[105]

The Constitution and Bill of Rights had the effect of restoring a certain distance between religion and politics, but this distance had little to do with modern questions of whether a state is establishing religion.[106] While the First Amendment is an important gauge of what that distance ought to be, it should be noted that Thomas Jefferson's view that there should be a complete and strong wall of separation between government and religion

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99. *Id.*

100. *Id.*

101. *Id.* at 68.

102. *Id.*

103. *Id.* at 74.

104. *Id.*

105. *Id.* The result of taking away nationally sponsored churches was to increase the number of options individuals had when deciding which denomination within a particular religion they wished to practice. Beyond that, it had energized many of the faiths. For example, Catholicism, which faced general decline in Europe throughout the nineteenth-century, experienced great growth during this period in the United States. American Catholics, as a body, tended to be more loyal to the Pope in early America. Both traditional and evangelical religions were able to thrive in America, unlike anywhere else in the world at that time. *See* MURRIN, *supra* note 58, at 35.

106. NOLL, *supra* note 76, at 73.

made him a "lonely radical of his day."[107] Justice Story, author of the early American era's most influential commentaries on the Constitution, held a more typical view on how best to interpret the Establishment Clause and the distance it created between Church and State.[108] Justice Story believed that:

> [T]he promulgation of the great doctrines of religion . . . can never be a matter of indifference to any well ordered community . . . Indeed, in a republic, there would seem to be a peculiar propriety in viewing the Christian religion, as the great basis, on which [the government of the United States] must rest for its support and permanence, if it be, what it had been deemed by its truest friends to be, the religion of liberty.[109]

In Story's commentary on the Constitution, he laid out his understanding of the First Amendment. In his view, the general—if not universal—sentiment at the time of the adoption of the First Amendment was "that Christianity in general ought to receive encouragement from the State."[110] Any attempt to level all religions or to hold them in utter indifference would have met with universal indignation, if not universal hostility.[111]

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107. *Id. See also* HAMBURGER, *supra* note 22, at 144-89. James Madison's views on this topic were far closer to reflecting the mainstream Framer's view and overall colonial thought. He asserted that voluntarily supported religious activities may and should take their place in public life.

108. NOLL, *supra* note 76, at 73. It cannot be said that Justice Story was a great ally in the Christian cause; like Jefferson, Justice Story was a Unitarian.

109. *Id.* at 73-74.

110. Wallace v. Jaffree, 472 U.S. 38, 104 (1984).

111. *Id.* In *Wallace*, Justice Rehnquist noted the following from Thomas Cooley, who was as widely respected as a legal authority as Justice Story. Cooley stated in his treatise entitled Constitutional Limitations that aid to a particular religious sect was prohibited by the United States Constitution, but he went on to say:

> "But while thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the Great Governor of the Universe, and of acknowledging with thanksgiving his boundless favors, or bowing in contrition when visited with the penalties of his broken laws. No principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by a general

Justice Story felt that while the government should not favor one church over another, it was permitted to promote religion in general. Through such general promotion, government could help the moral structure of society upon which a strong representative republic would depend.

V. HISTORICAL MISINTERPRETATION BY THE COURTS

The Framers' first goal at the Constitutional Convention was the formation of a republic based on certain principles consistent with the Founding Fathers' Christian beliefs.[112] In perhaps a less obvious manner, however, the Framers also sought to strengthen the character of America's citizenry—something essential to the survival and success of the new Republic. This was to be accomplished by strengthening the nation's moral character through strong Christian churches.[113] To better accomplish this goal, the Framers developed a solution that would eliminate direct governmental support for any one particular sect, while overtly acknowledging the importance of religion for society and democracy. Stronger churches had the direct benefit of a more moral society, and consequently a stronger society. The Founding Fathers believed that a moral society was a necessity for a strong country. Moreover, they believed that government should encourage churches—specifically Christian churches—to take an active role in public affairs. Therefore, it was the Framers' indirect purpose to reinforce American society through strengthened churches by ensuring that government did not interfere in the affairs of religion.

Given this history, one should wonder how we arrived at the increasingly secular society that is reflected in modern day life within the United States.

> exemption of the houses of religious worship from taxation for the support of State government."

472 U.S. 38 at 105 (quoting JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 470-72 (5th ed. 1891)). Later in the opinion, Rehnquist continues quoting Cooley:

> [t]his public recognition of religious worship, however, is not based entirely, perhaps not even mainly, upon a sense of what is due to the Supreme Being himself as the author of all good and of all law; but the same reasons of state policy which induce the government to aid institutions of charity and seminaries of instruction will incline it also to foster religious worship and religious institutions, as conservators of the public morals and valuable, if not indispensable, assistants to the preservation of the public order.

Id. at 106.

112. NOLL, *supra* note 76, at 64.

113. *Id.*

One's search can start and stop with the Supreme Court, which has established an ever-increasing wall of separation between public and religious institutions. Although Thomas Jefferson, in his letter to the Connecticut Baptists, was the first to plant the idea of a "wall of separation," he did not invent the phrase.[114] Rather, that distinction goes to Roger Williams, the pesky Puritan turned Baptist.[115] Jefferson, who was President at the time of his letter to the Danbury Baptist Association, was taking political heat for failing to call the nation to prayer and fasting.[116] Jefferson wrote:

> 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 government reach actions only, and not opinions, I contemplate with sovereign reverence that the act of the whole American people which declared that their legislature should make no law respecting an establishment of religion, or prohibiting the free exercise thereof, thus building a *wall of separation* between Church and State.[117]

Jefferson clearly broke with precedent by refusing to pray. While Jefferson's religious views as an adult are the subject of some debate, one should note that he was raised Anglican.[118] The reason for his views (as expressed to the Danbury Baptists) had much to do with Jefferson's prejudice toward the clergy of organized religion. Jefferson believed that the average American was suppressed by clergy and needed to be

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114. *See* MADDOX, *supra* note 66, at 28. The Danbury Baptist Association comprised twenty-six churches in Connecticut.

115. *Id.*

116. *Id.* at 26. Jefferson would later recognize the radical nature of the letter he wrote to the Danbury Baptist. His response was to deflect the potential political fallout by attending church services being held in the House of Representatives two days after issuing the letter to the Danbury Baptist, a practice he would continue for the next seven years. *See* HAMBURGER, *supra* note 22, at 162.

117. MADDOX, *supra* note 66, at 28-29 (emphasis added). *See also* 16 THOMAS JEFFERSON, WRITINGS OF THOMAS JEFFERSON 281-82 (Monticello ed. 1982).

118. MADDOX, *supra* note 66, at 29. Jefferson was a member of the officially established church in Virginia, the Anglican Church. *Id.* Prior to his election as president, religion was important to him, and he never spoke out against it. *Id.* As he grew older, however, he developed a different attitude, becoming more Unitarian in his theology. *Id.* Faith, belief in God and immortality, and service to his fellow human beings remained part of his worldview. *Id*.

liberated.[119] Mr. Jefferson wrote little on religion between 1786 and his election in 1800; but from his election until his correspondence with the Danbury Baptists, he wrote more letters with religious content than he had in his entire life.[120] Without exception, each of these letters contained criticism of the clergy.[121] Jefferson saw the Danbury petition as an opportunity to promote his views—something he was eager to do. He was disappointed at the lack of response from the public, whom he had hoped to persuade to accept his point of view as expressed in the letter.[122] While some papers in New England published the letter, the Danbury Baptists essentially ignored it.[123] The Baptists, not seeking the separation of Church and State, considered this view a radical departure from what they believed was proper.[124] They simply sought disestablishment of the recognized Connecticut church so one religion would not be favored above all others.[125]

While Jefferson had many motivations, he did not make official proclamations calling for prayer and thanksgiving like his predecessors, Washington and Adams, because he believed he lacked the constitutional authority to do so.[126] Does this mean that Jefferson's analysis of his constitutional authority to call the nation to prayer was more accurate than Washington or Adams, who did on regular occasions call the nation to prayer and fasting? Furthermore, consider, as an ambassador to France, Jefferson did not attend the Constitutional Convention.

The Framers' general consensus that government should encourage religion, particularly Christianity, for the good of society, which they understood was accomplished best by getting government out of the way,

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119. *See* HAMBURGER, *supra* note 22, at 147.

120. *Id.* at 147-48.

121. *Id.*

122. *Id.* at 159.

123. *Id.* at 164.

124. *Id.* at 165. To avoid being accused of supporting the separation of religion and government, the Baptists chose to hold onto the letter without publishing it. *Id* at 144.

125. *Id.* at 144.

126. When considering Jefferson's personal views toward organized religion during his presidency, one must keep in mind his rigid political ideology, as exhibited by his strict constructionist views of his constitutional powers as President. As an ardent Anti-Federalist, his view of his constitutional authority was considerably narrower than most, as manifested in his initial reaction that a constitutional amendment was necessary to complete the Louisiana Purchase in 1803. But for James Madison encouraging Jefferson to be more flexible in his views toward the purchase of lands west of Mississippi, who knows what the future course of this nation might have been. *See* MADDOX, *supra* note 66, at 26.

conflicts with Jefferson's "wall of separation" analysis.[127] If the Framers ever envisioned a wall at all, it would be a wall that limits government control of the church, not vice versa. In that circumstance, government would remain passive regarding where and when religion entered the public sphere, or received indirect government assistance. Former Chief Justice William Rehnquist's dissent in *Wallace v. Jaffree*[128] specifically addressed this very issue, and laid out his views on both constitutional interpretation of the Establishment Clause and the proper role of government with respect to issues of Church and State. He stated:

> It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years. Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress.
> . . . .
> There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in *Everson*.[129]

Rehnquist continued:

> But the greatest injury of the "wall" notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights. . . . [N]o amount of repetition of historical errors in judicial opinions can make the errors true. The "wall of

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127. Washington used a metaphor that was probably more appropriate than Jefferson's "Wall of Separation" analysis. Washington described the First Amendment as having "[e]stablish[ed] a textual barrier against spiritual tyranny and religious persecution." *See generally* EIDSMOE, *supra* note 27. Washington realized the importance of religion in society. He therefore sought to protect the church from the state and not vice versa. The term "Separation of Church and State" may be found nearly verbatim in the former constitution of the Union of Soviet Socialist Republics. KONSTITUTSIIA SSSR (1977) [KONST. SSSR] art. 52 [USSR CONSTITUTION], *available at* http://www.constitution.org/cons/ussr77.txt.

128. 472 U.S. 38 (1984). An Alabama law authorized teachers to set aside one minute at the start of each day for a moment of "silent meditation or voluntary prayer." Sometimes the teacher called upon a student to recite prayers. Relying on *Lemon v. Kurtzman*, the Court ruled 6-3 that the law was unconstitutional.

129. *Id.* at 92, 106.

> separation between church and State" is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.[130]

The phrase "wall of separation" penned by Jefferson went unnoticed for 150 years until it resurfaced in *Everson v. Board of Education.*[131] In a 5-4 decision, the Supreme Court held that the Establishment Clause did not prohibit a New Jersey law that used tax funds to pay bus fares for parochial schools students. The Court stated:

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion[132]

In that case, Justice Black concluded: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here."[133]

Many court decisions in the mid-twentieth century concerning religion reflected underlying anti-Catholic bias that encouraged separating state support, no matter how indirect, from religion.[134] Justice Black had his own

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130. *Id.* at 107. Rehnquist concluded:

> The Framers intended the Establishment Clause to prohibit the designation of any church as a "national" one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. Given the "incorporation" of the Establishment Clause as against the States via the Fourteenth Amendment in *Everson*, States are prohibited as well from establishing a religion or discriminating between sects. As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means.

Id. at 113.

131. 330 U.S. 1 (1947).

132. *Id.* at 15.

133. *Id.* at 18.

134. In his book on the separation of church and state, Dr. Hamburger traces the roots of the nation's anti-Catholic bias to the mid-nineteenth century, linking it to the rise of liberal

personal issues with Catholicism. He was a former member of the Ku Klux Klan and a Baptist who renounced the Klan, but never its anti-Catholic bias. Earlier in his career he represented a Methodist minister who shot and killed a Catholic priest for performing the wedding of the Methodist minister's daughter to a Puerto Rican.[135] Justice Black had serious reservations about Catholic schools and felt that Catholics were "looking towards complete domination and supremacy of their particular brand of religion," and were "powerful religion sectarian propagandists."[136]

Nevertheless, Jefferson's "wall" became well established in *Lemon v. Kurtzman.*[137] During the twenty-four intervening years between *Everson* and *Lemon,* a series of cases dealing with religion set the stage both politically and socially that led to the *Lemon* analysis. In the 1962 case of *Engel v. Vitale*,[138] the Supreme Court struck down New York's school prayer law. The Court held that state officials may not compose an official state prayer and require its recitation in the public schools at the beginning of each school day—even if the prayer was denominationally neutral and pupils who wished to do so could remain silent or be excused from the room while the prayer was being recited.[139] Justice Black, writing for a unanimous court held that public school prayer violated the Establishment Clause:

> Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause . . . . The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment

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Protestantism (e.g., Unitarianism) and the concern that the Catholic Church's assertion of theological authority was incompatible with the freedom that Protestantism defined as individual independence and personal authority. *See* HAMBURGER, *supra* note 22, at 193-251.

135. STEVE SUITTS, HUGO BLACK OF ALABAMA: HOW HIS ROOTS AND EARLY CAREER SHAPED THE GREAT CHAMPION OF THE CONSTITUTION 361-62 (2005).

136. GEOFFREY R. STONE, RICHARD ALLEN EPSTEIN & CASS R. SUNSTEIN, THE BILL OF RIGHTS IN THE MODERN STATE 121 (1992).

137. 403 U.S. 602 (1971).

138. 370 U.S. 421 (1962).

139. The offending prayer read: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422.

> of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not.[140]

The Court provided a brief explanation of what it believed the Framers were attempting to accomplish by placing the Establishment Clause in the First Amendment:

> When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs.[141]

The Supreme Court also noted that the Framers were keenly aware that national churches in Europe were used to persecute religious minorities as another motivation for the Establishment Clause. The Court noted ironically, and yet hopefully, that its ruling would not "indicate a hostility toward religion or toward prayer."[142] While pointing out that many of the Framers were men of deep-seated faith who believed in the power of prayer, the Court stated that even a prayer as innocuous of the one being used in New York would be considered an establishment:

> It is true that New York's establishment of its Regents' prayer as an officially approved religious doctrine of that State does not amount to a total establishment of one particular religious sect to the exclusion of all others—that, indeed, the governmental endorsement of that prayer seems relatively insignificant when compared to the governmental encroachments upon religion which were commonplace 200 years ago.[143]

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140. *Id.* at 430.

141. *Id.* at 431.

142. *Id.* at 434.

143. *Id.* at 436.

Notwithstanding, the ruling was incredibly broad in its scope and breadth. No matter one's view of the issue of school prayer, the result suggested a move towards the removal of any religious references in public schools. That decision created a values vacuum that has never been adequately filled.[144] The seamlessness of the decision is particularly interesting—it is devoid of any degree of nuance, and it lacks consideration of the fact that our Founding Fathers would never have considered such an innocuous prayer the type of establishment they sought to prohibit with the First Amendment. The logic of this decision could easily be transformed to find any number of other things done in public that might run afoul of the Establishment Clause, to include the national motto, the pledge, or prayers that open up Congress or other government institutions. If the logical basis of this decision would fail as to these areas of public expressions of religion, might that same logic be incorrect concerning the type of prayer forbidden here for school children? Essentially, the Court found that children, unlike adults, would be too oppressed or persuaded by such an innocuous statement of public religion, and that the protections of the Establishment Clause were necessary to shelter them. Ironically, the same young ears that are too impressionable to hear an innocuous non-denominational prayer are now taught amazingly complex issues, many without parental consentand often adverse to their religious values. These include, for example, subjects dealing with homosexuality, evolution, and sexual education that, depending on how the subject is presented, could do more damage to religious minority rights than the twenty-two word prayer struck down in *Engel*.[145]

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144. For example, the illegitimacy rate in 1962 was below eight percent. In 2007, that rate is 33.8%. Crime rates have also risen. Other problems have occurred and worsened in spite of trillions of tax dollars being spent in the War on Poverty. While no one would argue a direct casual link between eliminating prayer from school and increasing rates of illegitimacy, crime and other societal ills, the increases in these categories are still breathtaking and alarming. It certainly serves as strong evidence that the Framers' view of religion as the bulwark of a strong republic was accurate.

145. For an example of the flip side of this issue, on February 23, 2007, Massachusetts U.S. District Judge Mark L. Wolf dismissed a civil rights lawsuit brought by David Parker on behalf of his five-year-old child. Parker v. Hurley, 474 F. Supp. 2d 261 (D. Mass. 2007), *aff'd*, 514 F.3d 87 (1st Cir. 2008). Parker objected to his child being taught in kindergarten about the homosexual lifestyle without his consent or the opportunity to have his child opt out of the instruction. *Id.* at 263. Judge Wolf found that the school district's actions were reasonable, and that the district had an obligation to teach young children to accept homosexuality. *Id.* at 275. The petitioner was provided three options if he objected: place his child in private school, home school his child, or elect members of the school board who agreed with his views. *Id.* at 264.

Shortly after *Engel*, the Court followed up with related issues in *Abington School District v. Schempp*[146] and *Chamberlin v. Public Instruction Board.*[147] In *Schempp*, the Supreme Court declared unconstitutional a Pennsylvania law that stated: "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon written request of his parent or guardian."[148] *Murray* (decided with *Schempp*) found a requirement of the Baltimore school board that the Lord's Prayer be recited prior to the beginning of the day's classes unconstitutional.

Interestingly, in his majority opinion, Justice Clark cites the dissent in *Everson* that would have invalidated the provision of public aid to students attending Catholic schools. To support the proposition that in "the relationship between man and religion, the State is firmly committed to a position of neutrality,"[149] Clark stated that "the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense."[150] In citing this broad statement from the

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146. 374 U.S. 203 (1963).

147. 377 U.S. 402 (1964). In *Chamberlin*, the Court found a Florida statute requiring devotional Bible reading and prayer recitation in public schools unconstitutional. The Supreme Court also ruled during this time on other Establishment Clause cases leading up to *Lemon*. *See, e.g.*, Bd. of Educ. v. Allen, 392 U.S. 236 (1968) (upholding the constitutionality of a New York state law requiring the state to provide textbooks to all school children in grades seven through twelve, regardless of whether they attended public or private schools); McGowan v. Maryland, 366 U.S. 420 (1961) (holding that Sunday closing laws are not unconstitutional); Torcaso v. Watkins, 367 U.S. 488 (1961) (striking down a Maryland test for public office that required belief in God).

148. *Schempp*, 374 U.S. at 205. "The appellees Edward Lewis Schempp, his wife Sidney, and their children, Roger and Donna, are of the Unitarian faith and are members of the Unitarian church in Germantown, Philadelphia, Pennsylvania . . . ." *Id.*

149. *Id.* at 226.

150. *Id.* at 216 (quoting Everson v. Bd. of Educ., 330 U.S. 1, 26 (1947) (Jackson, J., dissenting)). Justice Clark further cited the dissenters in *Everson*:

> The [First] Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.

Everson dissent, Justice Clark essentially endorsed a complete and total separation between religion and the public square.

This was a bridge too far for some of the justices. Of note was the following admonition from Justice Goldberg's concurring opinion (joined by Justice Harlan):

> It is said, and I agree, that the attitude of government toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.[151]

In *Lemon v. Kurtzman*, decided in 1971, the Supreme Court put forward a three-part test, which is used to determine whether Jefferson's "wall of separation" has been breached. A state law (1) must have a secular legislative purpose, (2) its primary effect must be one that neither promotes religion nor inhibits religion, and (3) the statute must not foster "an excessive entanglement with religion."[152] Currently, in cases involving church and state issues concerning the Establishment Clause, the *Lemon* analysis is the proper test, if for no other reason than because it is the method by which the Court analyzes Establishment Clause cases. Based on the *Lemon* analysis, a series of inconsistent results have come from the courts, but the general trend has been to exclude religion, and specifically Christianity, from the public square.

For example, in 1980 the Supreme Court ruled that a Kentucky statute requiring the posting of a copy of the Ten Commandments, purchased with private contributions, to the wall of each public school classroom was an unconstitutional establishment of religion with no secular legislative

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Id. at 217 (quoting *Everson*, 330 U.S. at 31-32 (Rutledge, J., dissenting)).

151. *Id.* at 306.

152. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). *Lemon* was actually a series of three cases, including Earley v. DiCenso, 400 U.S. 901 (1970) and DiCenso v. Robinson, 316 F. Supp. 112 (D.R.I. 1970). The Supreme Court ruled unanimously that the state statutes providing support to private and parochial schools were an unconstitutional entanglement with religion. *Id.* at 615. The Pennsylvania law paid the salaries of teachers in parochial schools, and assisted the purchasing of textbooks, and other teaching supplies. *Id.* at 606. In Rhode Island, the State paid fifteen percent of the salaries of private school teachers. *Id.*

purpose.[153] Given this standard as explained in *Stone*, the Court had seemingly built an impregnable wall that could not be scaled by anything that remotely looked like state support of religious expression in any form, no matter how indirect. In 1985, the Supreme Court held that an Alabama statute authorizing a one-minute period of silence in all public schools "for meditation or voluntary prayer" was an unconstitutional establishment of religion.[154] In 1987, the Supreme Court found Louisiana's "Creationism Act" that forbade the teaching of the theory of evolution in public elementary and secondary schools unless accompanied by instruction in the theory of "creation science" to be facially invalid because the statute lacked a clear secular purpose.[155]

Some decisions using the *Lemon* analysis found support for some religious expression when the issue was the ability to exercise one's religion. This was especially clear concerning free access to public facilities by religious groups to practice religion under the Free Exercise Clause consistent with federal statutes that prohibited discrimination against religious viewpoints and speech.[156] In 1983, the Supreme Court found that the Nebraska Legislature's chaplaincy practice did not violate the Establishment Clause.[157] In 1984, the Supreme Court held in *Lynch v.*

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153. Stone v. Graham, 449 U.S. 39 (1980). *See also infra* note 185.

154. Wallace v. Jaffree, 472 U.S. 38 (1985). *See supra* note 111 for a further discussion of this case.

155. Edwards v. Aguillard, 482 U.S. 578 (1987).

156. In free exercise cases, the Supreme Court has been far more willing to support the ability of citizens to practice religion using public facilities, in part due to Federal legislation allowing for equal access for all groups, including religious groups. It is here that one sees a merging of the right to free exercise with the right to free speech and assembly. *See* Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995) (finding a University of Virginia rule that did not allow student activity funds to be used by student groups wanting to promote a religious viewpoint unconstitutional); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (finding a New York Statute preventing school boards from allowing schools to be used after hours for religious activities unconstitutional); Bd. of Educ. of the Westside Cmty. Sch. v. Mergens, 496 U.S. 226 (1990) (finding a violation of the equal access act where the Nebraska school district denied permission to a group of students who wanted to form a Christian Club in their high school because the club could not have a faculty sponsor); Widmar v. Vincent, 454 U.S. 263 (1981) (holding that a University of Missouri at Kansas City rule that its facilities could not be used by student groups for purposes of religious worship or religious teaching violated the Free Exercise Clause); Wisconsin v. Yoder, 406 U.S. 208 (1972) (holding that Wisconsin Law requiring mandatory attendance in schools until sixteen years of age violated Amish Students' right to free exercise of religion).

157. Marsh v. Chambers, 463 U.S. 783 (1983).

Donnelly that an annual Christmas display in a park owned by a nonprofit organization did not violate the Establishment Clause.[158] In *Agostini v. Felton*, the Court upheld a statute that provided public tutors for students attending private schools,[159] overruling *Aguilar v. Felton*,[160] which held a similar New York program to be an excessive entanglement. Other than twelve years time, the only thing that had changed between *Agostini* and *Aguilar* was the cost of complying with *Aguilar*.[161] Neither case seriously discussed whether the statute violated the Framers' view of the Establishment Clause. These two cases showed that the *Lemon* analysis had subsumed the Establishment Clause itself. Rather than defining whether a religion was established, the Court embroiled itself in a hypertechnical analysis of whether the statute created excessive entanglement with religion. This approach is far afield from the Framers' intent.

The *Lemon* analysis seemingly met its apparent Waterloo in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*.[162] In *Allegheny*, the ACLU and seven local residents filed suit seeking permanently to enjoin the county from displaying a nativity scene, and the city of Pittsburgh from displaying a menorah on the grounds that the separate displays violated the Establishment Clause.[163] The Supreme Court's inconsistent 5-4 plurality

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

159. Agostini v. Felton, 521 U.S. 203 (1997).

160. Aguilar v. Felton, 473 U.S. 402 (1985).

161. The Court accepted respondent's argument that there were no substantial changes in the circumstances between *Agostini* and *Aguilar*. The only thing that changed was the ever-shifting attitudes of the justices who used *Lemon* as a vehicle to reach a predetermined result rather than a tool of constitutional analysis. Justice Souter's and Justice Ginsburg's dissents criticize the majority for arriving at an opposite conclusion in spite of similar facts twelve years apart. *Agostini*, 521 U.S. at 240 (Souter, J., dissenting); *id.* at 255 (Ginsburg, J., dissenting).

162. Cnty. of Allegheny v. ACLU, 492 U.S. 573 (1989). The decision was a fractured 5-4 decision with concurrences and dissents coming from within the majority. The majority consisted of Justice Blackmun (parts III-A, IV, V), joined by Justices O'Connor, Brennan, Marshall, Stevens. Justice Kennedy authored the dissent, joined by Justices Rehnquist, White, and Scalia, which would have found both the crèche and the menorah constitutional. Since Justice Alito replaced Justice O'Connor, it is likely that the decision concerning the crèche is ripe for reversal. The vote was 6-3, finding the holiday display including a menorah constitutional. Justices Stevens, Brennan, and Marshall would have invalidated both the menorah and the crèche calling for a complete separation. Justice O'Connor wrote a separate opinion concerning the crèche, joined by Justices Brennan and Stevens.

163. *Id.* at 587-88.

decision resulted in the menorah display being found constitutional, and the crèche being found an unconstitutional establishment of religion.[164]

The Court found that the city of Pittsburgh's combined holiday display of a Chanukah menorah, a Christmas tree, and a sign saluting liberty did not have the effect of conveying an endorsement of religion.[165] Nevertheless, the Court held the county's crèche display to be an unconstitutional establishment because the crèche angel's words endorsed "a patently Christian message: Glory to God for the birth of Jesus Christ."[166] Justice Blackmun noted that "[t]he government may acknowledge Christmas as a cultural phenomenon, but under the *First Amendment* it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus."[167]

Justice Kennedy summarized the majority opinion conclusions as "an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents[.]"[168] Justice Kennedy stated, "Speech may coerce in some circumstances, but this does not justify a ban on all government recognition of religion."[169] Quoting former Chief Justice Burger, Justice Kennedy said:

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164. *Id.* at 621.

165. *Id.* at 620. Justice O'Connor's concurring opinion justified the City of Pittsburgh display as meeting constitutional muster by stating:

> In setting up its holiday display, which included the lighted tree and the menorah, the city of Pittsburgh stressed the theme of liberty and pluralism by accompanying the exhibit with a sign bearing the following message: "During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom." . . . This sign indicates that the city intended to convey its own distinctive message of pluralism and freedom. By accompanying its display of a Christmas tree—a secular symbol of the Christmas holiday season—with a salute to liberty, and by adding a religious symbol from a Jewish holiday also celebrated at roughly the same time of year, I conclude that the city did not endorse Judaism or religion in general, but rather conveyed a message of pluralism and freedom of belief during the holiday season.

Id. at 635 (O'Connor, J., concurring) (citations omitted).

166. *Id.* at 601 (majority opinion).

167. *Id.* (emphasis added). Justice Blackmun makes his prejudice known later in the opinion when critiquing Justice Kennedy's dissent when he states: "The history of this Nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically." *Id.* at 604.

168. *Id.* at 655 (Kennedy, J., concurring in judgment in part and dissenting in part).

169. *Id.* at 661.

> The general principle deducible from the *First Amendment* and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.[170]

Justice Kennedy concluded with this stinging rebuke to the majority:

> The approach adopted by the majority contradicts important values embodied in the Clause. Obsessive, implacable resistance to all but the most carefully scripted and secularized forms of accommodation requires this Court to act as a censor, issuing national decrees as to what is orthodox and what is not. What is orthodox, in this context, means what is secular; the only Christmas the State can acknowledge is one in which references to religion have been held to a minimum. The Court thus lends its assistance to an Orwellian rewriting of history as many understand it. I can conceive of no judicial function more antithetical to the *First Amendment*.[171]

The five justices in the *Allegheny* majority decision, Blackmun, Marshall, Brennan, Stevens, and O'Connor, came from the liberal wing of the Court, many of whom have been replaced by more conservative justices. It is reasonable to believe that the holding and reasoning of *Allegheny* would fail to survive a second look by the Supreme Court should it be challenged in the future, given the present Court makeup. For those who think *Allegheny* is inconsistent with the Framers' intent, it is also appropriate to ask whether *Allegheny* should be overtly challenged by engaging in the same type of conduct found unconstitutional in that decision.

The decision in *Allegheny* led the George H. W. Bush administration to argue that the *Lemon* test should be abandoned in issues involving whether there was governmental promotion of religion in *Lee v. Weisman*.[172] In *Weisman*, a Jewish parent in Providence, Rhode Island challenged the local school district's policy of including a prayer in its graduation ceremonies.

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170. *Id.* at 662 (quoting Walz v. Tax Comm'r of the City of N.Y., 397 U.S. 664, 669 (1970)).

171. *Id.* at 678-79 (1989) (emphasis added).

172. 505 U.S. 577, 587 (1992).

At the disputed graduation, a rabbi gave an invocation where he thanked God by stating:

> God of the Free, Hope of the Brave: For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. . . .
>
> For the liberty of America, we thank You. . . .
>
> For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. . . .
>
> For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.
>
> May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.
>
> AMEN[.][173]

The same rabbi also gave the benediction where he stated: "O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement. . . . We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion."[174] The Bush administration agreed with the school board, which argued that the prayer did not demonstrate a religious endorsement.[175]

In a 5-4 decision, the Supreme Court ruled that the graduation prayer violated the Establishment Clause.[176] In a decision authored by Justice

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173. *Id.* at 581-82.

174. *Id.* at 582.

175. *Id.* at 583-84.

176. *Id.* at 599. The vote in the majority included Justice Kennedy, joined by Justices Blackmun, Stevens, O'Connor, and Souter, with a concurrence by Justice Blackmun, joined by Justices Stevens, and O'Connor, and a second concurrence by Justice Souter, joined by Justices Stevens and O'Connor. *Id.* at 580. The dissent was written by Justice Scalia, and joined by Justices Rehnquist, White, and Thomas. *Id.* at 580. Justice Kennedy is purported to have changed his vote during deliberations. *Lee v. Weisman*, FIRST AMENDMENT CENTER, http://www.firstamendmentcenter.org/faclibrary/case.aspx?case=Lee_v_Weisman (last visited May 1, 2011). It appears what impacted him was the fact that the principal had written a pamphlet on composing prayers during public occasions. *See Weisman*, 505 U.S. at 588. Justice Kennedy wrote:

> Through these means the principal directed and controlled the content of the prayers. Even if the only sanction for ignoring the instructions were that the rabbi would not be invited back, we think no religious representative who valued his or her continued reputation and effectiveness in the community

Kennedy, the Supreme Court refused to reverse the standard it established in *Lemon*, and extended the *Engel* prohibition against school prayer to graduation ceremonies.

> The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the *Establishment Clause*. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so." . . . The State's involvement in the school prayers challenged today violates these central principles.
>
> That involvement is as troubling as it is undenied. A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur.[177]

Justice Kennedy's majority opinion found that such a prayer offered at a graduation ceremony subjected students to harm by impermissible peer pressure.

> The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. . . . [F]or the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real. . . . It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that . . . a reasonable dissenter

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> would incur the State's displeasure in this regard. It is a cornerstone principle of our *Establishment Clause* jurisprudence that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government," . . . and that is what the school officials attempted to do.

Id. at 588 (citations omitted) (emphasis added).

177. *Id.* at 587 (alteration in original) (citations omitted).

> in this milieu could believe that the group exercise signified her own participation or approval of it.[178]

For the dissenters, this logic was nonsense. Justice Scalia wrote:

> The history and tradition of our Nation are replete with public ceremonies featuring prayers of thanksgiving and petition. . . .
>
> From our Nation's origin, prayer has been a prominent part of governmental ceremonies and proclamations. . . .
>
> . . . .
>
> This tradition of Thanksgiving Proclamations—with their religious theme of prayerful gratitude to God—has been adhered to by almost every President. . . .
>
> In addition to this general tradition of prayer at public ceremonies, there exists a more specific tradition of invocations and benedictions at public school graduation exercises.[179]

But one of Justice Kennedy's arguments, arguing that having to listen to a prayer at a graduation ceremony would injure a dissenter by signifying his approval of such a prayer, was—to quote Justice Scalia—"ludicrous":

> [A] student who simply *sits* in "respectful silence" during the invocation and benediction (when all others are standing) has somehow joined—or would somehow be perceived as having joined—in the prayers is nothing short of ludicrous. We indeed live in a vulgar age. But surely "our social conventions," . . . have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence. . . .
>
> . . . .
>
> The deeper flaw in the Court's opinion does not lie in its wrong answer to the question whether there was state-induced "peer-pressure" coercion; it lies, rather, in the Court's making violation of the *Establishment Clause* hinge on such a precious question. The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.[180]

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178. *Id.* at 594.

179. *Id.* at 633-35 (Scalia, J., dissenting).

180. *Id.* at 637, 640 (citations omitted) (emphasis added).

The Jefferson wall may have seen its first cracks in 2005 in a pair of Supreme Court 5-4 decisions on the posting of the Ten Commandments on public property. The Court found a Texas display constitutional while at the same time found a Kentucky display unconstitutional. The key in both decisions centered upon whether the display adhered to a secular purpose, reflecting a wrong-headed strict adherence to the *Lemon* analysis. In *Van Orden v. Perry*,[181] the Court held that the Texas governmental display of the Ten Commandments did not cross the line into impermissible proselytizing. In *McCreary County v. ACLU*,[182] involving Ten Commandments displays on the walls of two county courthouses, the Court found that public officials sought to advance religion, and were not motivated by a secular purpose in establishing the courthouse display.[183]

Justice Breyer was the swing voter in both cases. In *Van Orden*, Justice Breyer was persuaded by the length of time the Texas display had been standing. Justice Breyer reasoned in his plurality opinion that:

> [A] further factor is determinative here. As far as I can tell, 40 years passed in which the presence of this monument, legally speaking, went unchallenged (until the single legal objection raised by petitioner). . . . Hence, those 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect . . . .[184]

Justice O'Connor voted to find both displays unconstitutional. Justice Alito has since replaced Justice O'Connor, whose views would seem to favor

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181. Van Orden v. Perry, 545 U.S. 677, 681 (2005).

182. McCreary Cnty. v. ACLU, 545 U.S. 844, 850-51, 881 (2005).

183. *But see* ACLU v. Grayson Cnty., 591 F.3d 837 (6th Cir. 2010), *reh'g denied*, 605 F.3d 426 (6th Cir. 2010), in which the Sixth Circuit Court of Appeals allowed Grayson County's courthouse to keep a display that included the Ten Commandments. *Grayson*, 591 F.3d at 841. The display, located on the second floor of Grayson County's courthouse, is titled "Foundations of American Law and Government" and includes the Ten Commandments, Magna Carta, Mayflower Compact, Declaration of Independence, Bill of Rights, Preamble to the Kentucky Constitution, Star-Spangled Banner, National Motto, and a picture of Lady Justice. *Id.*

184. *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in judgment).

such displays in spite of the public official's motivations.[185] This is another example of a holding that is ripe for challenge.

For the most part, the courts have applied *Lemon* by essentially eliminating any and all references of God and religion in most public fora when the issue before the court concerned whether the activity in question involved government action reflecting an establishment of religion.[186] In its place, a philosophy of Secular Humanism has developed, as forewarned by Justice Goldberg in *Schempp*,[187] that can be found especially prevalent in the public schools. Further still, the courts may be protecting secularism under the guise of neutrality, because secularists deem it to be a philosophy and not a religion.[188] Evolution, which denies the creation of man by God, shall be taught exclusively as fact, without challenge, as it is deemed acceptable science and has the absence of religious influences. Any attempts to give equal time to scientific theories supporting Intelligent Design have thus far been denied on a basis that such theories are not based in science, but on religious faith, and are therefore an unconstitutional endorsement of religion by government.[189] In states that have recognized homosexual marriage, that lifestyle is taught to students as early as elementary school, notwithstanding the religious views of parents that might run counter to that curriculum.[190]

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185. *See, e.g.*, Pamela Harris, Pleasant Grove v. Summum *and the Establishment Clause: Giving with One Hand, Taking with the Other?*, 46 WILLIAMETTE L. REV. 677, 685-86 (2010) (discussing Justice Alito's Establishment Clause views in a recent case involving religious monuments on government property); Kelly S. Terry, *Shifting out of Neutral: Intelligent Design and the Road to Nonpreferentialism*, 18 B.U. PUB. INT. L.J. 67, 100-04 (2008) (discussing Justice Alito's record on the Establishment Clause while on the Third Circuit).

186. For an excellent discussion of the development of law concerning church and state issues in school, see Brian Heady, Note, *Constitutional Law: What Offends a Theist Does Not Offend the Establishment Clause.* Smith v. Board of School Commissioners*, 827 F.2d. 684 (11th Cir. 1987)*, 13 S. ILL. U. L.J. 153 (1988).

187. *Sch. Dist. Of Abington Tp., Pa. v. Schemp*, 374 U.S. 203, 306 (1963).

188. *Id.* at 171-72.

189. *See* Edwards v. Aguillard, 482 U.S. 578, 581-82 (1987) (invalidating a statute requiring public schools to give balanced treatment to evolution and creation science); McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255, 1256, 1274 (E.D. Ark. 1982) (invalidating a law mandating a balanced treatment of evolution and creation).

190. On February 24, 2007, a Massachusetts federal judge ruled that schools can compel children to learn about homosexuality against the wishes of their parents. Parker v. Hurley, 474 F. Supp. 2d 261, 263-64 (D. Mass. 2007). U.S. District Judge Mark L. Wolf dismissed a civil rights lawsuit, ordering that it is reasonable for public schools to teach young children to accept homosexuality. *Id.* The plaintiff had been arrested when he protested the school's

Religious values are excluded, but values that run counter to religion, and specifically Christianity, can be taught without regard to the views of the parents. Consider further, for example, that in Santa Rosa County, Florida, school officials were threatened with imprisonment for leading a prayer before a luncheon dedicating a school building, where no students were even in attendance.[191] If the courts can so easily ban religious expression, those same courts could conclude that a resurrected "Fairness Doctrine" requires Christian broadcasters to offer alternative viewpoints.[192] Certainly, the Framers would have a difficult time recognizing the landscape of American society and culture that our court system has systematically imposed upon the American people based on a narrow and incorrect interpretation of the Establishment Clause.

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refusal to notify him when his six-year-old kindergartner was going to be taught about homosexuality. *Father Faces Trial Over School's "Pro-Gay" Book*, WORLD NET DAILY (Aug. 4, 2005, 1:00 AM), http://www.worldnetdaily.com/index.php?pageId=31618. In April 2006, the same school used the book *King and King*, to teach about homosexual romances and marriage to second-graders and again refused to provide parental notification. *Parker*, 474 F. Supp. 2d. at 266. Judge Wolf found that

> In essence, under the Constitution public schools are entitled to teach anything that is reasonably related to the goals of preparing students to become engaged and productive citizens in our democracy. Diversity is a hallmark of our nation. It is increasingly evident that our diversity includes differences in sexual orientation. . . .
>
> . . . .
>
> . . . An exodus from class when issues of homosexuality or same-sex marriage are to be discussed could send the message that gays, lesbians, and the children of same-sex parents are inferior and, therefore, have a damaging effect on those students.

Id. at 263-64, 265.

191. Katie Tammen, *School Officials May Be Jailed for Prayer*, NEWSHERALD.COM (Aug. 4, 2009, 5:14 PM), http://www.newsherald.com/articles/high-76368-administrators-pensecola.html. "Principal Frank Lay and Athletic Director Robert Freeman face[d] criminal contempt charges for 'willfully violating the court's temporary injunction order' after they prayed at a school function, according to a court order of contempt." *Id.* The violation was brought to the attention of the court by the ACLU, which alleged: "Lay encouraged Freeman to lead a prayer before a meal at the dedication of a new field house during a school-day luncheon." *Id.*

192. Mallika Rao, *Christian Broadcasters Nervous About Fairness Doctrine*, CROSSWALK.COM (Aug. 8, 2008), http://www.crosswalk.com/ news/christian-broadcasters-nervous-about-fairness-doctrine-11580296.html. "If the Fairness Doctrine were to be reinstated by Congress, broadcasters would be legally forced to follow the old protocol: one-third of the airtime given to one opinion must be offered free-of-charge to opponents." *Id.* This is of particular concern to Christian broadcasters whose specific goal is to preach the gospel.

VI. CONCLUSION

In *Religion and the State*, written in 1941, the author made a statement, which became a warning to all for our present age:

> As our government extends its control over the economic activities of its citizens, are we sure that this increasingly powerful modern state may not enlarge its control over other social concerns? How far, for instance, may the state go in molding the ideas of youth, without coming into conflict with . . . the churches?[193]

The *Lemon* analysis is inconsistent with the Framers' intent for the Establishment Clause and should be abandoned. The *Lemon* analysis does more to harm the religious constitutional rights of Americans than it does to protect those who it purports to protect from the intrusion of public religious expression. The American people would be better served if the Court would reconsider its analysis in *Weisman* and adopt the view that was espoused by the dissent. The Court needs to reconsider who it is trying to protect and from what it is protecting those people by keeping religious expression limited to the private property of the church and home. The Court need not treat religious expression as though it represented the equivalent of some type of existential threat to "dissenters."

Beyond that, we have developed a society that now assumes being in the mere presence of religious speech signifies acceptance. This becomes a pernicious assumption that one has a right to be free from religion. Public expression of religion should not be forced from view and treated similarly to hate speech, pornography, or provoking words threatening the general welfare and public peace. The courts should consider whether this nation is actually better off based on the past fifty years of Establishment Clause jurisprudence that has replaced public religious expression with absolute secularism and Judeo-Christian religious morals with a subjective morality in the guise of secularism and faux neutrality.

The Framers believed that churches would mold America's social values with the indirect and subtle encouragement of government, rather than with the government's overt support for one specific creed. The Framers viewed the Establishment Clause as limiting government action only and not the actions of individuals, whether or not they were in the government's employ, or whether the religious speech occurred on the government's land. The Establishment Clause was supposed to be a shield against overt

193. EVARTS B. GREENE, RELIGION AND THE STATE 2-3 (1941).

government action to prop up one religious sect at the expense of all others, rather than a sword to remove all religious expression from public view. Somehow, though, encouragement of religious expression became unconstitutional. Since *Engel*, individual expressions of religion in the public square have been essentially eliminated in the view that such individual actions created a view of favoritism toward one religion or another.

One should not mince words. The impact of removing religion from public view has been devastating to the nation. It is a plain and open fact that since *Engel* and other court decisions that have removed religious expression from the schools and public square, the loss of religious expression has been inversely proportional to the rise in anti-social behavior. The past fifty years have seen increased rates of illegitimacy, crime, abortions, divorce, and the general coarsening of society, along with a rise in other anti-social activities related to these behaviors (e.g., dropout rates in school, increase in drug use, and greater rates of cohabitation versus marriage).

One might immediately declare that this is an outlandish use of *post hoc, ergo propter hoc*,[194] which is faulty logic. While there are always a myriad of complex reasons to explain the rise of any type of specific anti-social activity, there is always a core underlying cause, which has a point of inception. With the rise of secularism, assisted by court decisions that promoted neutrality at the expense of religious expression, there has been an increasing belief that all morality is a subjective value. This view of subjective morality holds that moral issues should not and cannot be imposed by government, as all views and actions have equal value and claim. One could also describe this as a rise of moral relativism that became ascendant in the vacuum created by the courts' limitation of religious values in the public arena. Moral relativism, which has become the de facto position of our government and society, would be a foreign concept to the Founding Fathers who believed in an objective moral code with universal truths. Our Framers believed that this universal moral code was ascertainable and understandable by society, and to be embodied in both law and public practice. If morality is subjective and there are no universal truths, it will inevitably lead to a society that provides for abortion on demand at any age, euthanasia, a removal of all age of consent laws, the elimination of governmental recognition of marriage, and of laws dealing with moral issues proscribing prostitution, gambling, adultery, and

194. Latin for "after this, therefore because of this." BLACK'S LAW DICTIONARY 1205 (8th ed. 2004). This is a fallacy "assuming causality from sequence." *Id.*

eventually even child pornography. "A bridge too far," one would declare. Yet already in Rhode Island, minors as young as sixteen can engage in adult entertainment and legalized prostitution.[195]

A ship of state with no moral anchor will float wherever societal currents carry it. The Jefferson wall as resurrected in *Everson* and carried forward by those jurists who believe in a complete and total separation of religion from government is a historical mistake. This mistake found its way not only into our constitutional jurisprudence, but into the public lexicon as well. People speak freely of the "wall of separation between church and state" as though these words were firmly planted in the First Amendment. Thus, fixing the problem involves more than just correcting the inaccurate legal analysis of the cases discussed here, but a complete education of an ill-informed society. More importantly, those who are studying law need to properly understand what our Founding Fathers intended concerning the Establishment Clause and the church's role in public affairs.

If our nation is to stop its increasing slide into moral decay, the courts will have to restore the original intent of our Founding Fathers and move away from the concept that neutrality is required. Stopping this slide requires liberating the nation from the tyranny of the *Lemon* analysis, and accepting the view that religious expression has a place in the public square no less equal than any other expression. This means overruling decisions that preclude prayers at public school graduations, moments of silence at the beginning of a school day, and allowing cities to offer religious displays during religious holidays. Religious displays in public locations should be permissible regardless of a lack of secular purpose. Students should be able to sing songs that have religious roots during holiday periods without fear that a court will find an establishment of religion. Ten Commandment monuments should be permitted regardless of location or intent. Crosses at government cemeteries should not be subject to *Lemon*-like scrutiny. The judicial mountains have declared that the Establishment Clause requires a

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195. Amanda Milkovits, *Minors in R.I. Can Be Strippers,* PROVIDENCE J. (July 21, 2009, 11:44 AM), http://www.projo.com/news/content/teen_dancers_07-21-09_Q6F39ID_v80.3985e27.html

> Providence police recently discovered that teen job opportunities extend into the local adult entertainment world while they were investigating a 16-year-old runaway from Boston. . . . That's when the police found that neither state law, nor city ordinance bars minors from working at strip clubs. . . . With the age of consent at 16 in Rhode Island, the police worry that teenage strippers could take their business to the next level and offer sexual favors—and it wouldn't be illegal.

Id.

secular society, only to see the nation lose its way in a sea of moral uncertainty, unrecognizable to those who authored the very clause. It is far past time for the experiment in judicial revisionism to end in favor of original intent for the sake of the nation.

This article ends at the point where our nation began. The Framers believed the aforementioned truths to be "self evident."[196] They believed in an objective moral code where God "endowed" all "with certain unalienable Rights."[197] When objective morality consistent with the Law of God is taken out of the equation and replaced with the subjective moral code of earthly institutions, absolutely any moral depravity can and will go. This lesson has been seen throughout all history, including our modern times. Consider ancient Rome's moral code, which was determined by the predilections of whoever was emperor at the time. An individual's civil rights, life, and liberty were subservient to the whims of the subjective moral code of the emperor, who was a god unto himself. In modern times, one need only look to Nazi Germany, Stalin's Soviet Union, or to recent events in Bosnia, Rwanda, and Darfur to see the subjective morality of these leaders play out to devastating effect. These examples suggest that when a society rejects the objective moral code—one espoused in our own Declaration of Independence—and, by default, creates an absence of God, those societies will be subsumed by depravity. If one believes that it could not eventually happen here, one might consider the fifty-three million abortions,[198] the fourteen million arrests in 2008,[199] the fifty percent divorce rate,[200] and the thirty-six percent illegitimacy rate.[201] We are a nation that is

196. THE DECLARATION OF INDEPENDENCE para. 2 (1776).

197. *Id.*

198. According to statistics maintained by the Guttmacher Institute, there have been 53.3 million abortions in the United States since *Roe v. Wade* in 1973. *Abortion Statistics*, NAT'L RIGHT TO LIFE COMM., http://www.nrlc.org/factsheets/FS03_ AbortionInTheUS.pdf (last visited Apr. 1, 2011).

199. *Table 29: Estimated Number of Arrests*, FBI (Sept. 2009), http://www2.fbi.gov/ucr/cius2008/data/table_29.html. According to the FBI, the list of crimes in 2008 include the following: Violent Crimes: 1,382,012; Property Crimes: 9,767,915; Murder: 16,272; Rape: 89,000; Robbery: 441,855; Aggravated Assault: 834,885; Burglary: 2,222,196; Larceny-theft: 6,588,873; Vehicle Theft: 956,846. *2008 Crime in the United States*, FBI (Sept. 2009), http://www2.fbi.gov/ucr/cius2008/index.html (click on either "Violent Crime" for statistics on murder, rape, robbery, aggravated assault, and violent crime in general, or "Property Crime" for statistics on burglary, larceny-theft, motor vehicle theft, and property crime in general).

200. *Divorce Statistics*, DIVORCE STATISTICS, http://www.divorcestatistics.org (last visited Apr. 9, 2011) (citing report that forty-five to fifty percent of first marriages in America end in divorce).

sleepwalking toward the abyss. We are standing at the cliff, arrogantly refusing to see that the road we have traveled has taken us from our roots. No nation is guaranteed tomorrow, and the great ones fall from within long before they fall. If this nation is to survive, we must, as a people, acknowledge the importance of religion in the life of the nation.[202]

201. The U.S. illegitimacy rate was 36.8 percent, according to data reported by the National Center for Health Statistics in its recent report, "Births: Preliminary Data for 2005." Brady E. Hamilton et al., *Births: Preliminary Data for 2005*, CTRS. FOR DISEASE CONTROL AND PREVENTION, NAT'L CNTR. FOR HEALTH STATISTICS, http://www.cdc.gov/nchs/data/hestat/prelimbirths05/prelimbirths05.htm (last updated Apr. 6, 2010).

202. The following book, while not cited, was supplemental in the formulation of this paper: JAY ALAN SEKULOW, WITNESSING THEIR FAITH: RELIGIOUS INFLUENCE ON SUPREME COURT JUSTICES AND THEIR OPINIONS (Margaret Hammerot ed., 2006).

ARTICLE

SIXTH AMENDMENT LIMITATIONS PLACED ON CROSS-EXAMINATION OF AN ACCOMPLICE-TURNED-GOVERNMENT-WITNESS

M. Jackson Jones Esq., M.S.[†]

I. INTRODUCTION

> *Alfred Pennyworth: I suppose they'll lock me up as well. As your accomplice . . . .*
> *Bruce Wayne: Accomplice? I'm going to tell them the whole thing was your idea*.[1]

The federal courts of appeals are currently split over whether the Sixth Amendment's Confrontation Clause[2] is violated when a defendant is not allowed to cross-examine an accomplice-turned-government-witness about the specific penalty reduction the accomplice believed he or she would receive for testifying for the government and against the defendant.[3] This split that began in the 1980s has existed for nearly thirty years. Courts of appeals have fallen on one side or the other of the question of whether prohibiting inquiry into an accomplice's subjective beliefs violates the Confrontation Clause.[4] This Article argues that prohibiting such inquiry violates the Confrontation Clause.

Part II of this Article examines the early history of the Confrontation Clause, particularly cases and events that led to the adoption of the clause. Part III discusses some opinions from federal courts of appeals that have

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1. THE DARK KNIGHT (Warner Bros. Pictures 2008).

2. U.S. CONST. amend. VI.

3. *See* United States v. Chandler, 326 F.3d 210, 220 (3d Cir. 2003).

4. *See* United States v. Luciano-Mosquera, 63 F.3d 1142 (1st Cir. 1995). *But see Chandler*, 326 F.3d at 210; United States v. Turner, 198 F.3d 425 (4th Cir. 1999). The remaining federal courts of appeals are either undecided on the issue or have not addressed it.

addressed this issue. Part IV analyzes relevant Supreme Court precedent, the admissibility of accomplice statements, and the Federal Rules of Evidence.

II. THE SIXTH AMENDMENT

> *In all criminal prosecutions, the accused shall enjoy the right* to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.[5]

The Bill of Rights conferred a host of additional constitutional protections in 1791, but many of these rights, including those relating to criminal prosecutions under the Sixth Amendment, have historical roots reaching back throughout history. "The inspiration for the Confrontation Clause likely derived from the English system, but the concept of 'facing the accusers against you' can be seen in the works of William Shakespeare and the *Bible*."[6] For example, Shakespeare wrote in Richard II, "[t]hen call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak . . . ."[7]

Similarly, in *Acts* 25, the Apostle Paul was charged with several crimes.[8] Though Paul's accusers wanted him sentenced to death,[9] Festus, the Roman governor of Judea, refused to sentence the Apostle without allowing him to face his accusers.[10] Festus declared, "[i]t is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges."[11]

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5. U.S. CONST. amend. VI (emphasis added to highlight the Confrontation Clause).

6. Joshua C. Dickinson, *The Confrontation Clause and the Hearsay Rule: The Current State of a Failed Marriage in Need of a Quick Divorce*, 33 CREIGHTON L. REV. 763, 765 (2000).

7. Coy v. Iowa, 487 U.S. 1012, 1016 (1988) (quoting WILLIAM SHAKESPEARE, RICHARD II act 1, sc. 1).

8. *Acts* 25:7 (NIV).

9. *Acts* 25:1-3 (NIV).

10. *Acts* 25:1-6 (NIV).

11. *Coy*, 487 U.S. at 1015-16 (citing *Acts* 25:16).

The Roman Emperor Trajan faced the same confrontation issues during the Empire's prosecution of Christians.[12] He ruled, "anonymous accusations must not be admitted in evidence as against anyone, as it is introducing a dangerous precedent, and out of accord with the spirit of our times."[13]

Confrontation issues continued to proliferate throughout the sixteenth and seventeenth centuries. For example, English court officials, such as justices of the peace, examined witnesses prior to trial.[14] "These examinations were sometimes read in court in lieu of live testimony, a practice that 'occasioned frequent demands by the prisoner to have his 'accusers,' i.e. the witnesses against him, brought before him face to face.'"[15]

Parties raised such demands in a number of British cases. In 1554, Sir Nicholas Throckmorton stood trial for treason.[16] The court would not allow Throckmorton to have an attorney, call witnesses, or present any defense.[17] During his trial that lasted one day, Throckmorton objected to the prosecution's use of a missing witness's deposition.[18] He stated, "how happeneth it he is not brought face to face to justify this matter . . . ."[19] Throckmorton's objection was unsuccessful, and he was convicted.

Nearly fifty years after Throckmorton's case, the confrontation issue was raised again during the trial of Sir Walter Raleigh. His trial was perhaps the most famous confrontation case in British history.

In 1603, Raleigh stood trial for treason.[20] During his trial, the prosecution read letters from Raleigh's alleged accomplice, Lord Cobham,[21] as well as Cobham's examination before the Privy Council.[22] In both the examination and the letter, Cobham implicated Raleigh.[23] Raleigh

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12. Daniel H. Pollit, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 384 (1959).

13. *Id.*

14. Crawford v. Washington, 541 U.S. 36, 43 (2003).

15. *Id.*

16. Robert J. McWhirter, *How the Sixth Amendment Guarantees You the Right to a Lawyer, A Fair Trial, and a Chamber Pot*, ARIZ. ATT'Y, Dec. 2007, at 17 n.3.

17. *Id.*

18. David Lusty, *Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials*, 24 SYDNEY L. REV. 361, 371 (2002).

19. *Id.*

20. *Crawford*, 541 U.S. at 44.

21. *Id.*

22. *Id.*

23. *Id.*

adamantly protested the introduction of these two items, arguing that a desire to obtain the King's favor motivated Cobham's accusations.[24] Raleigh stated, "Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favour."[25] Raleigh also demanded Cobham be brought to court to testify personally against him.[26] He said, "[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face . . . ."[27] The trial judge did not grant Raleigh's demands and instead sentenced Raleigh to death.[28]

In the wake of Sir Walter Raleigh's unjust trial, Parliament made face-to-face confrontation mandatory for the prosecution of certain crimes.[29] "For example, treason statutes required witnesses to confront the accused 'face to face' at his arraignment."[30] Parliament also changed the rules for admitting evidence from witnesses who were unavailable to testify.[31] For example, in the 1696 case of *King v. Paine*, the court held that a deceased witness's testimony could not be used against a defendant when the defendant did not receive an opportunity to cross-examine the witness.[32]

A. The Colonial Roots of the Confrontation Clause

The American colonies also faced their own confrontation issues.[33] The Virginia Council "protested against the Governor for having 'privately issued several commissions to examine witnesses against particular men *ex parte*,' complaining that 'the person accused is not admitted to be confronted with, or defend himself against his defamers.'"[34] The colonists sought to remedy such governmental behavior by including constitutional provisions granting defendants the right to confront their accusers.

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24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* One of Raleigh's judges even said, "[t]he justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh." *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 46.

34. *Id.* at 47.

For example, Article XII of the Massachusetts Declaration of Rights states, "every subject shall have a right . . . to meet the witnesses against him face to face . . . ."[35] This same notion appears in Article I, Section XV of the New Hampshire State Constitution and Section IX of the Pennsylvania Declaration of Rights.[36]

Other state constitutions granted defendants the right to confront their accusers without using face to face terminology. For example, the Maryland Declaration of Rights provides "[t]hat in all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him."[37] The North Carolina State Constitution and the Virginia Declaration of Rights have similar provisions.[38]

Interestingly, the proposed federal Constitution almost did not contain the Confrontation Clause.[39] However, it became a part of the Constitution after legislators advocated for its adoption.[40]

B. The International Response

Other nations adopted constitutional provisions that are very similar to the Sixth Amendment's Confrontation Clause. The Philippine Bill of Rights, for example, has been interpreted as "secur[ing] the accused the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination."[41] The Japanese Constitution also has a provision that states "[the accused] 'shall be permitted full opportunity to examine all witnesses . . . .'"[42]

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35. MASS. CONST. pt. 1, art. XII.

36. *See* N.H. CONST. pt. I, art. XV ("Every subject shall have a right . . . to meet the witnesses against him face to face . . . ."); *see also* PA. CONST. art. I, § IX ("That in all prosecutions for criminal offences, a man hath a right . . . to be confronted with the witnesses [against him] . . . .").

37. MD. CONST. Declaration of Rights art. XXI.

38. *See* VA. DECLARATION OF RIGHTS § 8 (1776) ("[A] man hath a right to . . . be confronted with the accusers and witnesses . . . ."); *see also* N.C. CONST. art. I, § 23 ("[I]n all criminal prosecutions, every man has a right to be informed of the accusation against him, and to confront the accusers and witnesses with other testimony . . .").

39. *Crawford*, 541 U.S. at 48.

40. *Id.* at 48-49.

41. Coy v. Iowa, 487 U.S. 1012, 1017 (1988).

42. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] art. 37, para. 1 (Japan).

III. THE FEDERAL CIRCUIT SPLIT

Federal courts vary in their application of the Confrontation Clause, and several circuits are split on an issue concerning the subjective intent of the witness. The confusion arises when determining whether the accused has a Sixth Amendment right to interrogate a witness concerning the subjective reasons behind a witness's acceptance of a plea agreement and the subsequent impact on the witness's willingness to testify.

A. The First Circuit Court of Appeals' View in United States v. Luciano-Mosquera*: No Confrontation Clause Violation if a Defense Attorney Cannot Inquire Into an Accomplice's Subjective Understanding of His or Her Plea Agreement With the Government*

Carlos Pan-San-Miguel ("Miguel"), Edgar Gonzalez-Valentin, Raul Lugo-Maya, Rafael Pava-Buelba, and Julio Luciano-Mosquera were found guilty of various drug offenses.[43] During Miguel's trial, one of his co-accomplices, Jonas Castillo-Ramos ("Ramos"), testified against him and for the government.[44] In return for Ramos's testimony, the government did not pursue firearm charges against him.[45]

Miguel's attorney attempted to cross-examine Ramos about the penalties Ramos would have faced if the government pursued the firearm charges.[46] Specifically, the defense attorney attempted to ask Ramos "whether [Ramos's] attorney had informed him that if he had been 'found guilty of the possession of the firearm during the commission of a drug offense [he would be] sentenced to thirty-five years in addition to the drug offense.'"[47] The judge did not allow this question.[48]

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43. United States v. Luciano-Mosquera, 63 F.3d 1142, 1148 (1st Cir. 1995). The five defendants were found guilty of conspiracy to import cocaine, importing 232.8 kilograms of cocaine, possessing cocaine with intent to distribute, and knowingly carrying or aiding and abetting the carrying of firearms in relation to the drug trafficking. *See id.*

44. *Id.* at 1153.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* (noting that the trial judge ruled that informing the jurors about the possible penalties Ramos faced was an attempt to inform jurors about the penalties Miguel faced for violating the same firearm statute).

On appeal, Miguel argued that the judge's ruling violated his Sixth Amendment rights under the Confrontation Clause.[49] The First Circuit Court of Appeals agreed with the trial judge's ruling.[50] It noted that the trial court has discretion to limit cross-examination that may be prejudicial, repetitive, or irrelevant.[51] Additionally, the court stated that a trial judge does not exceed this discretion as long as the jury had enough evidence to "make a discriminating appraisal of the possible biases and motivations of the witnesses."[52]

In this case, the court believed the jury had sufficient information to make a discriminating appraisal of Ramos's biases. It recognized that Miguel's attorney was allowed to repeatedly ask Ramos about any benefits the government provided him for testifying.[53] The court believed that informing the jury of the number of years Ramos avoided was of very minimal value. It wrote, "[t]he district court properly decided that the value of the information was outweighed by the potential for prejudice by having the jury learn what penalties the defendants were facing."[54]

B. Alternative Views: Confrontation Clause Violation If A Defense Attorney Cannot Inquire Into An Accomplice's Subjective Understanding Of His Or Her Plea Agreement With The Government

Other circuits have rejected the First Circuit's view that there is minimal value in allowing the jury to hear the benefits bestowed on the witness for his or her testimony. These courts consider preventing a jury from hearing the consequences that will be imposed on the witness for not testifying as problematic. This information, they contend, is necessary for the jury to understand any bias or prejudice, and to determine what weight such testimony should be given.

1. The Fourth Circuit Court of Appeals: *United States v. Turner* (1999)

Eric Michael Turner was convicted of "engaging in a continuing criminal enterprise; intentionally killing an individual while engaging in a continuing criminal enterprise; interstate travel in aid of a racketeering

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49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* (quoting Brown v. Powell, 975 F.2d 1, 5 (1st Cir. 1992)).

54. *Id.* at 1153.

enterprise; and using and carrying a firearm during a crime of violence."[55] On appeal, Turner argued that the trial court inappropriately limited his cross-examination of an accomplice-turned-government-witness, Denise Grantham.[56]

During his trial, Turner's defense attorney attempted to cross-examine Grantham about the penalties she faced for participating in the murder. The following exchange took place:

> [Turner's attorney]: So your choices were to talk with the police or be indicted for continuing criminal enterprise and for murder; is that right?
> [Grantham]: Yes.
> [Turner's attorney]: Did you have some idea what the penalties might be at that time?
> [Grantham]: My understanding was . . . .[57]

The prosecution objected, asserting that the penalties were not relevant. The judge refused to allow Grantham to answer the question because the judge believed her answer would inform jurors of the penalties Turner faced.[58] Instead, Grantham was only permitted to state that the penalties she faced were "pretty serious."[59]

The Fourth Circuit reversed the trial judge's ruling, holding that an accomplice-turned-government-witness could be cross-examined about the accomplice's subjective understanding of the penalties he would face if the accomplice did not testify for the prosecution.[60] The court believed that this information helped defense attorneys establish an accomplice's bias, prejudice, and motive for testifying against his co-accomplice.[61] The court therefore ruled that such information was relevant in helping the jury assess the accomplice-turned-government-witness's credibility.[62]

In addition, the Fourth Circuit was not concerned with the jury learning about the penalties Turner faced. It instead held that the "impeachment value of Grantham's testimony" outweighed any of these concerns.[63]

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55. United States v. Turner, 198 F.3d 425, 427 (4th Cir. 1999).
56. *Id.* at 429.
57. *Id.*
58. *Id.*
59. *Id.* at 430.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*

2. The Third Circuit Court of Appeals: *United States v. Chandler* (2003)

Linda Lee Chandler was convicted of drug trafficking and sentenced to 121 months imprisonment.[64] During Chandler's trial, two accomplices, Sly Sylvester and Kathleen Yearwood, testified against her for the prosecution.[65] Chandler's attorney "attempted to cross-examine Sylvester about the sentence reduction he had received, and to cross-examine Kathleen Yearwood about the reduction she hoped to receive, in exchange for their guilty pleas and cooperation."[66] The trial judge limited Chandler's attorney's inquiry to the accomplices' subjective beliefs.

(a) Sylvester's Testimony

Sylvester admitted that he was testifying pursuant to a plea agreement.[67] Since Sylvester testified against Chandler, the government "limited the charges against him to those associated with the three-ounce cocaine sale . . ." even though Sylvester admitted to selling nearly five kilograms of cocaine.[68] Instead of being imprisoned for twelve to eighteen months, as recommended by the Sentencing Guidelines, Sylvester's cooperation resulted in a sentence of one month of house arrest and probation.[69]

The following is an excerpt from the cross-examination of Sylvester:

> [Chandler's Attorney]: Did anyone explain to you what the penalties for five kilos is under the guidelines?
> [United States Attorney]: Your Honor, I object to these questions regarding the penalties for five kilos.
> [The Court]: Okay. Penalties should not be discussed in the case, I would agree.
> [Chandler's Attorney]: All right.
> [Chandler's Attorney]: Did they ever—well, was it explained to you that it was much more serious, that the Government actually gave you a break by charging you this small amount?

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64. United States v. Chandler, 326 F.3d 210, 213 (3d Cir. 2003).

65. *Id.*

66. *Id.* at 216.

67. *Id.*

68. *Id.* at 216-17 (noting that during his testimony, Sylvester acknowledged that he could have been charged with trafficking cocaine).

69. *Id.* at 217.

> [Sylvester]: That's a great question because they only had me on three ounces. That's what they said the terms of this would be 12 to 18. I am not so sure exactly of your question. Would you want me to say to you that the bigger you sell, the more you sell, the more penalty? Well, of course.
> [Chandler's Attorney]: Okay. At the time you sold that three ounces, you had been dealing for awhile, hadn't you?
> [Sylvester]: Yes, sir.[70]

(b) Yearwood's Testimony

Prior to testifying, Yearwood pled guilty to trafficking between fifteen to fifty kilograms of cocaine, but she had not been sentenced.[71] She testified in hopes "that the government would move for a reduced sentence against her."[72]

Yearwood's cross-examination was similar to Sylvester's:

> [Chandler's Attorney]: . . . You want to talk about Linda Chandler, is that correct?
> [Yearwood]: Right.
> [Chandler's Attorney]: Because you have an agreement, isn't that correct, and [the assistant United States Attorney] is going to, you hope, put in a motion to cut your time?
> [Yearwood]: Yes.
> . . .
>
> [Chandler's Attorney]: Now you want to help yourself and help—because you are in serious trouble. You were dealing in multikilos. Yes or no?
> [Yearwood]: I'm 50. No more than 50.
> [Chandler's Attorney]: No more than 50 in this. But do you think you dealt more than 50?
> [Yearwood]: No, I don't think so.
> . . .
> [Chandler's Attorney]: How many lie detector tests did the Government put you on?
> [Yearwood]: None, but they can put me on them.

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70. *Id.*

71. *Id.*

72. *Id.*

> [Chandler's Attorney]: Isn't that in your plea agreement letter?
> [Yearwood]: Yes, it is.
> [Chandler's Attorney]: But they haven't, and it's [the assistant United States Attorney] who is going to write that letter to this Judge to say that you're honest and forthright, so you are going to talk about Linda Chandler, is that correct?
> [Yearwood]: No.
> [Chandler's Attorney]: That's what you are here for today, to talk about Linda Chandler?
> [Yearwood]: No, I'm here to tell the truth.
> . . .
>
> [Chandler's Attorney]: And you know that you're here, you're facing a heavy sentence—what did your attorney, Mr. Riester, tell you you're facing?
> [United States Attorney]: Your honor, again I object to discussing the penalties here.
> [The Court]: The objection is sustained. I think the point's been made that she knows by testifying she might get a reduction.
> [Chandler's Attorney]: Okay. No other questions.[73]

(c) The Court's Ruling

The Third Circuit ruled that the trial judge should have permitted Chandler's attorney to inquire into Sylvester and Yearwood's subjective understanding of their plea agreements with the government.[74] It stated, "a reasonable jury could have 'reached a significantly different impression' of Sylvester's and Yearwood's credibility had it been apprised of the enormous magnitude of their stake in testifying against Chandler."[75]

The court recognized that the jury heard that Sylvester pled guilty to a drug offense and could have received twelve to eighteen months imprisonment but only received house arrest and probation.[76] The court ruled that this information was insufficient to allow the jury to adequately weigh Sylvester's testimony. Instead, the court determined that the jury should have been told that Sylvester could have received eight years

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73. *Id.* at 218.

74. *Id.* at 222.

75. *Id.*

76. *Id.*

imprisonment instead of "the modest sentence he in fact received."[77] Thus, it ruled "[t]he limited nature of Sylvester's acknowledgment that he had benefitted from his cooperation made that acknowledgment insufficient for a jury to appreciate the strength of his incentive to provide testimony that was satisfactory to the prosecution."[78]

Additionaly, the court held that the jury was also entitled to learn about the benefits Yearwood hoped to receive.[79] Yearwood was facing a penalty of nearly twelve years imprisonment.[80] Since she testified in hopes of receiving a reduced sentence, the court stated that the jury was entitled to hear the sentencing reduction she expected to receive.[81] If Yearwood "anticipated a benefit equal to even a fraction of Sylvester's proportionate penalty reduction, her mere acknowledgment that she hoped that the government would move for a lesser sentence did not adequately enable a jury to evaluate her motive to cooperate."[82]

IV. DO DEFENSE ATTORNEYS' DESERVE DEFERENCE? AN ANALYSIS

A. A Broad Test

The Supreme Court has held that "cross-examination is the principal means by which the believability of a witness and the truthfulness of his testimony are tested."[83] Even though trial judges are given significant latitude to limit cross-examination, the Supreme Court has indicated that defense attorneys should be given broad leeway in examining an accomplice's bias. In *Delaware v. Van Arsdall*, it recognized the test for determining if a defendant's Confrontation Clause rights have been violated. The Supreme Court ruled:

> We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and

77. *Id.* (noting that according to the Sentencing Guidelines, the base offense level for a defendant convicted of trafficking between 3.5 and 5 kilograms of cocaine is between 97 and 121 months imprisonment).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. Davis v. Alaska, 415 U.S. 308, 316 (1974).

> thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness."[84]

To prove a violation of the Confrontation Clause, therefore, a defendant merely has to show two things: (1) he was attempting to cross-examine an accomplice about any potential bias the accomplice has for testifying for the government, and (2) this bias would aid the jury in determining how much credit it should give to the accomplice's testimony.[85]

The Supreme Court has given substantial deference to defense attorneys when they are seeking to expose an accomplice's bias. In these cases, the Supreme Court ruled the limitations placed on cross-examination violated the Confrontation Clause.

The first illustration of this point was revealed by the Court in *Davis v. Alaska*. On February 16, 1970, over $1,000 dollars and a safe were stolen from the Polar Bar.[86] Police found the safe about twenty-six miles outside of Anchorage, Alaska near the home of Jess Straight and his family.[87] Straight's stepson, Richard Green, told the police that he saw "two Negro men standing alongside a late-model metallic blue Chevrolet sedan near where the safe was later discovered."[88] Green identified Davis as one of the men standing near the Chevrolet.[89]

During Davis's trial, Green was called as a witness.[90] Prior to his testifying, the prosecutor sought to prevent the defense attorney from using Green's juvenile record for impeachment purposes.[91] Davis's attorney informed the court that he would not use Green's juvenile record to impeach his character.[92] Instead, the attorney wanted to show Green aided

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84. Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986) (quoting *Davis*, 415 U.S. at 318).

85. The Court has placed parameters on this rule. For example, the testimony solicited by the defense attorney must to be in accord with Federal Rule of Evidence 403. FED. R. EVID. 403. Any attempt to expose an accomplice's bias must be relevant and not harassing, prejudicial or misleading. *See id.*

86. *Davis*, 415 U.S. at 309.

87. *Id.*

88. *Id.*

89. *Id.* at 310.

90. *Id.*

91. *Id.* at 310-11 (noting that at the time of the trial Green was on probation for burglarizing two cabins).

92. *Id.* at 311.

police "out of fear or concern of possible jeopardy to his probation."[93] The attorney argued that he would only use the juvenile record to expose Green's potential biases or prejudices for aiding the police.[94]

The trial judge agreed with the prosecutor and prevented the defense attorney from inquiring into Green's juvenile probation.[95]

The Alaska Supreme Court affirmed the conviction.[96] The court refused to address the Confrontation Clause issue because it believed Davis's attorney was afforded adequate opportunity to cross-examine Green about his potential biases or motivations for testifying for the government.[97] Davis appealed to the Supreme Court.[98]

The Court had to decide whether a defendant's Confrontation Clause rights were violated when the defendant could not cross-examine a government witness about possible biases "deriving from the witness' probationary status as a juvenile delinquent when such an impeachment would conflict with a State's asserted interest in preserving the confidentiality of juvenile adjudications of delinquency."[99]

The Court noted that one of the most important rights under the Confrontation Clause is the right to cross-examination, which served two significant purposes.[100] First, it provided the defendant an opportunity to question a witness's memory and observations.[101] Second, cross-examination served as an effective tool for impeaching or discrediting witnesses.[102] The Court wrote, "[w]e have recognized that the exposure of a

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93. *Id*.

94. *Id.*

95. *Id.* (noting that the judge's decision was based on Alaska Rule of Children's Procedure 23 and Alaska Statute § 47.10.080(g)). Rule 23 provides, in pertinent part: "No adjudication, order, or disposition of a juvenile case shall be admissible in a court not acting in the exercise of juvenile jurisdiction except for use in a presentencing procedure in a criminal case where the superior court, in its discretion, determines that such use is appropriate." ALASKA R. OF CHILD. PROC. 23. Under Section 47.10.080(g), "[t]he commitment and placement of a child and evidence given in the court are not admissible as evidence against the minor in a subsequent case or proceedings in any other court . . . ." ALASKA STAT. § 47.10.080(g) *repealed by* 1996-59 Alaska Adv. Legis. Serv. 55 (LexisNexis); *see also Davis*, 415 U.S. at 311.

96. *Davis*, 415 U.S. at 314-15.

97. *Id.*

98. *Id.*

99. *Id.* at 309.

100. *Id.* at 315-16.

101. *Id.*

102. *Id.*

witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."[103]

In *Davis*, the Court believed the defense attorney's inquiry into Green's potential biases was appropriate. The Court noted that the jury was entitled to hear testimony about Green's probation status, because the government's case was largely based on Green's testimony.[104] Recognizing that Green's credibility was an important issue in the trial, the Court stated, "[t]he claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer, as well as of Green's possible concern that he might be a suspect in the investigation."[105]

Additionally, in *Delaware v. Van Arsdall*, the Court reiterated its deference to defense attorneys during cross-examination. In *Van Arsdall*, the state of Delaware alleged that Robert Van to testify.[106] On cross-examination, Van Arsdall's attorney tried "questioning [Fleetwood] about the dismissal of a criminal charge against him—being drunk on a highway—after he had agreed to speak with the prosecutor about Epps' murder."[107] The trial court allowed the defense to only question Fleetwood about the dismissal outside the jury's presence.[108] In addition, the trial judge also ruled that Van Arsdall's attorney could not cross-examine Fleetwood about any specific details of his plea agreement with the government.[109] Van Arsdall was found guilty of first-degree murder.[110]

The Delaware Supreme Court reversed the conviction and held that "[b]y barring *any* cross-examination of Fleetwood about the dismissal of the public drunkenness charge, the ruling kept from the jury facts concerning bias that were central to assessing Fleetwood's reliability."[111] The United States Supreme Court vacated Van Arsdall's sentence and remanded his case.[112]

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103. *Id.*

104. *Id.* at 319-20.

105. *Id.* at 317-18.

106. *Id.* at 675.

107. *Id.*

108. *Id.*

109. *Id.* (noting that the judge's rationale for limiting any cross-examination about the plea agreement was based on Delaware Rule of Evidence 403, which is similar to the Federal Rule of Evidence 403); D.R.E. 403 (1980); FED R. EVID. 403.

110. *Van Ardsell*, 475 U.S. at 677.

111. *Id.*

112. *Id.* at 678.

The Court believed that completely precluding Van Arsdall's attorney from questioning Fleetwood about the dismissal of his public drunkenness case violated the Confrontation Clause.[113] It recognized that the jury's impression of Fleetwood might have been different if it had known about the dismissal of his criminal case.[114] The Court also noted that a judge's latitude to restrict cross-examination cannot, under any circumstances, impede a defendant's rights under the Confrontation Clause.[115] Thus, as the Fourth Circuit Court of Appeals noted, "any exercise of discretion once that threshold is reached must be informed by 'the utmost caution and solicitude for the defendant's *Sixth Amendment* rights.'"[116]

Both *Davis* and *Van Arsdall* establish that the Supreme Court has afforded defense attorneys broad discretion when cross-examining an accomplice-turned-government-witness about his or her motivations for testifying for the government. The Court has stated that cross-examination "reveal[s] possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand."[117] It has recognized it is a vital constitutional right that should be protected.

These cases also show that cross-examination allows a jury to better assess or weigh an accomplice's testimony. The policies underlying cross-examination support this premise. As the *Davis* court recognized, cross-examination serves two important functions.[118] First, it exposes an accomplice's bias and motivation for testifying.[119] Second, cross-examination tests a witness's memory or observations.[120] The second purpose is significant in situations in which the accomplice's memory or observations are swayed by the promise of a reduced term of imprisonment or dismissal of a criminal case. It is also significant in situations where the government's case is substantially based on the testimony of an accomplice. Cross-examination "is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness,

113. *Id.* at 679.

114. *Id.* at 680.

115. *Id.* at 679.

116. Hoover v. Maryland, 714 F.2d 301, 305 (4th Cir. 1983).

117. Davis v. Alaska, 415 U.S. 308, 316 (1974).

118. *Id.* at 316.

119. *Id.*

120. *Id.*

intolerance, prejudice, or jealousy."[121] An accomplice-turned-government-witness can fit into any of these categories.

B. Accomplice Statements in Lilly v. Virginia

In *Lilly*, the Supreme Court had to determine whether a defendant's Confrontation Clause rights were violated when a court allowed introduction of an accomplice's entire confession that contained both statements against the accomplice's penal interest and implicated the defendant.[122] Benjamin Lee Lilly and two accomplices, Mark Lilly and Gary Wayne Barker, broke into a home and stole some alcohol, guns, and a safe.[123] They then kidnapped, shot, and killed Alex DeFilippis.[124] Benjamin and his accomplices then committed two more robberies.[125] Mark admitted to committing the burglary, stealing alcohol, and participating in at least one of the robberies.[126] He also informed police that Benjamin shot DeFilippis.[127]

During Benjamin's trial, the government called Mark as a witness.[128] However, instead of testifying, he invoked his Fifth Amendment privilege against self-incrimination.[129] The trial judge allowed the Commonwealth to introduce Mark's taped and written statements.[130] Benjamin was found guilty.[131] The Supreme Court of Virginia affirmed the conviction.[132]

The United States Supreme Court reversed ruling, "we have over the years 'spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants.'"[133] Prior court precedence supported the Court's position. In *Lee v. Illinois*, the Court stated, "[W]hen one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation

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121. *Id.* at 317 n.4 (quoting Greene v. McElroy, 360 U.S. 474, 496 (1959)).
122. Lilly v. Virginia, 527 U.S. 116, 120 (1999).
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 121.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 122.
131. *Id.*
132. *Id.*
133. *Id.* at 131 (quoting Lee v. Illinois, 476 U.S. 530, 541 (1986)).

is presumptively suspect and must be subjected to the scrutiny of cross-examination."[134] In *Crawford v. United States*, the Court ruled that courts should be suspicious of an accomplice's confession that implicated both the accomplice and defendant.[135] The *Crawford* court even recognized that accomplice confessions "ought . . . not be passed upon by the jury under the same rules governing other and apparently credible witnesses."[136]

The sentiments of *Lilly* have been reflected in decisions from other courts.[137] These courts have also acknowledged that the testimony of accomplice-turned-government-witnesses is inherently unreliable and questionable. For example, one court has noted, "'where . . . an accomplice of the defendant . . . may have some other substantial reason to cooperate with the government, the defendant should be permitted wide latitude in the search for the witness' bias.'"[138]

C. Cross-Examination Should Solely Be Limited To An Accomplice's Subjective Understanding of His Or Her Plea Agreement With The Government

Defense attorneys should only be permitted to question the accomplice about his or her subjective understanding of any plea agreement he or she entered into with the government. The attorney should not be allowed to ask the accomplice about the government's reasons for entering into the plea agreement. If the defense were permitted to do so, the accomplice would not know of the government's motivations, and any answer by the accomplice would be mere speculation.

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134. *Id.* at 132 (citing *Lee*, 476 U.S. at 541). The *Lilly* Court recognized that the dissenting justices in *Lee* "agreed that 'accomplice confessions ordinarily are untrustworthy precisely because they are *not* unambiguously adverse to the penal interest of the declarant's but instead are likely to be attempts to minimize the declarant's culpability." *Id*. (citing *Lee*, 476 U.S. at 552-53) (Blackmun, J., dissenting).

135. *Id*. at 131 (citing Crawford v. United States, 212 U.S. 183, 204 (1909)).

136. *Id.* (citing *Crawford*, 212 U.S. at 204).

137. *See, e.g.*, Hoover v. Maryland, 714 F.2d 301, 305 (4th Cir. 1983) (stating that a defendant should be permitted wide-latitude to search for a witnesses' bias when an accomplice may have a substantial reason to cooperate with the government); Burr v. Sullivan, 618 F.2d 583, 586-87 (9th Cir. 1980) (discussing defendant's right to cross-examine accomplices to show their inherent bias or self-interest in testifying); United States v. Onori, 535 F.2d 938, 945 (5th Cir. 1976) (discussing the importance of granting a defendant the right to cross-examine an accomplice who may have a substantial reason to cooperate with the government).

138. *Hoover*, 714 F.2d at 305 (quoting United States v. Tracey, 675 F.2d 433, 438 (1st Cir. 1982)).

In *Davis*, the Supreme Court twice noted that a witness's subjective motivation for testifying was an appropriate subject of cross-examination. It wrote, "'[a] partiality of mind at some *former time* may be used as the basis of an argument to the same state at the time of testifying; though the ultimate object is to establish partiality at the time of testifying.'"[139] There is partiality of mind when an accomplice-turned-government-witness enters a plea agreement to testify against another accomplice.

The *Davis* Court also stated, "[w]e have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."[140] The accomplice has a motive to testify because the accomplice anticipates his or her testimony will result in either a reduced sentence or dismissal of his or her criminal case.

D. Federal Rules of Evidence

Rule 403 of the Federal Rules of Evidence governs the admissibility of relevant evidence. It provides "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[141] Any issue relating to the accomplice's bias is not only relevant, but of great probative value. The federal courts and Supreme Court have supported this premise by heavily scrutinizing the introduction of an accomplice's testimony.

Generally, courts are concerned that the value of the accomplice's subjective reason for entering into a plea agreement is not "outweighed by the potential for prejudice by having the jury learn what penalties the defendants were facing."[142] A jury's knowledge of the potential penalty a defendant is facing, though, should not outweigh the defendant's rights under the Confrontation Clause." The government's "interest in protecting the anonymity of juvenile offenders, ha[s] to yield to [the] constitutional

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139. Davis v. Alaska, 415 U.S. 308, 317 n.5 (1979) (citing 3A WIGMORE, EVIDENCE § 940, 776 (emphasis in original)).

140. *Id.* at 316-17 (citing Greene v. McElroy, 360 U.S. 474, 496 (1959)).

141. FED. R. EVID. 403.

142. United States v. Luciano-Mosquera, 63 F.3d 1142, 1153 (1st Cir. 1995). This concern typically arises when the defendant and accomplice are charged with violating the same laws.

right to probe the 'possible biases, prejudices, or ulterior motives of the [witness] . . . .'"[143]

Rule 611 of the Federal Rules of Evidence provides the parameters of cross-examination. The Rule provides, "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the *credibility of the witness*. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination."[144] Trial judges should use their discretion to allow defense attorneys to inquire into accomplice's subjective motives for testifying for the government. Such information is directly relevant to the credibility of the accomplice-turned-government-witness by exposing his or her bias against the defendant.

V. CONCLUSION

The courts have unanimously recognized that one cannot trust accomplices. Not only is the accomplice usually charged with the same offense as the defendant, but the accomplice also shares culpability. When an accomplice-turned-government-witness testifies against another accomplice, he or she does so with the specific intent to receive a beneficial agreement from the government. These agreements usually include less severe terms of imprisonment or other penalties than the accomplice could face if he or she did not agree to testify for the government. The benefits of these agreements should always be presented to the jury.

If a jury is unaware of the accomplice's understanding of his or her sentencing reduction, that jury's assessment of the accomplice's credibility may be skewed. As one court wrote, "[i]f the trial court [does] not [prohibit the defendant] from cross-examining [the witnesses] with respect to the *magnitude* of the sentence reduction they believed they had earned, or would earn, through their testimony, the jury might [receive] a significantly different impression of [their] credibility."[145]

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143. United States v. Chandler, 326 F.3d 210, 223 (3d Cir. 2003) (quoting *Davis*, 415 U.S. at 316).

144. FED. R. EVID. 611 (emphasis added).

145. Wilson v. Delaware, 950 A.2d 634, 639 n.9 (Del. 2008) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986)).

COMMENT

CRIMINALS BY NECESSITY: THE AMERICAN HOMELESS IN THE TWENTY-FIRST CENTURY

Lisa M. Kline[†]

> Remember when homelessness itself was not a crime, until the homeless made themselves too visible by panhandling at ATMs? Only when they made affluent people uncomfortable were they locked up . . . . The criminalization of homelessness—one of the ways this society gets rid of the poor as well as a certain number of people with psychiatric disabilities—removes the daily reminders of the obvious injustice of the very existence of homelessness in the richest country in the world.[1]

I. INTRODUCTION

As the economic condition of the nation worsens, the plight of the American homeless population continues to deteriorate. Since the beginning of the current recession, families across the nation have been forced into poverty. Between April of 2008 and April of 2009, there was a 32% increase in foreclosures nationwide.[2] Over six million jobs have been lost since the economic downturn, and that number continues to grow every day.[3] In fact, the national unemployment rate peaked in October of 2009; at over 10%—its highest point since 1983.[4] Often, the cost of living prevents these people from getting back on their feet. In every state, more than minimum wage is required to afford a one- or two-bedroom apartment at Fair Market Rent,[5] making it virtually impossible for an entire fragment of

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1. TERRY KUPERS, PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT 259 (1999).

2. *Why Are People Homeless?*, NAT'L COAL. FOR THE HOMELESS, http://www.nationalhomeless.org/factsheets/Why.pdf (July, 2009).

3. *Id*.

4. Peter S. Goodman, *U.S. Unemployment Rate Hits 10.2%, Highest in 26 Years*, N.Y. TIMES, Nov. 6, 2009, at B1, *available at* http://www.nytimes.com/2009/11/07/business/economy/07jobs.html (last visited Feb. 16, 2010).

5. Fair Market Rent is the "amount needed to rent privately owned, decent, safe, and sanitary rental housing of a modest (non-luxury) nature with suitable amenities." Final Fair Market Rents for Fiscal Year 2010 for the Housing Choice Voucher Program and Moderate

society to obtain permanent housing.[6] Without any other options, many of these families have had to move to the streets and shelters.

It is estimated that over 12% of the nation's population lives in poverty.[7] These individuals, if not already homeless, are teetering on the edge of homelessness.[8] One car accident, one job loss, or one health issue would send any one of these people to the street in a matter of days.

As the problem of homelessness grows, so do laws criminalizing homeless activities. In a 2009 report, the National Law Center on Homelessness and Poverty surveyed 235 cities across the nation and compiled information about city ordinances criminalizing homelessness.[9] Of those 235 cities, 33% prohibit "camping" in particular public places, 30% prohibit sleeping or lying in public places, 47% prohibit loitering in public areas, and 47% prohibit begging in particular public places.[10] These laws are sometimes enforced selectively and are usually enforced without mercy.

When confronted with the issue of homelessness, many people respond with either apathy or disgust. The first images that spring to mind are those of drunken, lazy people who choose not to work. However, many times, that is simply not the case. Many people thrust into poverty today have no other option, yet they are viewed as failures too lazy to contribute to society. Throughout our nation's short history, the homeless and working poor have consistently been viewed with a certain level of disdain.[11] Many even contend that we should not care about the homeless, or that the treatment they are receiving is what they deserve. Why should we care about the homeless? The United States is a nation based on the principle of equality. The Declaration of Independence states:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain

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Rehabilitation Single Room Occupancy Program, 74 Fed. Reg. 50,552. (Sept. 30, 2009). Housing and Urban Development (HUD) establishes FMRs in every locality in each of the fifty states.

6. NAT'L COAL. FOR THE HOMELESS, *supra* note 2, at 2.

7. *Id*.

8. *Id*.

9. *Homes Not Handcuffs: The Criminalization of Homelessness in U.S. Cities*, NAT'L COAL. FOR THE HOMELESS, http://www.nationalhomeless.org/factsheets/criminalization.pdf (July, 2009), (offering a more detailed analysis of the above summary http://www.nationalhomeless.org/publications/crimreport/CrimzReport_2009.pdf).

10. *Id*.

11. *See infra* Part II.

> unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . .[12]

The Founders believed that every individual is born with certain unalienable rights. These rights—often called fundamental rights—are those rights "implicit in the concept of ordered liberty" or "deeply rooted in [the nation's] history and tradition."[13] The Founders believed that these unalienable rights come from God, our Creator, through Natural Law.[14] Throughout the Bible, there are over 2,000 verses that address the issues of poverty and social justice.[15] Many of those scriptures, like Micah 6:8, include admonitions such as: "[W]hat does the LORD require of you but to do justice, and to love kindness, and to walk humbly with your God?"[16] Other verses illustrate God's heart for the poor: "[L]earn to do good; seek justice, correct oppression; bring justice to the fatherless, plead the widow's cause."[17]

This Comment argues that certain cities violate the Fourteenth Amendment of the United States Constitution by the particular ways the cities criminalize homelessness. Therefore, courts should invalidate these laws, and legislatures should implement more constructive ways of dealing with the problem of homelessness. This Comment will not argue that the government has any obligation to provide housing to the homeless or that the homeless class deserves special benefit rights.[18] Instead, this Comment argues that the government has a duty not to infringe on any individual's basic freedom rights as outlined in the Fourteenth Amendment, whether that individual is homeless or not. Part II presents the history and development of homelessness in our nation and examines how the homeless have come to be viewed as a criminal class. Part II also surveys the judicial response to the criminalization of homelessness. Part III lays out the

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

13. Lawrence v. Texas, 539 U.S. 558, 593 (2003).

14. W. CLEON SKOUSEN, THE 5,000 YEAR LEAP: THE 28 GREAT IDEAS THAT CHANGED THE WORLD 46 (2007).

15. *The Bible That Reveals God's Passion*, THE POVERTY AND JUSTICE BIBLE, http://www.povertyandjusticebible.org.au/index.php (last visited May 1, 2010).

16. *Micah* 6:8 (English Standard Version).

17. *Isaiah* 1:17 (English Standard Version).

18. Harris v. McRae, 448 U.S. 297, 316 (1980) (holding that the government may not preclude an individual from exercising his fundamental rights, but government "need not remove those not of its own creation").

problems brought on by the criminalization of homelessness through an in-depth analysis of the ways these statutes violate the Fourteenth Amendment in two cities: Seattle, Washington and St. Petersburg, Florida. Part IV then presents an analytical framework based on the Fourteenth and Fourth Amendments, examining the issue through the Due Process Clause, the Equal Protection Clause, and the implied right to travel. Part V concludes the Comment with an overview of the work being done throughout the nation to repeal these laws and decriminalize homelessness.

II. BACKGROUND

A. The Development of the Criminalization of Homelessness

Vagrancy laws date back to feudal England, when the Statutes of Laborers were enacted in response to the depopulation caused by the Black Death.[19] The Statutes of Labourers required every able-bodied person to work for wages fixed at a certain level.[20] These statutes essentially sought to turn every working class citizen into a serf.[21] Under these laws, it was illegal to accept more than the set wage, to refuse an offer of work, or to give money to beggars who refused to work.[22] In an effort to enforce these laws, the Act of 1414 gave justices of the peace the power to punish vagrants.[23] Despite the measures taken to criminalize vagrancy, the homeless population continued to grow.[24] Poor work conditions and a lack of work created an entire class of individuals who became a burden to society.[25] Therefore, laws were enacted that confined those unable to work to their own town; if they left, they would be forcibly removed, returning them to the town legally bound to support them.[26]

In sixteenth-century England, the Slavery Acts mandated two years imprisonment for any individual who "live[d] idly and loiteringly, by the

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19. Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts To Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631, 635 (1992).

20. *Id*.

21. *Id*.

22. 23 Edw. 3, c. 7 (1349).

23. 2 Hen. 5, c. 4 (1414).

24. Simon, *supra* note 19, at 636.

25. *Id*.

26. Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 616 (1956).

space of three days . . . ."[27] By the nineteenth century, "the roads of England were crowded with masterless men and their families, who had lost their former employment through a variety of causes, had no means of livelihood, and had taken to vagrant life."[28] The decay of the feudal system and the deteriorating economy exacerbated the problem.[29] The dissolution of the monasteries under King Henry VIII drastically affected the poor, taking away the religious institutions that had provided assistance.[30]

These policies and prejudices carried over to early American law and helped shape the laws regarding the homeless.[31] Paupers and vagabonds were specifically excepted from the privileges and immunities clause of the Articles of Confederation: "The free inhabitants of each of these States, *paupers, vagabonds, and fugitives from justice excepted*, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State . . . ."[32] This constitutes one of the earliest examples in America of the homeless being explicitly denied the right to travel—a right that the Supreme Court has since recognized as fundamental.[33]

In *Mayor of New York v. Miln*, the United States Supreme Court held that New York could deny paupers arriving by ship entrance into the country:

> We think it as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infections articles imported, or from a ship, the crew of which may be laboring under an infectious disease.[34]

Forty years later, the Supreme Court described government efforts to exclude paupers as "a right founded . . . in the sacred law of self-defence."[35] Society began to question laws prohibiting homelessness during the Great

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27. Mark Malone, Note, *Homelessness in a Modern Urban Setting*, 10 FORD. URB. L.J. 749, 754 n.17 (1982).

28. Ledwith v. Roberts, 1 K.B. 232, 271 (1937).

29. *Id*.

30. *Id*.

31. Papachristou v. City of Jacksonville, 405 U.S. 156, 161 (1972).

32. ARTICLES OF CONFEDERATION of 1781, art. IV (emphasis added).

33. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

34. Mayor v. Miln, 36 U.S. (11 Pet.) 102, 142-43 (1837).

35. R.R. Co. v. Husen, 95 U.S. 465, 471 (1877).

Depression.[36] However, no real changes appeared until after World War II, when federal and state courts across the nation began to strike down vagrancy laws as void for vagueness.[37] Cities responded to these court decisions by enacting more specific ordinances.[38] Courts consistently upheld these newer ordinances until the early 1990s, at which point some courts began holding them unconstitutional.[39] Today, many of these types of ordinances are still enforced.[40] While these ordinances may not be as blatantly anti-homeless, the effects are the same—they make basic life activities necessary for existence on the street illegal.[41]

B. The Judicial Response to the Criminalization of Homelessness

Pottinger v. City of Miami was the first notable instance that a court applied the Fourth Amendment to a statute criminalizing homelessness.[42] In *Pottinger*, a group of homeless individuals challenged the seizure of their personal belongings and alleged that the City had a policy of harassing homeless people for sleeping, eating, and performing life-sustaining activities in public places.[43] The district court found that the criminalization of essential acts performed in public when there was no alternative violated the plaintiffs' right to due process under the Fourteenth Amendment and right to be free from cruel and unusual punishment under the Eighth Amendment.[44] In addition, the court found that the City violated the plaintiffs' rights under the Fourth Amendment.[45] The court also found that approximately 6000 people were homeless in Miami, while there were fewer than 700 shelter spaces.[46] On review, the Eleventh Circuit Court of Appeals referred the case for mediation.[47] The parties negotiated a settlement requiring the City to institute a law enforcement protocol to

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36. Simon, *supra* note 19, at 640.

37. *Id.* at 642.

38. *Id.* at 647.

39. *See, e.g.*, Pottinger v. City of Miami, 810 F. Supp. 1551 (S.D. Fla. 1992).

40. *See generally Homes Not Handcuffs*, *supra* note 9 (noting the ongoing problem of the criminalization of homelessness).

41. *Id.*

42. *Pottinger*, 810 F. Supp. at 1569.

43. *Id.* at 1569-70.

44. *Id.* at 1583.

45. *Id.* (holding that the City's practices constituted an unlawful search/seizure under the 4th Amendment).

46. *Id.* at 1564.

47. Pottinger v. City of Miami, 76 F.3d 1154 (11th Cir. 1996).

protect the rights of the homeless.[48] As part of the settlement, the City agreed to conduct training for police officers, educating them on the plight of the homeless.[49] The City also instituted mandatory procedures for law enforcement officers to follow when dealing with the homeless to ensure the protection of the homeless population's legal rights.[50] Finally, the City set up a $600,000 fund to compensate homeless citizens injured by the enforcement of the statutes.[51]

In the 1993 case *Joyce v. City and County of San Francisco*, plaintiffs challenged the City of San Francisco's "Matrix" program, a strict enforcement of a group of ordinances prohibiting homeless activities.[52] The United States District Court for the Northern District of California found that homelessness is not a status, and therefore rejected the plaintiffs' claim that the program punished them for their status in violation of the Eighth Amendment.[53] The court also rejected the claims that the program violated the plaintiffs' rights to equal protection, due process, and travel.[54] On appeal, the Ninth Circuit Court of Appeals held that the case was moot because, under a new mayor, the City had eliminated the Matrix program.[55]

In *Johnson v. Dallas*, a 1994 case, the United States District Court for the Northern District of Texas held a similar group of ordinances unconstitutional under the Eighth Amendment.[56] The plaintiffs alleged that the ordinances violated their Eighth, Fourth, and Fourteenth Amendment rights.[57] The district court granted the plaintiffs' motion for preliminary injunction in part, holding that the ordinances punished the status of homelessness, and as such, violated the Eighth Amendment.[58] In dicta, however, the district court rejected the Equal Protection claims, finding that the homeless are not a suspect or quasi-suspect class and that the laws were

48. *Pottinger v. City of Miami–Negotiations Lead to Settlement Agreement*, LAW LIBRARY–AMERICAN LAW AND LEGAL INFORMATION, *available at* http://law.jrank.org/pages/24461/Pottinger-v-City-Miami-Negotiations-Lead-Settlement-Agreement.html (last visited Mar. 30, 2011).

49. *Id.*

50. *Id.*

51. *Id.*

52. Jones v. City and County of S.F., 846 F. Supp. 843, 845 (N.D. Cal. 1994).

53. *Id.* at 853-58.

54. *Id.* at 858-61.

55. Joyce v. City and County of S.F., 87 F.3d 1320 (9th Cir. 1996).

56. Johnson v. City of Dallas, 860 F. Supp. 344, 347-48 (N.D. Tex. 1994), *rev'd in part*, *vacated in part* 61 F.3d 442 (5th Cir. 1995).

57. *Id.* at 351, 358.

58. *Id.* at 359.

rationally related to a legitimate state interest.[59] On review, the Fifth Circuit Court of Appeals reversed and declared the ordinances constitutional.[60] The Fifth Circuit held that the Eighth Amendment prohibition against cruel and unusual punishment applies only after conviction for a criminal offense, and the plaintiffs in this case had only been cited or fined, not convicted.[61] The case was eventually dismissed.[62]

In 2006, in *Fifth Avenue Presbyterian Church v. City of New York*, a church had invited homeless individuals to sleep on its outdoor property.[63] The City of New York forced the homeless to move, despite the fact that they were sleeping on private property.[64] The district court granted a preliminary injunction preventing the City's actions regarding the church property, but denied the injunction as to the public sidewalk bordering the church's property.[65] On appeal, the Second Circuit Court of Appeals affirmed the district court's decision, holding that the Church's provision of sleeping space to the homeless was the manifestation of a sincerely held religious belief deserving of protection under the Free Exercise Clause.[66] As such, the City's actions were subjected to strict scrutiny.[67] The Second Circuit also rejected the City's argument that its actions were necessary to address a public nuisance, because no evident health risk had been proved.[68]

Jones v. City of Los Angeles, a 2006 case, is the most recent significant decision regarding homelessness statutes.[69] In *Jones*, six homeless individuals brought suit against Los Angeles, challenging arrests made for violating a statute that prohibited individuals to "sit, lie or sleep in or upon any street, sidewalk or other public way."[70] The Plaintiffs, relying on *Pottinger v. City of Miami*, argued that the ordinance violated the Fourteenth and Eighth Amendments of the United States Constitution.[71]

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59. *Id.* at 355-58.

60. Johnson v. City of Dallas, 61 F.3d 442, 445 (5th Cir. 1995).

61. *Id.* at 444-45.

62. *Homes Not Handcuffs*, *supra* note 9, at 101.

63. Fifth Ave. Presbyterian Church v. City of New York, 293 F.3d 570, 572 (2d Cir. 2002).

64. *Id.*

65. *Id.* at 572-73.

66. *Id.* at 575.

67. *Id.*

68. *Id.* at 576.

69. Jones v. City of Los Angeles, 444 F.3d 1118 (9th Cir. 2006).

70. L.A., CAL., MUN. CODE § 41.18(d) (2011).

71. *Jones*, 444 F.3d at 1125.

The district court rejected the Plaintiffs' reliance on *Pottinger*, holding that the plaintiffs were not a certified class, and granted summary judgment for the City of Los Angeles following the reasoning in *Joyce v. City and County of San Francisco*.[72] The plaintiffs appealed to the Ninth Circuit Court of Appeals, which held that the City of Los Angeles's treatment of these individuals—arresting them for sleeping on the streets when there was no other viable option—constituted cruel and unusual punishment under the Eighth Amendment.[73] In October of 2007, the City settled the lawsuit, agreeing not to enforce the law between 9:00 p.m. and 6:00 a.m. until 1,250 permanent housing units for the homeless were constructed.[74] The settlement also required that, before any arrests were made for violating the ordinance, the police officers had to provide adequate verbal warning and a reasonable time to move.[75]

III. CRIMINALIZING HOMELESSNESS: THE PROBLEM

While many cities have criminalized the activities associated with homelessness in recent years, this Comment will focus on two cities that illustrate the greater national problem—Seattle, Washington and St. Petersburg, Florida. Other cities, such as Los Angeles, California,[76] Atlanta, Georgia,[77] and even Boise, Idaho,[78] are implementing similar programs.

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72. *Id.*

73. *Id.* at 1137.

74. *Homes Not Handcuffs*, *supra* note 9, at 35.

75. *Id.*

76. A 2009 report named Los Angeles the "meanest" city in the United States with regard to the homeless. *Id.* at 33. In 2006, Los Angeles enacted the Safer City Initiative, a program designed to clean up the city. *Id.* at 34. Los Angeles spends $6 million a year to implement the Safer City Initiative, but budgets only $5.7 million a year for homeless services. *Id.* The Safer City Initiative added fifty police officers to patrol the Skid Row area. *Id.* These officers arrest homeless people for crimes like jaywalking and loitering, crimes that usually go unnoticed outside of Skid Row. *Id.* at 35. During one eleven-month period, twenty-four inhabitants of Skid Row were arrested on 201 different occasions, costing the city $3.6 million for jail time, prosecutors, public defenders, and other court expenses. *Id.* at 34. While crime in Skid Row has dropped under the Safer City Initiative, the City has not come through on its promise to provide additional homeless services under the program, leaving many individuals without any options. *Id.* Since the implementation of the Initiative, homeless residents have moved to other areas that cannot supply needed services. *Id.* One study estimated that 1,345 people occupied the streets of Skid Row at the beginning of 2006. *Id.* One year later, that number had dwindled to 875. *Id.* While Skid Row's homeless population dwindled, the homeless populations of surrounding areas dramatically increased. *Id.* While many applaud the Safer City Initiative as a wonderful scheme that has brought

A. Seattle, Washington

Approximately 2,827 people are unsheltered on any given night in King County, where the city of Seattle, Washington is located.[79] In November of 2007, Seattle implemented a new policy aimed to remove homeless people from their camps throughout the city.[80] Despite the fact that the shelters throughout the city were at capacity and there was nowhere else for these people to go, city officials ordered all makeshift shelters destroyed, forced the residents to move, and destroyed their belongings.[81] "Sweeps," during which the police force would come through and destroy the shelters and possessions, happened twice in 2007.[82] Announcements were made before a sweep in November, but several camps were cleared out in the summer without any notice.[83] In the cases where advance notice was given, signs were posted informing the homeless that they would need to leave the premises within forty-eight hours.[84] Many of these signs also listed an outdated phone number.[85] During the sweeps, after confiscating personal property, city crews were told to store personal items for up to sixty days and discard anything worth less than twenty-five dollars.[86]

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hope back to Skid Row, it has merely moved the problems elsewhere, oftentimes dramatically harming the homeless in the process. *Id.*

77. In 2007, the City of Atlanta enacted an ordinance outlawing panhandling in heavily visited downtown areas and anywhere after dark. *Id.* at 38. "The ordinance also prohibits panhandling within 15 feet of an ATM, bus stop, taxi stand, pay phone, public toilet, or train station. . . ." *Id.* Police officers dressed as tourists to catch people "aggressively begging" in the prohibited areas. *Id.*

78. The Boise Police began using bike patrol officers to enforce a strict anti-camping ordinance in 2007. *Id.* at 50. Although the number of unsheltered individuals exceeds the available shelter space, the police have cited hundreds of homeless individuals for violations of the anti-camping ordinance and a similar disorderly conduct ordinance. *Id.* In one extreme instance, a homeless individual was charged with theft for allegedly attempting to charge a cell phone at a park picnic shelter. *Id*. Homeless individuals are often arrested for failing to appear in court for these violations and failure to pay the required fines. *Id.* Sentences of up to ninety days have been imposed for violations of the ordinance. *Id.* Each day in jail comes with a twenty-five dollar fine for costs. *Id.*

79. *Id.* at 81.

80. *Homes Not Handcuffs*, *supra* note 9, at 80.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Homes Not Handcuffs*, *supra* note 9, at 80.

A new plan for addressing the homeless in Seattle was announced in April of 2008.[87] According to the plan, twenty shelter beds would be added, and during the camp sweeps, homeless residents would be given three days' notice to vacate the area.[88] Just a month later, however, a homeless camp in Queen Anne Park was swept and twenty-one tons of materials were removed.[89]

After the demolition of the homeless camp in Queen Anne Park, a group of homeless individuals in Seattle banded together to create a new tent city.[90] They satirically christened their community "Nickelsville" after Mayor Greg Nickels, the man largely responsible for the new policies.[91] Nickelsville houses from fifty to one hundred people each night.[92] The camp has been housed at several different sites, including churches and public property.[93] Founded with the intention of providing a place where inhabitants would know they had a guaranteed place to stay, the community enforces strict rules regarding alcohol, drug use, and other behavior.[94] Shortly after Nickelsville's founding, Mayor Nickels ordered an eviction of the tent city for "safety and health concerns."[95] At that time, twenty-five residents were arrested.[96] Since then, Nickelsville has moved several times.[97] The group of homeless individuals set up camp, the City raids the camp, and they move again.[98] As recently as September 2009, Port of Seattle Police entered the tent city and evicted its inhabitants.[99] Police handcuffed twenty-two homeless persons and arrested them for trespassing on city property. [100] The inhabitants of the tent city have even been evicted

87. *Id.*

88. *Id.*

89. *Id.* at 81.

90. Patrick Oppman, *Tent City Becomes Home in Tough Times*, CNN (Apr. 13, 2009, 12:09 PM), http://www.cnn.com/2009/LIVING/wayoflife/03/19/seattle.tent.city.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Homes Not Handcuffs*, *supra* note 9, at 81.

96. *Id.*

97. *Id.*

98. Oppman, *supra* note 90.

99. NICKELSVILLESEATTLE.ORG, http://www.nickelsvilleseattle.org (last visited Feb. 16, 2010).

100. *Id.*

from private property such as a church parking lot.[101] Nickelsville leaders continue to look for a permanent location.[102]

Despite the City of Seattle's promises to improve, conditions continue to worsen. Facing a $56 million operating budget deficit for 2010, the King County Council made cuts across the board.[103] The funds allocated to address homelessness and homelessness prevention (including shelters, food banks, etc.) were cut from $471,687 for 2009 to $154,000 for 2010.[104] Shelters, counseling programs, food banks, and legal services provided for the poor were stripped of all funding.[105] Homeless youth shelters were completely cut from the budget.[106] These organizations will either have to cease operations or look to other sources for funding.

B. St. Petersburg, Florida

The National Law Center on Homelessness and Poverty named St. Petersburg, Florida the second "meanest city" towards the homeless in the nation in 2009, second only to Los Angeles.[107] According to surveys, there are 6,235 homeless individuals in Pinellas County, the area surrounding St. Petersburg.[108] That figure represents a 20% increase in the Pinellas County homeless population since 2007.[109] Approximately 2,232 of the 6,235 individuals experiencing homelessness are unsheltered, an 82.7% increase from 2007.[110]

On January 19, 2007, St. Petersburg police raided two homeless camps after giving residents a week's notice to vacate the premises.[111] During the

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101. *Id.*

102. *Id.*

103. Chris Grygiel, *King County Could Cut All Human Services Funding*, SEATTLEPI.COM (Sept. 27, 2009, 10:00 PM), http://www.seattlepi.com/local/410589_budget28.html.

104. COUNCIL BUDGET RESTORATION (2009), *available at* http://blogs.seattleweekly.com/dailyweekly/Council%20Budget%20Restoration.xls.

105. *Id.*

106. *Id.*

107. *Homes Not Handcuffs*, *supra* note 9, at 3.

108. Complaint at 7, Catron v. St. Petersburg, No. 8:09-cv-00923-SDM-EAJ (M.D. Fla. May 20, 2009).

109. *Id.*

110. *Id.*

111. Abhi Raghunathan, *Homeless Fight Back with High Tech*, ST. PETERSBURG TIMES, (Feb. 2, 2007), http://www.sptimes.com/2007/02/02/Southpinellas/Homeless_fight_back_w.shtml.

raid, police used box cutters to slash and destroy tents,[112] earning St. Petersburg a new nickname: "a national poster child for cruelty against the homeless."[113] In December of 2007, Catholic Charities established a new tent city called "Pinellas Hope" in the outskirts of the city.[114] Since that time, local government has taken on part of the burden of running the camp.[115]

In early 2007, St. Petersburg passed six new ordinances that essentially criminalize homelessness.[116] These ordinances prohibit panhandling,[117] sleeping on sidewalks or streets,[118] sleeping near private property,[119] lying on streets or sidewalks during the day,[120] constructing any temporary shelter,[121] and storing personal property in public places.[122] Since the passage of these ordinances, police officers regularly conduct sweeps throughout the city with signs instructing the homeless that they have thirty-six hours to remove their belongings from public property.[123] Removing personal belongings to other public property does not satisfy the requirement.[124] After thirty-six hours, the property is confiscated and taken to a storage facility where, after thirty days, it is destroyed.[125]

The situation in St. Petersburg has escalated to the point where Bob Dillinger, the Pinellas-Pasco public defender, has refused to extend a contract with St. Petersburg and will no longer represent indigent people arrested for violating municipal ordinances.[126] Dillinger's refusal was in

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112. For video footage of this incident, visit *St. Petersburg Police Cutting Up Homeless Tents*, YOUTUBE, http://www.youtube.com/watch?v=LrPdZmPB36U (last visited Apr. 27, 2011).

113. Raghunathan*, supra* note 111.

114. *Homes Not Handcuffs*, *supra* note 9, at 36.

115. David DeCamp, *Vote Favors $300K Infusion for Pinellas Hope Tent City for Homeless*, ST. PETERSBURG TIMES (Nov. 15, 2009), http://www.tampabay.com/news/localgovernment/vote-favors-300k-infusion-for-pinellas-hope-tent-city-for-homeless/1051309.

116. *Homes Not Handcuffs*, *supra* note 9, at 11.

117. ST. PETERSBURG CITY CODE § 20-79 (2009).

118. ST. PETERSBURG CITY CODE § 20-74 (2009).

119. ST. PETERSBURG CITY CODE § 20-75 (2009).

120. ST. PETERSBURG CITY CODE § 20-82 (2009).

121. ST. PETERSBURG CITY CODE § 20-76 (2009).

122. ST. PETERSBURG CITY CODE § 8-321 (2009).

123. Complaint at 22, Catron v. St. Petersburg, No. 8:09-cv-00923-SDM-EAJ (M.D. Fla. May 20, 2009).

124. *Id.* at 16.

125. *Id.* at 22; ST. PETERSBURG CITY CODE § 8-321 (2009).

126. Abhi Raghunathan, *Public Defender Will Stop Working Homeless Cases in St.*

response to excessive arrests of homeless people throughout the city.[127] According to Dillinger's office, 676 of the 879 people arrested for violating these municipal ordinances were homeless individuals from the city of St. Petersburg.[128]

The National Law Center on Homelessness and Poverty has filed a lawsuit in the United States District Court for the Middle District of Florida on behalf of several homeless individuals who have been cited or arrested for violating one or more of the ordinances prohibiting homeless conduct.[129] The first of the plaintiffs, Anthony Catron, was issued a trespass warning on August 23, 2006, which stated that Catron would be subject to arrest if he was found anywhere in a city park.[130] This warning is in place permanently.[131] On August 29, 2007, an officer issued another trespass warning to Catron—this time, it applied to all public property in St. Petersburg, and would be in effect for one year. Neither warning specifically stated the violation cited.[132] These warnings apply "curb to curb," so that several public sidewalks are included.[133]

Charles Hargis, another plaintiff in the case, was also issued two trespass warnings and arrested for being present in a park when it was open to the general public.[134] One of the warnings was to be in effect for two years. Hargis was also issued a "Notice to the Owner and All Persons Interested in Affected Property," a notice which required Hargis to remove his personal belongings from public property.[135] The ordinance prohibiting public storage of personal belongings specifically states, "moving the unlawfully stored items to another location on public property shall not be considered to be removing the item from public property . . ." making it impossible for Hargis to have his belongings with him in any public place.[136]

Petersburg, ST. PETERSBURG TIMES (Jan. 31, 2007), *available at* http://www.sptimes.com/2007/01/31/Southpinellas/Public_defender_will_.shtml.

127. *Id.*

128. *Id.*

129. *See* Complaint at 2-3, 9-10, Catron v. St. Petersburg, No. 8:09-cv-00923-SDM-EAJ (M.D. Fla. May 20, 2009).

130. *Id.* at 11.

131. *Id.*

132. *Id*.

133. *Id.* at 12.

134. *Id.* at 14.

135. Complaint at 15.

136. *Id.*

Another homeless plaintiff, Ferdinand Lupperger, was also issued a trespass warning prohibiting his presence in St. Petersburg public parks.[137] A week later, Lupperger was arrested for being present in a public park, despite the fact that the park was open to the public at the time.[138] The report does not state the underlying violation.[139] The other plaintiffs in the case were cited for similar violations.

IV. A CONSTITUTIONAL ANALYSIS OF THE RIGHT TO BE HOMELESS

This Comment seeks to demonstrate that laws criminalizing homelessness violate the Fourteenth and Fourth Amendments to the United States Constitution and should therefore be invalidated by the courts and repealed by the legislatures.

A. The Constitutional Framework

1. The Fourteenth Amendment

Three important doctrines are found in the Fourteenth Amendment: Due Process, Privileges and Immunities, and Equal Protection.[140] Working together, these concepts guarantee each individual procedural protection of his fundamental rights.[141]

The Due Process Clause of the Fourteenth Amendment requires that before a State deprives a person of life, liberty, or property, the State must give that person notice of the case against him and opportunity to meet it.[142] Due process is meant to protect each citizen's fundamental rights, which consist of any "fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government."[143] To determine whether a person has been deprived of due process, courts must answer two questions. First, the court needs to

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137. *Id.* at 19.

138. *Id.*

139. *Id.*

140. The Fourteenth Amendment provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

141. *Id.*

142. *Id.*; Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

143. Twining v. New Jersey, 211 U.S. 78, 106 (1908).

determine the nature of the interest.[144] The Supreme Court has held that to determine whether due process requirements apply, courts must look "not to the weight but to the nature of the interest at stake."[145] Second, after a court has determined that the nature of the interest requires due process, it then must determine the type of notice required.[146] The Supreme Court has put forth three factors to determine the type of notice due in a given situation: the individual's interest in retaining his property, the risk of error through the procedures used, and the government's interest, including costs or burden of the additional process.[147]

The Equal Protection Clause of the Fourteenth Amendment directs that "all persons similarly circumstanced shall be treated alike."[148] However, the states still have the power to classify people groups as long as its action survives judicial scrutiny.[149] The Court uses three standards to judge whether classifications are valid: minimal scrutiny, strict scrutiny, and intermediate scrutiny.[150] Under the default minimal scrutiny standard (rational basis), which is the lowest level of review, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[151] Legitimate state interests include exercises of enumerated police powers, through which the state acts to protect the public health, welfare, morals, and safety of its citizens.[152] The strict scrutiny standard, which is the highest level of review, is applied when a statute involves a suspect classification or violates a group's fundamental rights.[153] Under that standard, the classification is presumed invalid and the state must prove it is valid.[154] The state must prove that the classification promotes a compelling governmental interest,

144. Bd. of Regents v. Roth, 408 U.S. 564, 570-71 (1972).

145. *Id.*

146. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

147. *Eldridge*, 424 U.S. at 321.

148. Plyler v. Doe, 457 U.S. 202, 216 (1982) (citation omitted).

149. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 271 (1979).

150. Johnson v. Dallas, 860 F. Supp. 344, 351-52 (1994).

151. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (citing Schweiker v. Wilson, 450 U.S. 221, 235 (1981); U.S. R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174-75 (1980); Vance v. Bradley, 440 U.S. 93, 97 (1979); New Orleans v. Dukes, 427 U.S. 297, 303 (1976)).

152. BLACK'S LAW DICTIONARY 1446 (8th ed. 2004) (defining "state police power").

153. *Johnson*, 860 F. Supp. at 352 (quoting Qutb v. Strauss, 11 F.3d 488, 492 (5th Cir. 1993)).

154. *Id.*

and that the statute is narrowly tailored such that there are no less restrictive means available to achieve the desired end.[155] The third standard, intermediate scrutiny is a middle standard that focuses on whether a particular government action is "substantially related to a legitimate government interest."[156] Intermediate scrutiny is most often applied to cases involving quasi-suspect classifications.[157]

There are two ways to evaluate legislation under Equal Protection analysis: either looking at it on its face or looking at its underlying purpose.[158] When evaluating a statute facially, courts consider the text of the statute itself.[159] If the text of the law is facially discriminatory, it will be struck down as invalid.[160] If the text of the law is neutral on its surface, an individual challenging its constitutionality must prove that the law was enacted with a discriminatory purpose in mind.[161] Under this discriminatory purpose analysis, courts look to the function of the law in specific instances to determine if it has been applied with a discriminatory purpose.[162] In *Crawford v. Board of Education*, the Supreme Court stated, "Under decisions of this Court, a law neutral on its face still may be unconstitutional if motivated by a discriminatory purpose."[163]

In *Attorney General of New York v. Soto-Lopez*, the Supreme Court held that the freedom to travel is a fundamental right secured by the Constitution through the Equal Protection Clause of the Fourteenth Amendment.[164] Freedom to travel from state to state and to enter or live in any state is a "virtually unconditional personal right, guaranteed by the Constitution to us all."[165] In a 1969 case, *Shapiro v. Thompson*, the Supreme Court stated that the Court had "long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or

155. *Id.*

156. *Id.* (quoting *City of Cleburne*, 473 U.S. at 441).

157. *Id.*

158. Crawford v. Bd. of Educ., 458 U.S. 527, 536, 543-44 (1982).

159. *Id.*

160. *Id.* at 536.

161. *Id.* at 544.

162. *Id.*

163. *Id.*

164. Attorney Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 901 (1986) (quoting Dunn v. Blumstein, 405 U.S. 330, 338 (1972) (citation omitted)).

165. Shapiro v. Thompson, 394 U.S. 618, 643 (1969).

restrict this movement." [166] The Court held that any State action that attempted to restrict such movement was "constitutionally impermissible."[167] In *Shapiro*, the Court applied strict scrutiny to the government action inhibiting the right to travel.[168] While the right to travel had traditionally been found implicit in the text of the Equal Protection Clause, in *Saenz v. Roe* the Supreme Court interpreted the Fourteenth Amendment's Privileges and Immunities Clause to explicitly protect the right to travel.[169] Viewed as a whole, the case law regarding the right to travel indicates that, whether the right comes from the Equal Protection Clause or the Privileges and Immunities Clause, there is a fundamental right to travel which, when infringed upon, triggers strict scrutiny analysis.[170]

2. The Fourth Amendment's Right to Privacy

The Fourth Amendment to the United States Constitution guarantees each individual the right to privacy in his person and personal property.[171] The Court has consistently held that the Fourth Amendment's right to privacy is enforceable against the states through the Fourteenth Amendment's due process clause.[172] The Supreme Court summed up the principle in *Wolf v. Colorado*: "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."[173]

The Supreme Court has put forth a two-fold test to decide uncertainties regarding the right to privacy. First, an individual must have a subjective

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166. *Id.* at 629.

167. *Id.*

168. *Id.* at 634.

169. Saenz v. Roe, 526 U.S. 489, 501 (1999).

170. *Id.* at 499.

171. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

172. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961); Wolf v. Colorado, 338 U.S. 25, 27-28 (1949).

173. *Wolf*, 338 U.S. at 27-28 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

expectation of privacy.[174] Second, that expectation must be one that society is prepared to recognize as reasonable.[175] When these two requirements are met, the Fourth Amendment prohibits the state from infringing upon a citizen's right to privacy.[176] This right to privacy does "not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room . . . . Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures."[177] An individual's property has been "seized" when there is some meaningful interference with that individual's possessory interests in the property.[178]

Twenty-five years after the Supreme Court established this privacy test, the Eleventh Circuit applied this standard to homeless individuals in *Pottinger v. City of Miami*, holding that homeless individuals have the required legitimate expectation of privacy in their personal belongings.[179]

B. Applying the Constitutional Framework

1. Seattle, Washington

The City of Seattle, in expelling citizens from tent cities and destroying their property, violated the homeless persons' rights to due process. The Due Process Clause of the Fourteenth Amendment requires that before a person is deprived of life, liberty, or property, he must be given notice of the case against him and opportunity to meet it.[180] In determining whether government actions regarding homeless activity violate procedural rights, the Supreme Court's two-question due process analysis should be applied.

First, the nature of the interest must be determined.[181] In *Poe v. Ullman*, Justice Harlan considered the scope of the rights guaranteed by the Due Process Clause:

> This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational

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174. Katz v. United States, 389 U.S. 347, 361 (1967).

175. *Id.*

176. *Id.*

177. *Id.* at 359.

178. Soldal v. Cook Cnty, 506 U.S. 56, 61 (1992).

179. Pottinger v. City of Miami, 810 F. Supp. 1551 (S.D. Fla. 1992).

180. *Mullane*, 339 U.S. at 313.

181. *Roth*, 408 U.S. at 570-71.

> continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.[182]

In other words, Harlan was suggesting that fundamental rights are not simply a list of rights found in the text of the Constitution, but include more broadly other rights that are so naturally fundamental as to demand a heightened level of scrutiny. In the Seattle tent cities, the interest at stake is the right to privacy in personal property—a right to freedom from arbitrary impositions. While a right to privacy is often found implicit in the Constitution,[183] even if it is not, it is one of those rights necessary to be free from "arbitrary impositions and purposeless restraints"[184] and is therefore fundamental.

In conducting the camp sweeps, the police destroy not only the inhabitants' temporary shelters, but also much of their personal property.[185] The Fourteenth Amendment specifically states that no person shall be deprived of property without due process of law.[186] The Fourth Amendment deliberately guarantees "the right of the people to be secure in their persons, houses, papers, and effects . . . ."[187] The right to privacy in personal belongings is specifically addressed within the Constitution itself, and certainly qualifies as a principle "inherent in the fundamental idea of liberty itself."[188] The United States is a nation founded on personal property interests.[189] Therefore, the homeless individuals' privacy interest in their personal property is a fundamental right specifically protected by the Fourth Amendment. The seriousness of the loss of this property cannot be emphasized enough; these people have nowhere else to go or to store their

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182. Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

183. Griswold v. Connecticut, 381 U.S. 479, 483-84 (1965) (holding that there is a general right to privacy which emanates from the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments).

184. *Poe*, 367 U.S. at 542-43 (1961) (Harlan, J., dissenting).

185. *Homes Not Handcuffs*, *supra* note 9.

186. U.S. CONST. amend. XIV, § 1.

187. U.S. CONST. amend. IV.

188. Twining v. New Jersey, 211 U.S. 78, 106 (1908).

189. U.S. CONST. amend. IV.

belongings.[190] Because shelters are at capacity, their only option is to find refuge in tent cities.[191]

Second, if it is determined that the nature of the interest requires due process, the type of required notice must be determined.[192] To determine the type of notice required, the Supreme Court has prescribed three factors: the individual's interest in retaining his property, the risk of error through the procedures used, and the costs or burden of the additional process.[193] The inhabitants of the tent cities have a great interest in retaining their property—these possessions are all that they own. Also, there is a very high risk of error in the current procedure. Without any investigation into the reason for the violation or the availability of alternate storage, innocent individuals' property may be destroyed. The City of Seattle, at times, has failed to provide notice to the homeless population of upcoming sweeps.[194] This type of notice would not be difficult to provide—it has already been provided in some circumstances.[195] Were a court to apply this framework, considering these three factors together and balancing each party's interests, it seems to be a logical conclusion that these sweeps and the destruction of personal property violate the fundamental right to due process.

In *Katz v. United States*, the Supreme Court put forth a test to determine when an individual's right to privacy is protected by the Fourth Amendment.[196] Under *Katz*, so long as the Nickelsville inhabitants have a "reasonable" expectation of privacy in their personal belongings, these government sweeps violate the homeless individuals' rights.[197] When the Eleventh Circuit held that homeless individuals do have a legitimate, reasonable expectation of privacy in their personal belongings, the court was referring to homeless individuals on the street.[198] The inhabitants of Nickelsville live in a fixed, semi-permanent location.[199] They conduct all of their daily living activities in this place, and are part of a larger

190. *Homes Not Handcuffs*, *supra* note 9, at 80.

191. *Id.* at 80-81.

192. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

193. Mathews v. Eldridge, 424 U.S. 319, 321 (1976).

194. *Homes Not Handcuffs*, *supra* note 9, at 80.

195. *Id.*

196. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

197. Minnesota v. Olson, 495 U.S. 91, 95-96 (1990) (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

198. Pottinger v. City of Miami, 810 F. Supp. 1551, 1571-72 (S.D. Fla. 1992).

199. NICKELSVILLESEATTLE.ORG, http://www.nickelsvilleseattle.org (last visited Feb. 16, 2010).

community.[200] Surely, if people on the street have a legitimate expectation of privacy in their personal belongings, these homeless individuals continue to have a legitimate expectation of privacy in their personal belongings when those possessions are stored in a semi-permanent structure inside of a larger community. If the right to privacy in these items is determined to be valid, the city's actions in confiscating personal property constitute a violation of the Fourth Amendment's protection against unlawful seizures.

The Supreme Court, in *Payton v. New York*, held that "[t]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity."[201] This concept is related to the "open fields doctrine," which holds that the special protection accorded by the Fourth Amendment to citizens in their persons, houses, papers, and effects does not extend to the open, public areas.[202] Some may argue that, because these individuals are in public places, the open fields doctrine applies and their right to privacy no longer applies. The difference here is that these individuals, in most instances, are not suspected of any criminal activity other than being in the wrong place at the wrong time. In conducting the sweeps, Seattle police did not seize personal belongings as evidence of some greater crime; the homeless individuals' possessions were seized simply because they were on public property. Furthermore, application of the open fields doctrine in this case conflicts with the very purpose of the Fourth Amendment as outlined in *Katz*: "[T]his effort to decide whether or not a given 'area,' viewed in the abstract, is 'constitutionally protected' deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places."[203] The physical boundaries of the home are protected in order to prevent intrusion into the "privacies of the life within."[204] As Justice Harlan stated in his dissent in *Poe v. Ullman*:

> Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its

200. *Id.*

201. Payton v. New York, 445 U.S. 573, 587 (1980).

202. Oliver v. United States, 466 U.S. 170, 176 (1984).

203. Katz v. United States, 389 U.S. 347, 351 (1967).

204. Poe v. Ullman, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting).

> protection the principles of more than one explicitly granted Constitutional right.[205]

The right to privacy, universally considered fundamental, prevents the government from seizing personal property without just cause.

Equal Protection guarantees that "all persons similarly circumstanced shall be treated alike."[206] In the case of Nickelsville, the Mayor developed a specific plan to address the homeless.[207] This plan included police sweeps of homeless tent cities in order to demolish temporary structures and destroy individuals' personal property.[208] This law was put in place to affect the homeless and no one else. Therefore, it is discriminatory on its face. However, the states still have the power to classify people groups as long as the classification is rationally related to a legitimate government interest.[209] The City of Seattle asserts that the sweeps and ordinances are in place to preserve the health and welfare of the city.[210] On its face, this is a legitimate government interest; the City of Seattle is exercising its enumerated police power in order to protect its citizens. However, the means implemented are not rationally related to the interest at hand—destroying a homeless individual's personal property does not protect any citizen's health or welfare, and only injures the homeless individual. Therefore, these sweeps violate the Equal Protection Clause of the Fourteenth Amendment.

Some would argue that these individuals' personal property has no value and is in fact nothing more than an assortment of trash collected from the street. In some instances, these belongings may in fact be hazardous to public health. However, the Fourth Amendment does not protect an individual's property from being seized so long as it has some objective value.[211] In fact, the Amendment is deliberately broad: it protects "persons, houses, papers, and effects."[212]

As citizens of the United States, the homeless inhabitants of Nickelsville have a valid privacy interest in their personal belongings, despite the value or location of those belongings. When the government came in, without

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205. *Id.*

206. Plyler v. Doe, 457 U.S. 202, 216 (1982) (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

207. *Homes Not Handcuffs*, *supra* note 9, at 81.

208. *Id.*

209. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 271 (1979).

210. *Id.*

211. *See* U.S. CONST. amend. IV.

212. *Id.*

notice, and decided to summarily seize and destroy everything these individuals owned, it violated these individuals' constitutional rights of due process, privacy, and equal protection.

2. St. Petersburg, Florida

Because an analysis regarding the personal property issues would be the same in St. Petersburg as in Seattle, the analysis of St. Petersburg will focus on the trespass warnings issued to various homeless individuals. Trespass warnings prohibiting presence in any city park have been issued to several homeless individuals, often without notice of the underlying violation. Some of these warnings prohibit an individual from entering a city park for a year, while others prohibit any entrance indefinitely.

To determine whether the trespass warnings violate the Due Process Clause, the Supreme Court's two-question analysis should be utilized. First, the nature of the interest must be determined. Upon examination, it becomes apparent that the interest at stake here is very much a fundamental right. These individuals are being deprived of their right to freedom of movement and travel, a right implicitly found in the Constitution and generally considered to be fundamental.[213] Whether the fundamental right to travel is found in the Equal Protection Clause or the Privileges and Immunities Clause, it is indeed a fundamental right which, when infringed upon, subjects a government action to strict scrutiny.[214]

Second, after the court finds that the nature of the interest requires due process, it must then determine the type of notice required.[215] Three factors to determine the type of notice due are: the individual's interest in retaining his right, the risk of error through the procedures used, and the costs or burden of the additional process.[216] The state's interest, the public health and welfare, does not exceed the homeless individual's personal interest in being allowed to exist in public areas. The risk of error is great because homeless individuals who do not purposely violate any ordinance or do not, in fact, violate any law may be banned from public areas for indefinite periods of time. The St. Petersburg police provide notice to the homeless through the issuance of the warnings themselves. However, that notice is not sufficient. No hearings are scheduled, and many of the individuals issued citations do not understand the full import of the situation. Without any procedural protection of the right to exist in public places, the homeless

213. Shapiro v. Thompson, 394 U.S. 618, 629 (1969).

214. *Id.*

215. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

216. Mathews v. Eldridge, 424 U.S. 319, 321 (1976).

of St. Petersburg will continue to be pushed out of public areas and receive citations for violation of trespass warnings. Fines accompany every citation and these individuals cannot afford to pay and criminal records these people cannot afford to accumulate. The ordinances themselves perpetuate homelessness because by criminalizing activities these people must engage in to survive, the city is making it virtually impossible for the homeless to find work or permanent housing. Few employers are willing to hire those with long criminal records, and few landlords are willing to rent to those with unfortunate financial and criminal backgrounds.

All citizens have the right to "travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict."[217] Yet these trespass warnings prohibit a class of individuals from traveling in public areas, even when these areas are open to the non-homeless public. Because the right to travel is fundamental, government actions affecting this right are subject to strict scrutiny review.[218] The state must prove that the action promotes a compelling government interest, and that the statute is narrowly tailored such that there are no less restrictive means available to achieve the desired end.[219] St. Petersburg's alleged objective is protecting the public health and welfare. While the government has a legitimate interest in protecting the public health and welfare, that has not been considered a compelling government interest. The Court has not established a bright-line test for whether a government interest is compelling, but it usually involves some level of necessity.

Even if St. Petersburg's objective in issuing trespass warnings constituted a compelling government interest, there are certainly less restrictive ways of accomplishing the same goal. Prohibiting an individual from entering any public park or any public area for a year or longer is an extreme measure. Several of the plaintiffs in *Catron* were prohibited from entering any public area for a year or more.[220] Therefore, prohibiting these homeless individuals' entrance into any public area is a violation of their fundamental right to freedom of travel.

Although the Equal Protection Clause guarantees that "all persons similarly circumstanced shall be treated alike,"[221] the officers enforcing the

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217. *Id.*

218. Saenz v. Roe, 526 U.S. 489, 501 (1999).

219. Johnson v. Dallas, 860 F. Supp. 344, 352 (1994).

220. Complaint at 10-21, Catron v. St. Petersburg, No. 8:09-cv-00923-SDM-EAJ (M.D. Fla. May 20, 2009).

221. Plyler v. Doe, 457 U.S. 202, 216 (1982).

trespass warnings in St. Petersburg are targeting a specific class—the homeless. Because homelessness is not a suspect or quasi-suspect class, minimal scrutiny applies.[222] Therefore, if St. Petersburg can prove that the practice of issuing trespass warnings to homeless individuals is rationally related to the legitimate government interest of protecting the public health and welfare, this practice would not violate the Equal Protection Clause, even though it appears to violate the fundamental right of homeless people to freedom of travel.

V. CONCLUSION

The history of homelessness and its criminalization is decidedly mixed. Throughout the last fifty years, some courts have held statutes criminalizing homelessness constitutional, while others have struck them down on a variety of grounds. While in some cases these laws are struck down as unconstitutional, the real problem lies in the way these cases almost always end. Many times, after a court hands down a decision unfavorable to a city and its actions concerning the homeless, a city will offer the homeless plaintiffs generous settlements in exchange for vacating the adverse judgment.[223] For instance, the Eleventh Circuit decision *Jones v. City of Los Angeles* would have gone a long way toward shifting the tide regarding the criminalization of homelessness, but that decision was vacated after the parties reached a settlement.[224] *Pottinger v. Miami*, another case which could have had even greater effects in this area of the law were it not settled, ended with an agreement in which the city implemented training for law enforcement and set up a $600,000 compensation fund for injured parties.[225]

The problem of homelessness is one that affects virtually every city throughout the nation. Organizations like the National Law Center on Homelessness and Poverty, the National Coalition for the Homeless, and many others have been working with homeless individuals in an effort to end homelessness. Some cities have set up initiatives to provide housing for those in need: for instance, Portland, Oregon has implemented a program where city funding enables outreach agencies to offer permanent housing to

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222. *Johnson*, 860 F. Supp. at 352.

223. *See, e.g.*, Jack Noldon, *Judge Approves Multi-million Dollar Settlement with Fresno Homeless*, KSEE NEWS (June 6, 2008, 4:50 PM), http://www.ksee24.com/news/local/19609404.html.

224. Jones v. City of Los Angeles, 505 F.3d 1006 (9th Cir. 2007).

225. *Homes Not Handcuffs*, *supra* note 9, at 111.

people while they work to find employment.[226] Private organizations have also been able to reach out to the homeless in order to improve their plight. In St. Petersburg, a new initiative called "Project Homeless Connect" was launched on January 30, 2010.[227] Through this project, about 1,200 homeless individuals received medical care, job and housing assistance, legal services, and other personal services.[228] As part of the initiative, Pinellas County held the state of Florida's first "Homeless Court," through which the county hopes to settle minor criminal cases with homeless defendants.[229]

Things are slowly improving, but this issue will not be put to rest until these laws are completely eradicated. Instead of criminalizing homelessness and pushing those in the greatest need deeper into poverty, Americans need to band together and do something to address the homelessness pervading their cities. After all, in a country founded on the doctrines of equality and liberty that is the least we can do.

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226. *Id.* at 31.

227. *Project Homeless Connect Needs 700 Volunteers for Pinellas Event*, ST. PETERSBURG TIMES, (Jan. 24, 2010), http://www.tampabay.com/news/briefs/article1067659.ece

228. *Id.*

229. Victoria Benchimol, *Florida's First Homeless Court*, ABC ACTION NEWS (Jan. 30, 2010), http://www.abcactionnews.com/content/news/local/pinellas/south/story/Floridas-first-Homeless-Court/a5gBIiKvoEaYJnf3L_5Y7w.cspx.

NOTE

DONINGER V. NIEHOFF: TAKING *TINKER* TOO FAR

Travis Miller[†]

I. INTRODUCTION

Though the Supreme Court has laid a basic framework for teachers, principals, and other school officials to determine whether students can be disciplined for their speech, and whether student speech can be suppressed, the Supreme Court has yet to determine the scope of a school's authority to discipline a student for speech that occurs off-campus and online.[1] This has left both school officials and courts with the difficult task of determining which, if any, Supreme Court precedent applies to a student's online speech. The negative implications associated with teenagers spending an average of twelve hours a week online (such as the increased frequency of cyber-bullying or online threats against teachers) does not make this difficult task any easier.[2]

For the most part, the substantial disruption test used in *Tinker v. Des Moines Independent Community School District* is the default rule that courts use to determine whether suppressing a student's speech, or whether a student's punishment resulting from his speech, is warranted.[3] This rule allows a school to prohibit or punish a student's speech where school authorities reasonably forecast that the student's speech "would materially and substantially disrupt the work and discipline of the school."[4] But how and when should schools and the courts apply this substantial disruption test? Assuming that a school can use this test for a student's online speech,

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1. Doninger v. Niehoff, 527 F.3d 41, 48 (2d Cir. 2008).

2. Jane Weaver, *Teens Tune Out TV, Log on Instead*, MSNBC (July 24, 2006), http://www.msnbc.msn.com/id/3078614/.

3. *See* Lowery v. Euverard, 497 F.3d 584, 588 (6th Cir. 2007) ("The Supreme Court has established three frameworks for evaluating student speech: (1) vulgar and obscene speech is governed by *Bethel School Dist. v. Fraser* . . . (2) school-sponsored speech is governed by *Hazelwood v. Kuhlmeier* . . . and (3) all other speech is governed by *Tinker*.").

4. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

should it be applied the moment school officials discover the online speech, or retroactively to the very moment the student created the online speech? Moreover, exactly how—if at all—should this test relate to a student's extracurricular activities?

Given no instructions from the Supreme Court on a school's authority to discipline a student's online speech, lower courts have used *Tinker* in "situation[s] and scenario[s] that the Court in 1969 could hardly have imagined."[5] In *Doninger v. Niehoff*, the United States Court of Appeals for the Second Circuit applied *Tinker*'s substantial disruption test to a message that high school student Avery Doninger, a junior who served on the Student Council as the Junior Class Secretary, posted on her publicly accessible blog hosted by LiveJournal.com.[6] This case arose "out of a dispute between the school administration and a group of Student Council members at [Lewis Mills High School], including Avery, over the scheduling of an event called 'Jamfest,' an annual battle-of-the-bands concert that these Student Council members helped to plan." Following this dispute, Avery encouraged her fellow students to read and respond to a posting on her blog, where she wrote:

> [J]amfest is cancelled due to douchebags in central office. . . . basically, because we sent [the original Jamfest email] out, Paula Schwartz is getting a TON of phone calls and emails and such. . . . however, she got pissed off and decided to just cancel the whole thing all together, anddd [sic] so basically we aren't going to have it at all, but in the slightest chance we do[,] it is going to be after the talent show on may 18th.[7]

Though the school discovered Avery's posting after the dispute that it had been directed at was resolved, the Second Circuit still held that the *Tinker* test governed Avery's posting and ruled for the school district.[8] But

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5. Clay Calvert, *Tinker's Midlife Crisis: Tattered and Transgressed but Still Standing*, 58 AM. U. L. REV. 1167, 1175 (2009).

6. *Doninger*, 527 F.3d at 44-45. *See generally About Us*, LIVEJOURNAL, http://www.livejournalinc.com/aboutus.php ("LiveJournal is a community publishing platform, willfully blurring the lines between blogging and social networking. Since 1999 LiveJournal has been home to a wide array of creative individuals looking to share common interests, meet new friends, and express themselves.") (last visited May 1, 2011).

7. Doninger v. Niehoff, 514 F. Supp. 2d 199, 206 (D. Conn. 2007), *aff'd*, 527 F.3d 41 (2d Cir. 2008).

8. *Doninger*, 527 F.3d at 46 ("According to [school district superintendent Paula] Schwartz's testimony, she learned of Avery's posting only some days after the meeting

the court's use of *Tinker* was unnecessary; the Second Circuit should have solely justified the disciplining of Avery on the basis that her conduct was against her school's standard of conduct for those that participate in student government, which required Avery to "work cooperatively with [her] advisor and with the administration, and promote good citizenship both in school and out."[9] By clinging to *Tinker*, the Second Circuit both stretched a school's authority under *Tinker*, and missed an important opportunity to reaffirm a school's authority to discipline a student involved in extracurricular activities without using the *Tinker* test.

This Note has five parts. Part II provides a short historical background on student speech, summarizes Supreme Court cases that have addressed the authority of schools to discipline students for their speech, briefly illustrates the disagreements on when and how the *Tinker* rule is to be utilized, and summarizes *Wisniewski v. Board of Education*, a Second Circuit decision that applied *Tinker* to a student's online speech. Part III addresses the problem with the reliance on *Tinker* in *Doninger v. Niehoff*. Part IV argues that the Second Circuit should have decided *Doninger* without using *Tinker's* substantial disruption test. In addition, Part IV provides an alternative solution for affirming the district court's decision in a way that reinforces the authority of schools to require higher standards of conduct for students that participate in voluntary extracurricular activities. Finally, Part V reinforces two conclusions: (1) courts should apply *Tinker* cautiously to a student's online speech, and (2) courts should follow the modern trend of giving schools flexibility in framing and enforcing the conduct requirements that students must follow when participating in extracurricular activities.

II. STUDENT SPEECH AND SUPREME COURT PRECEDENT

It has been said that "the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools."[10] The power of schools acting *in loco parentis* (in the

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[between herself and Avery Doninger] when her adult son found it while using an Internet search engine.").

9. *Id.* at 52.

10. Morse v. Frederick, 551 U.S. 393, 410-11 (2007) (Thomas, J., concurring); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 522 (1969) (Black, J., dissenting)

> Nor does a person carry with him into the United States Senate or House, or into the Supreme Court, or any other court, a complete constitutional right to go into those places contrary to their rules and speak his mind on any subject

place of the parent) "stems from a common-law doctrine that has deep roots."[11] According to Sir William Blackstone, a parent may

> delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purpose for which he is employed.[12]

Traditionally, schools acting *in loco parentis* were allowed to strictly regulate student speech without judicial interference.[13] Public school teachers in early America instilled common values in students through strict discipline, and students were punished for behavior that was considered disrespectful, improper, indecent, or vulgar.[14] In these public schools, "[t]eachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order."[15] Case law illustrates that "[c]ourts routinely preserved the rights of teachers to punish speech that the school or

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> he pleases. It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases. Our Court has decided precisely the opposite.

Id. But see Tony LaCroix, *Student Drug Testing: The Blinding Appeal of In Loco Parentis and the Importance of State Protection of Student Privacy*, 2008 BYU EDUC. & L.J. 251, 263 (2008).

> To allow fundamental constitutional protections to be set aside for the sake of convenience, or in deference to the interest of governmental actors charged with quasi-parental action, is patently contrary to the Court's own recognition that school children do, without any doubt, enjoy the protection of the bedrock constitutional guarantees of liberty and privacy.

Id.

11. ANNE PROFFITT DUPRE, SPEAKING UP: THE UNINTENDED COSTS OF FREE SPEECH IN PUBLIC SCHOOLS 9 (2009). *But see* LaCroix, *supra* note 10, at 270 ("[T]here are better models for describing the student/school relationship and drawing analogies for use in making constitutional decisions about the rights of students, for example, that of the doctor/patient relationship. The modern approach to public schooling is astoundingly diagnostic and treatment-oriented.").

12. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *454.

13. *Morse*, 551 U.S. at 414 (Thomas, J., concurring).

14. *Id.* at 411, 414 ("By the time the States ratified the Fourteenth Amendment, public schools had become relatively common. If students in public schools were originally understood as having free-speech rights, one would have expected 19th-century public schools to have respected those rights and courts to have enforced them. They did not.").

15. *Id.* at 412.

teacher thought was contrary to the interests of the school and its educational goals."[16]

Despite the traditional view that public school authorities were allowed to restrict and punish student speech for nearly any reason, "the Supreme Court has recognized since the mid-twentieth century that students do not shed their constitutional rights as a condition of public school attendance."[17] During the cultural turbulence of the late 1960s, a case reached the Supreme Court that would profoundly change this traditional student-teacher dynamic.[18] This case is *Tinker v. Des Moines*, and it is "the cornerstone on which the student speech right was built."[19]

A. Supreme Court Decisions on Student Speech

1. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*

In December 1965, a group of students in Des Moines, Iowa, decided to publicize their support for a peaceful resolution to the Vietnam War and to mourn all casualties of the War by wearing black armbands to school.[20] The principals of their schools became aware of this plan and collectively "adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband."[21] The students were aware of this policy[22] and despite the risk of suspension, they wore black armbands to their schools.[23] True to their word, the schools sent the students home and suspended them until they returned to school without their armbands.[24] The

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16. *Id.* at 414.

17. STEPHEN B. THOMAS, NELDA H. CAMBRON-MCCABE, & MARTHA M. MCCARTHY, PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS 106 (6th ed. 2009).

18. DUPRE, *supra* note 11, at 10.

19. *Id.*

20. *Id.* at 12; s*ee also* JOHN W. JOHNSON, THE STRUGGLE FOR STUDENT RIGHTS 4 (1997). Among those subsequently interviewed who had attended the meeting where it was agreed that the students would begin wearing black armbands to class, all agreed that the act "had two purposes: to mourn all the casualties of the Vietnam War . . . and to support Senator Robert Kennedy's call for an extension of the anticipated Christmas 1965 truce, which it was hoped would lead to a negotiated end of the war." *Id.*

21. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).

22. *Id.*

23. *Id.*

24. *Id.* ("They [the students] were all sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired—that is, until after New Year's Day.").

students, through their fathers, filed a complaint in federal district court seeking an injunction preventing the disciplining of the students and nominal damages.[25] The District Court dismissed the complaint and "upheld the constitutionality of the school authorities' action on the ground that it was reasonable in order to prevent disturbance of school discipline."[26] The plaintiffs appealed the case, and the Court of Appeals for the Eighth Circuit affirmed.[27] The Supreme Court granted certiorari.[28]

Upon review, the Supreme Court recognized that the problem in the case "lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities."[29] After all, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[30] The Court found that the students were not punished for the expression of disruptive or intrusive speech, but for the school authorities' desire to avoid the controversy that could have resulted from the silent expression of opposition towards the war in Vietnam.[31] This type of "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[32] The Court noted that the Constitution prohibited school officials from denying this form of expression.[33] Such speech, which requires vigilant protection even in public schools, could only be prohibited where it "would materially and substantially disrupt the work and discipline of the school."[34] In effect, *Tinker* "made it clear that students had every right to challenge teachers and

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25. *Id.* at 503-04.

26. *Id.* at 504-05.

27. *Id.* at 505; *see also* JOHNSON, *supra* note 20, at 119.

> The appeals court ruling was contained in a one-paragraph per curiam opinion. . . . A per curiam opinion is sometimes issued by a judicial body to mask the reason for a disagreement on the court. The appeals court opinion in *Tinker* served just such a purpose. It contained no analysis whatsoever; it was essentially an order without justification.

Id.

28. *Tinker*, 393 U.S. at 505.

29. *Id.* at 507.

30. *Id.* at 506.

31. *Id.* at 508, 510.

32. *Id.* at 508.

33. *Id.* at 514.

34. *Id.* at 513.

principals as long as they believed their right of free speech was being infringed."[35]

Justice Hugo Black, in his dissenting opinion, concluded that the majority in *Tinker* ushered in a new era in which the power to control students, a traditional responsibility of school officials, was transferred to the Supreme Court.[36] According to Justice Black, *Tinker* was decided "wholly without constitutional reasons" and "subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students."[37] In addition, he found the record to demonstrate that the armbands "took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war."[38] He concluded that the majority would, in fact, allow students to defy openly the orders of school officials, ushering in a new and revolutionary era of permissiveness towards defiant student conduct.[39] Justice Harlan, in his dissent, offered a different standard to govern these types of cases and agreed "state public school authorities in the discharge of their responsibilities are not wholly exempt from the requirements of the Fourteenth Amendment respecting the freedoms of expression and association."[40]

2. *Bethel School District No. 403 v. Fraser*

Nearly twenty years after *Tinker*, the Supreme Court considered *Bethel School District No. 403 v. Fraser*, a case involving a Washington high school student who delivered a vulgar speech during a "school-sponsored educational program in self-government."[41] This student, Matthew N. Fraser, spoke in front of six-hundred high school students to nominate a

35. DUPRE, *supra* note 11, at 24.

36. *Tinker*, 393 U.S. at 515 (Black, J., dissenting).

37. *Id.* at 525.

38. *Id.* at 518. Testimony, by some students, "shows their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone." *Id*. at 517. There is also evidence that a mathematics teacher had his lesson period practically "wrecked" chiefly by disputes with Mary Beth Tinker, who wore her armband for her "demonstration." *Id*.

39. *Id.* at 518.

40. *Id.* at 526 (Harlan, J., dissenting). Justice Harlan proposed a different rule to govern student speech cases: "I would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion." *Id.*

41. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677 (1986).

fellow student for student elective office.[42] During the speech, "Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor."[43] This is his speech, in whole:

> I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.
>
> Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.
>
> Jeff is a man who will go to the very end—even the climax, for each and every one of you.
>
> So vote for Jeff for A. S. B. vice-president—he'll never come between you and the best our high school can be.[44]

Fraser delivered this inappropriate speech despite warnings from two of his teachers that "severe consequences" may result.[45] Some students responded to the graphic nature of the speech by yelling, while others made gestures that simulated the sexual acts alluded to by Fraser's speech.[46] A few students were embarrassed by the speech, and one teacher found it necessary to forego the time of a scheduled class lesson so she could discuss the speech with her class.[47]

The next day, the school's Assistant Principal met with Fraser and informed him that he had violated a school disciplinary rule prohibiting the use of obscene language in the school.[48] Fraser admitted that he intentionally used "sexual innuendo in the speech."[49] He was suspended for three days, and told he would no longer be considered a candidate for his school's commencement exercises.[50] Fraser was unsuccessful in his appeal to the School District, which affirmed the disciplinary action.[51] He then took his case to the United States District Court for the Western District of

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42. *Id*. at 677.
43. *Id.* at 677-78.
44. *Id.* at 687.
45. *Id.* at 675, 678.
46. *Id.* at 678.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 678-79.

Washington, which held, in part, that the school's disciplinary measures violated Fraser's right to free speech under the First Amendment.[52] The Court of Appeals for the Ninth Circuit affirmed, "holding that [Fraser's] speech was indistinguishable" from Tinker's armband.[53] The Ninth Circuit rejected the School District's claim that there had been a disruptive effect on the disciplinary process of the school, and "also rejected the School District's argument that it had an interest in protecting an essentially captive audience of minors from lewd and indecent language in a setting sponsored by the school . . . ."[54] The Ninth Circuit also "rejected the School District's argument that, incident to its responsibility for the school curriculum, it had the power to control the language used to express ideas during a school-sponsored activity."[55]

The Supreme Court reversed, recognizing that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse," and holding that the School District acted within its authority "in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech."[56] School authorities, acting *in loco parentis*, have an obvious concern to protect children from this type of speech.[57] The Court cited its previous First Amendment decisions that "recognized a state interest protecting children from sexually explicit, vulgar, or offensive speech."[58] The Court distinguished *Fraser* from *Tinker*, noting that the disciplining of Mr. Fraser was "unrelated to any political viewpoint," but still necessary to prevent the undermining of the "school's basic educational mission."[59] According to some authors, "[t]he majority further rejected the contention that the student had no way of knowing that his expression would evoke disciplinary action; the school rule barring obscene and disruptive expression and teachers' admonitions that his planned speech was inappropriate provided adequate warning of the

52. *Id.* at 679.

53. *Id.*

54. *Id.* at 679-80. Interestingly, but perhaps not surprisingly, the Ninth Circuit's reasoning in support of its conclusion had racial and class-based overtones: "the School District's 'unbridled discretion' to determine what discourse is 'decent' would 'increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in our public schools.'" *Id.*

55. *Id.* at 680.

56. *Id.* at 682, 685.

57. *Id.* at 685.

58. DUPRE, *supra* note 11, at 53.

59. *Fraser*, 478 U.S. at 685.

consequences of the expression."[60] *Fraser* was a marked change from the student-liberty-focused *Tinker* standard, and it reinforced the idea that schools are to inculcate students in the habits and manners of civility.[61] School officials, however, still have the difficult task of determining whether speech is "vulgar" or "offensive."[62] "This uncertainty, combined with the asymmetry brought about by the attorney's fees statute, leaves schools in a vulnerable position that surely has consequences for the day-to-day learning environment in schools."[63]

3. *Hazelwood School District v. Kuhlmeier*

In a relatively short time after the *Fraser* decision, the Court addressed the issue of whether school administrators could regulate the content of a student-authored, school-sponsored (and school-funded) newspaper in *Hazelwood School District v. Kuhlmeier*.[64] This newspaper was authored by members of the Hazelwood East High School's Journalism II class, and the school's principal reviewed each issue of the student newspaper prior to publication.[65] In the spring of 1983, the principal reviewed and objected to two articles scheduled to appear in the upcoming newspaper.[66] One story "described three Hazelwood East students' experiences with pregnancy; the other discussed the impact of divorce on students at the school."[67]

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60. THOMAS, CAMBRON-MCCABLE, & MCCARTHY, *supra* note 17, at 107-08. *But see Fraser*, 478 U.S. at 695 (Stevens, J., dissenting). Justice Stevens advocated a more objective approach to disruptive or offensive speech in school, stating:

> The fact that respondent reviewed the text of his speech with three different teachers before he gave it does indicate that he must have been aware of the possibility that it would provoke an adverse reaction, but the teachers' responses certainly did not give him any better notice of the likelihood of discipline than did the student handbook itself. In my opinion, therefore, the most difficult question is whether the speech was so obviously offensive that an intelligent high school student must be presumed to have realized that he would be punished for giving it.

Id.

61. DUPRE, *supra* note 11, at 56.

62. *Id.* at 72.

63. *Id.* at 72-73.

64. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262, 271 (1988).

65. *Id.* at 263.

66. *Id.*

67. *Id.*

The principal's concern was with the pregnant students being identified through the article (though the story had used false names),[68] and with the inappropriateness of the article's sexual subject matter.[69] He believed that the article on divorce, in which a student complained that her father was not spending enough time at home, should allow for the father to comment on these remarks (or to allow for him to consent to the publication of his child's remarks).[70] These concerns led the principal to eliminate these articles from the final published newspaper.[71] The students brought their action in federal district court, alleging their First Amendment rights were violated by the principal's refusal to allow the articles to be published.[72] The district court held that "no First Amendment violation had occurred," reasoning that "school officials may impose restraints on students' speech in activities that are 'an integral part of the school's educational function' . . . so long as their decision has 'a substantial and reasonable basis.'"[73] The Court of Appeals for the Eighth Circuit reversed, holding that "school officials had violated respondents' First Amendment rights by deleting the two pages of the newspaper."[74] The court concluded that the newspaper's "status as a public forum precluded school officials from censoring its contents except when 'necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others.'"[75]

The Supreme Court cut another exception into the *Tinker* standard and reversed the Court of Appeals, holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their

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68. *Id.*

69. *Id.*

70. *Id.* This fear proved to be mistaken, as the student's name had been deleted from the final draft of the article.

71. *Id.* at 263-64. The principal concluded that the only way for the newspaper to be printed before the end of the school year was "to publish a four-page newspaper instead of the planned six-page newspaper, eliminating the two pages on which the offending stories appeared, or to publish no newspaper at all." *Id.* He chose "to withhold from publication the two pages containing the stories on pregnancy and divorce." *Id.* at 264.

72. *Id.* at 264.

73. *Id.* "The court found that Principal Reynolds' concern that the pregnant students' anonymity would be lost and their privacy invaded was 'legitimate and reasonable,' given 'the small number of pregnant students at Hazelwood East and several identifying characteristics that were disclosed in the article.'" *Id.*

74. *Id.* at 265.

75. *Id.*

actions are reasonably related to legitimate pedagogical concerns."[76] In doing so, the Court deferred to the judgment of parents, teachers, and school officials, and also justified judicial intervention only where the suppression of school-sponsored student expression was unreasonable.[77] The Court reasoned that the newspaper was a "supervised learning experience for journalism students," and concluded that "school officials were entitled to regulate the contents of Spectrum [the student newspaper] in any reasonable manner."[78]

The Court differentiated this case from *Tinker* in that while *Tinker* required a school to tolerate certain student speech, the question posed in this case asks "whether the First Amendment requires a school affirmatively to promote particular student speech."[79] The Court also focused on a school's interest to "disassociate itself" not only from student speech that would "substantially interfere with [its] work . . . or impinge upon the rights of other students," but also from student speech that may be "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."[80]

In applying *Hazelwood*, "[c]ourts have reasoned that the school has the right to disassociate itself from controversial expression that conflicts with its mission and have considered school-sponsored activities to include student newspapers supported by the public school, extracurricular activities sponsored by the school, school assemblies, and classroom activities."[81] Courts, however, have also limited a school's authority to censor student expression that bears the school's imprimatur where blatant viewpoint discrimination is involved.[82] And, "[e]ven if viewpoint

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76. *Id.* at 273. *But see id.* at 280 (Brennan, J., dissenting)

> If mere incompatibility with the school's pedagogical message were a constitutionally sufficient justification for the suppression of student speech, school officials could censor each of the students or student organizations in the foregoing hypotheticals, converting our public schools into "enclaves of totalitarianism," that "strangle the free mind at its source." The First Amendment permits no such blanket censorship authority.

Id. (citations omitted).

77. *Id.* at 270.

78. *Id.*

79. *Id.* at 270-71.

80. *Id.* at 271 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)).

81. THOMAS, CAMBRON-MCCABE, & MCCARTHY, *supra* note 17, at 114.

82. *Id.*

discrimination is not involved, censorship actions in a non-public forum must still be based on legitimate pedagogical concerns."[83]

4. *Morse v. Frederick*

Recently, the Court again deferred to the authority and judgment of school administrators in *Morse v. Frederick*.[84] *Morse* involved actions at a school-sanctioned and school-supervised event to watch the Olympic Torch Relay pass through Juneau, Alaska.[85] At this event, a group of students unfurled a large banner bearing the phrase: "Bong HiTS 4 JESUS."[86] The school's principal, Deborah Morse, instructed the students to take down the banner, and every student but Frederick complied.[87] Frederick was subsequently suspended from school for advocating the use of illegal drugs during a school-sanctioned activity.[88] The Juneau School District Superintendent applied *Fraser* to this dispute and upheld the suspension (though reducing its length from ten to eight days), concluding that the principal acted within her authority because the banner was "speech or

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> There are limits, however, on school authorities' wide latitude to censor student expression that bears the public school's imprimatur. Blatant viewpoint discrimination, even in a nonpublic forum, abridges the First Amendment. For example, the Ninth Circuit held that a school board violated students' First Amendment rights, because it failed to produce a compelling justification for excluding an anti-draft organization's advertisement from the school newspaper, while allowing military recruitment advertisements. Similarly, the Eleventh Circuit placed the burden on school authorities to justify viewpoint discrimination against a peace activist group that was excluded from the public school's career day and not allowed to display its literature on school bulletin boards and in counselors' offices, when military recruiters were allowed such access. The court found no compelling justification for censoring specific views that the board found distasteful.

Id. at 114-15.

83. *Id.* at 115. For example, "[a] Michigan federal district court found no legitimate pedagogical reason for the removal from the school newspaper of a student's article on a pending lawsuit alleging that school bus diesel fumes constitute a neighborhood nuisance." *Id.*

84. *See* Morse v. Frederick, 551 U.S. 393, 403 (2007).

85. *Id.* at 397.

86. *Id.*

87. *Id.* at 398.

88. *Id.*

action that intrudes upon the work of the schools."[89] This decision was upheld by the Juneau School District Board of Education.[90]

Frederick filed suit under 42 U.S.C. § 1983, alleging the violation of his First Amendment rights by the school board and by Principal Morse.[91] The district court granted summary judgment for the school board and for Principal Morse, holding that "Morse had the authority, if not the obligation, to stop such messages at a school-sanctioned activity."[92] The Court of Appeals for the Ninth Circuit reversed, finding "a violation of Frederick's First Amendment rights because the school punished Frederick without demonstrating that his speech gave rise to a 'risk of substantial disruption.'"[93] The Supreme Court granted certiorari to determine, in part, "whether Frederick had a First Amendment right to wield his banner."[94]

The Supreme Court first set out to determine whether *Fraser* applied to this case. In doing so, the Court distilled two basic principles from *Fraser*.[95] "First, *Fraser*'s holding demonstrates that 'the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.'"[96] Had the student in *Fraser* "delivered the same speech in a public forum outside the school context, it would have been protected."[97] "Second, *Fraser* established that the mode of analysis set forth in *Tinker* is not absolute," as *Fraser* did not apply the substantial disruption analysis prescribed in *Tinker*.[98]

Thus, rejecting both the *Tinker* and *Fraser* tests as applied to this case, the Court held that "a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably

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89. *Id.* at 399 (quoting Appendix to Petition for Certiorari at 62a, *Morse*, 551 U.S. 393 (No. 06-278)).

90. *Id.*

91. *Id.*

92. *Id.* (quoting Appendix to Petition for Certiorari at 37a, *supra* note 89).

93. *Id.* (quoting Frederick v. Morse, 439 F.3d 1114, 1118, 1121-23 (9th Cir. 2006)).

94. *Id.* at 400. *See also* DUPRE, *supra* note 11, at 237-38 (explaining that the order by the Court of Appeals for the Ninth Circuit for the principal to pay money damages to a difficult student may have prompted the Supreme Court to hear the case, as "[d]uring oral argument, some of the justices seemed to be particularly bothered by the damages Deborah Morse would have to pay Joe Frederick if the Ninth Circuit opinion stood").

95. *Morse*, 551 U.S. at 404.

96. *Id.* (quoting Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 682 (1986)).

97. *Id.* at 405.

98. *Id.*

viewed as promoting illegal drug use."[99] The Court reasoned that a school's deterrence of drug use by its students is an "important—indeed, perhaps compelling" government interest, considering the dangers of illegal drugs and their use by school-age children.[100] In support of the high degree of this governmental interest, the Court also noted the billions of dollars in congressional support provided to schools for the purpose of school drug prevention programs.[101] Given these concerns, it was reasonable for the principal to make the on-the-spot decision to conclude that the banner promoted illegal drug use, in violation of school policy, "and that failing to act would send a powerful message to the students in her charge . . . about how serious the school was about the dangers of illegal drug use."[102] In allowing a school to regulate speech that could result in harm (whether that harm is through the disruption of a school's educational mission or harm to the students themselves), *Morse* thus articulates a standard similar to *Tinker*.[103]

The authority of school officials to discipline a student for his or her speech has slowly been reinforced since *Tinker* was decided in 1969.[104] No longer must schools predict whether a student's speech would cause a material disruption before a student can be disciplined or the speech suppressed.[105] Rather, schools can look to the vulgarity, content, and appropriateness of student speech to determine whether the speech is

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99. *Id.* at 403. *But see id.* at 444 (Stevens, J., dissenting).

> Frederick's credible and uncontradicted explanation for the message—he just wanted to get on television—is also relevant because a speaker who does not intend to persuade his audience can hardly be said to be advocating anything . . . The notion that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible.

Id.

100. *Id.* at 407 (majority opinion) (quoting Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)).

101. *Id.* at 408.

102. *Id.* at 410.

103. Michael J. O'Connor, Comment, *School Speech in the Internet Age: Do Students Shed Their Rights When They Pick Up a Mouse?*, 11 U. PA. J. CONST. L. 459, 467 (2009).

104. *See* Abby Marie Mollen, *In Defense of the "Hazardous Freedom" of Controversial Student Speech*, 102 NW. U. L. REV. 1501, 1510 (2008) (noting that, since *Tinker*, the Court has "treated school officials as the protagonists and focused on facilitating their 'comprehensive authority . . . to prescribe and control conduct in the schools'—an authority that *Tinker* recognized but limited").

105. *Morse*, 551 U.S. at 404-05.

acceptable for school-sponsored expressive activities.[106] In addition, school officials can discipline students for vulgar or indecent expression.[107] Finally, schools can also discipline students for advocating the use of illegal drugs, even at off-campus but school-sponsored events.[108] Nevertheless, difficulty and disagreements arise when determining which Supreme Court test a court should use when reviewing the disciplining or suppression of a student's speech.

B. Application of Tinker *to Student Speech: Evident Confusion in Lower Courts*

Even Chief Justice John Roberts has admitted that "[t]here is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents . . . ."[109] This uncertainty also includes *how* courts should apply school-speech precedents. Though bans on students wearing buttons have typically been upheld,[110] a small minority of courts address these bans in an approach that favors student speech.[111] In addition, in the wake of anti-Vietnam protests, several circuits struggled with determining whether policies of predistribution review of student writings distributed on campus were justified under *Tinker*.[112] In *Burch v. Barker*, the Ninth Circuit stated that the Second Circuit's approval of "broad review and censorship of non-school-sponsored publications" was "in fundamental conflict with the Supreme Court's analysis in *Tinker*."[113]

Interestingly, the Ninth Circuit has adopted a broad reading of *Tinker*'s rights-of-others exception by permitting a school to forbid students from wearing t-shirts with a message condemning homosexuality, reasoning it was proper to prevent emotional injury to a particularly vulnerable segment

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106. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271-72 (1988).

107. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685-86 (1986).

108. *Morse*, 551 U.S. at 347, 403.

109. *Id.* at 401.

110. THOMAS, CAMBRON-MCCABE, & MCCARTHY, *supra* note 17, at 117.

111. *See* Chandler v. McNinnville Sch. Dist., 978 F.2d 524, 530 (9th Cir. 1992) (holding, in part, that buttons with the word "scab" to protest non-union teachers were not inherently disruptive).

112. Burch v. Barker, 861 F.2d 1149, 1154-55 (9th Cir. 1988) (providing a survey of the various approaches taken by Circuit Courts of Appeals).

113. *Id.* at 1156-57.

of the student population.[114] The United States District Court for the Southern District of Ohio took a different approach to whether *Tinker* allows a school to stop a student from wearing a t-shirt with an anti-gay message, as it focused on *Tinker*'s disruption test and found that the student should be allowed to wear his shirt without repercussions from school officials.[115] These disagreements speak to the very real difficulties that courts face when determining how and when the *Tinker* standard governs. And this confusion is not merely restricted to a student's speech at school—some lower courts are misusing *Tinker* to censor off-campus student expression posted on the Internet.[116]

C. Wisniewski*: The Second Circuit's Recent Application of* Tinker *to Off-Campus, Online Student Speech*

Despite disagreements about when *Tinker* controls, courts have generally extended the reach of *Tinker* to include situations where a student's online and off-campus speech is directed at his or her school. In the 2007 case, *Wisniewski v. Board of Education*, the Second Circuit considered whether a student could appropriately be suspended for sharing over the Internet a drawing "suggesting that a named teacher should be shot and killed."[117] The student's instant messaging icon depicted "a small drawing of a pistol firing a bullet at a person's head, above which were dots representing splattered blood."[118] Under the drawing it read, "Kill Mr. VanderMolen," the

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114. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1182 (9th Cir. 2006). This was the first reported opinion that supported a restriction to a student's speech by using *Tinker*'s rights-of-others exception. *See* Calvert, *supra* note 5, at 1182.

115. Calvert, *supra* note 5, at 1183.

116. *Id*. at 1175.

117. Wisniewski v. Bd. of Educ., 494 F.3d 34, 36 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (2008).

118. *Id.* The Second Circuit then explained exactly what instant messaging entails:

> Instant messaging enables a person using a computer with Internet access to exchange messages in real time with members of a group (usually called "buddies" in IM lingo) who have the same IM software on their computers. Instant messaging permits rapid exchanges of text between any two members of a "buddy list" who happen to be on-line at the same time. Different IM programs use different notations for indicating which members of a user's "buddy list" are on-line at any one time. Text sent to and from a "buddy" remains on the computer screen during the entire exchange of messages between any two users of the IM program.

Id. at 35.

student's English teacher.[119] The student had created this icon "a couple of weeks after his class was instructed that threats would not be tolerated by the school, and would be treated as acts of violence."[120] This icon was available for viewing by the student's instant messaging contacts for three weeks.[121] A classmate of the student informed Mr. VanderMolen, who then relayed the information to school officials.[122] School administration and even the police became involved, as there were investigations to determine whether the student was a threat to his teacher or any other school official.[123] The police investigator concluded "that the icon was meant as a joke, that [the student] fully understood the severity of what he had done, and that [he] posed no real threat to VanderMolen or to any other school official."[124] This situation was also brought before a hearing officer, who found the icon threatening; though it was created and distributed off-campus, "she concluded that it was in violation of school rules and disrupted school operations . . ."[125] As a result, the student was suspended for a semester.[126]

A suit was then brought on the student's behalf against the school board and the superintendent, alleging in part that the student's icon was protected under the First Amendment.[127] The district court determined that "the icon was reasonably to be understood as a 'true threat' lacking First Amendment protection."[128] On appeal, the Second Circuit applied a variation of the *Tinker* standard to the student's off-campus speech, holding that Aaron's transmission of the icon posed a "reasonably foreseeable risk that the icon would come to the attention of school authorities, and that it would 'materially and substantially disrupt the work and discipline of the school.'"[129]

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119. *Id.* at 36.

120. *Id.*

121. *Id.*

122. *Id.* Mr. VanderMolen was so distressed by the threatening buddy icon that he was allowed to stop teaching the students' class. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 37.

127. *Id.*

128. *Id.*

129. *Id.* at 38-39 (quoting Morse v. Frederick, 551 U.S. 393, 403 (2007)). The Second Circuit did not consider whether the icon presented a 'true threat,' as defined in *Watts v. United States*, 394 U.S. 705 (1969). *Id.* at 38. "Although some courts have assessed a

The Second Circuit found it "reasonably foreseeable that the IM icon would come to the attention of school authorities and the teacher whom the icon depicted being shot."[130] Further, the court saw no doubt that the icon, once discovered by school administration and the teacher it depicted, "would foreseeably create a risk of substantial disruption within the school environment."[131] The fact that this was off-campus speech was disregarded, as the court noted that the Second Circuit had previously recognized that off-campus students could cause a substantial disruption within the school.[132] *Wisniewski*'s reliance on *Tinker* regarding a student's on-line and off-campus speech was further extended by the Second Circuit in *Doninger v. Niehoff*. But the Second Circuit's decision in *Doninger* would needlessly depart from the holdings of *Tinker* and *Wisniewski* in a significant way.

III. *DONINGER* TOOK *TINKER* TOO FAR

Doninger v. Niehoff involved a dispute between Avery Doninger, a junior at Lewis Mills High School (LMHS), and the school's administration.[133] While serving as her school's Junior Class Secretary, Avery Doninger was involved in planning "'Jamfest,' an annual battle-of-the-bands concert."[134] A conflict arose with the scheduling of the event, and in response, Avery wrote an inflammatory Livejournal blog post with the purpose of encouraging her fellow students to contact and "piss off" the school district's "douchebag" superintendent.[135] In writing this Livejournal

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student's statements concerning the killing of a school official or a fellow student against the 'true threat' standard of *Watts* . . . we think that school officials have significantly broader authority to sanction student speech than the Watts [sic] standard allows." *Id.*; *see also* Clay Calvert, *Punishing Public School Students for Bashing Principals, Teachers & Classmates in Cyberspace: The Speech Issue the Supreme Court Must Now Resolve*, 7 FIRST AMEND. L. REV. 210, 228 (2009) ("The rule, then, from *Wisniewski* appears to boil down to a rather primitive 'if-then' formula: *If it is reasonably foreseeable that student speech created off campus will come to the attention of school authorities, then school authorities may exert disciplinary authority over it.*").

130. *Wisniewski*, 494 F.3d at 39.

131. *Id.* at 40.

132. *Id.* at 39 (citing Thomas v. Bd. of Educ., 607 F.2d 1043, 1052 (2d Cir. 1979) ("We can . . . envision a case in which a group of students incites substantial disruption within the school from some remote locale. We need not, however, address this scenario because, on the facts before us, there was simply no threat or forecast of material and substantial disruption within the school.").

133. Doninger v. Niehoff, 527 F.3d 41, 43 (2d Cir. 2008).

134. *Id.* at 44.

135. *Id.* at 45.

blog entry, Avery ignored her Principal's instructions (which were directed to Avery only hours before) that asked her to "work cooperatively with [her] faculty advisor and with the administration in carrying out Student Council objectives."[136] This blog post was discovered by the superintendent some days after the Jamfest dispute was resolved, and only after the superintendent's son found it using an Internet search engine.[137] As a result of her vulgar comments, Avery was disqualified from running for Senior Class Secretary.[138]

Avery Doninger's mother, alleging a violation of her daughter's First Amendment rights, had "moved for a preliminary injunction voiding the election for Senior Class Secretary and ordering the school to either hold a new election in which Avery would be allowed to participate or to grant Avery the same title, honors, and obligations as the student elected to the position."[139] The district court denied this motion.[140] Justifying the school's jurisdictional reach over Avery's speech, the Second Circuit in *Doninger* reasoned that not only was it reasonably foreseeable that Avery's Livejournal posting would reach school property, but that her speech was directed at the school.[141] The Second Circuit affirmed the denial of the preliminary injunction motion because "Avery's blog post created a foreseeable risk of substantial disruption at LMHS."[142]

The court relied on three factors to reach this conclusion.[143] First, Avery's language on her Livejournal blog post was not only offensive, "but also potentially disruptive of efforts to resolve the ongoing controversy."[144] Second, the court found it significant that Avery's post used misleading, or perhaps even false, information in her attempt to encourage more students to communicate with District Superintendent Schwartz.[145] Third, it was noteworthy that the discipline was related to "Avery's extracurricular role as a student government leader."[146]

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136. *Id.*

137. *Id.* at 46.

138. *Id.*

139. *Id.* at 43.

140. *Id.*

141. *Id.* at 50.

142. *Id.* at 43-44.

143. *Id.* at 50.

144. *Id.* at 50-51.

145. *Id.* at 51 ("It was foreseeable . . . that school operations might well be disrupted further by the need to correct misinformation as a consequence of Avery's post.").

146. *Id.* at 52.

Doninger's attorney argued that *Tinker* was not satisfied because the controversy at the school may not have been caused by Avery's Livejournal posting.[147] Rather, the disruption resulted from Avery's mass e-mail.[148] The Second Circuit labeled this argument as misguided, as the argument implied "that *Tinker* requires a showing of actual disruption to justify a restraint on student speech."[149] The court reasoned that school officials had a duty to prevent the harmful effects of disruptions.[150] Therefore, the question was not whether damage had been done, but whether school officials "'might reasonably portend disruption' from the student expression at issue."[151]

This framing of the issue is consistent with *Tinker*. *Tinker*'s substantial disruption test is forward-looking, and the Second Circuit admitted as much.[152] But exactly where and when must a school look to put *Tinker*'s test to use? In *Wisniewski*, the Second Circuit applied *Tinker*'s substantial disruption test not from the moment the student created the threatening icon, but upon discovery of the icon by the teacher and by other school officials.[153] Once the icon was discovered, a police investigator and a psychologist had to determine whether the student was a threat to the safety of teachers and other school officials.[154] Unlike *Doninger*, *Wisniewski* involved an actual finding of a disruption of school operations by the special attention given to the situation by "school officials, replacement of the threatened teacher, and interviewing pupils during class time."[155] This materialization of a substantial disturbance reinforces the judgment of the Second Circuit "that the icon, once made known to the teacher and other school officials, would foreseeably create a risk of substantial disruption within the school environment."[156]

Nevertheless, *Doninger* took a misguided approach regarding when the *Tinker* test should govern. In *Doninger*, the opportunity for Avery's speech

147. *Id.* at 51.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *See id.* at 51 ("*Tinker* does not require school officials to wait until disruption actually occurs before they may act.").

153. Wisniewski v. Bd. of Educ., 494 F.3d 34, 40 (2d Cir. 2007) ("And there can be no doubt that the icon, once made known to the teacher and other school officials, would foreseeably create a risk of substantial disruption within the school environment.").

154. *Id.* at 36.

155. *Id.*

156. *Id.* at 40.

to be a possible substantial disruption had already passed once school administrators discovered the speech.[157] Therefore, the court's framing of the question—"whether school officials 'might reasonably portend disruption' from the student expression at issue"—if applied once the communication was discovered, must be answered in the negative.[158] Yet Avery was still disciplined, though her online speech did not cause actual disruption, and the possibility that it would cause a disruption had essentially passed.[159] This is because the Second Circuit applied *Tinker* not from when school administrators discovered Avery's speech, but from when that speech was first written.[160] This use of *Tinker*'s substantial disruption test allows school administrators to punish online student speech that caused no substantial disruption in the past and will not cause a substantial disruption in the future, though it could have, but did not, cause a substantial disruption in the past.

Such an exercise of *Tinker*'s substantial disruption test was never considered by the Court in *Tinker*. According to the Court in *Morse*, "*Tinker* held that student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'"[161] This test, as *Doninger* clearly noted, allows a school to suppress speech that it reasonably predicts will cause disruption.[162] At its essence, *Tinker* allows a school to look to the future consequences of a student's speech to determine whether suppression of that speech is justified. The variation of the *Tinker* test used in *Doninger* is backward-looking, and is thus contrary to *Tinker*.

IV. THE PROPOSAL: IGNORE *TINKER* AND FOCUS ON THE EXTRACURRICULAR ACTIVITY

Without relying on *Tinker*, the Second Circuit should have justified the disciplining of Avery Doninger solely on the relation of the discipline to

157. *Doninger*, 527 F.3d at 46.

158. *Id.* at 51.

159. *See id.* at 45. Avery's request for students to call and email the school administration to gather support for Jamfest was rendered moot after the school administration decided to hold Jamfest. The likelihood that the Livejournal posting would cause a substantial disruption at school was therefore minimal.

160. *Id.* at 51. Ms. Doninger's words were "potentially disruptive of efforts to resolve the ongoing controversy." *Id.* Once her Livejournal posting was discovered, however, the dispute was already resolved. *Id.* at 46.

161. Morse v. Frederick, 551 U.S. 393, 403 (2007).

162. *Doninger*, 527 F.3d at 51.

"Avery's extracurricular role as a student government leader."[163] The prevailing view among the courts, including the Second Circuit, "is that conditions can be attached to extracurricular participation, because such participation is a privilege rather than a right."[164] Students who participate in optional extracurricular activities such as school athletics "have reason to expect intrusions upon normal rights and privileges."[165] Part of the reason for this expected intrusion is that students who choose to participate in extracurricular pursuits "voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally."[166]

The Supreme Court has recognized this principle in a different context. In *Vernonia School District 47J v. Acton*, the Supreme Court considered whether a school district's policy that "authorize[d] random urinalysis drug testing of students who participate[d] in the District's school athletics programs . . . violate[d] the *Fourth* and *Fourteenth Amendments to the United States Constitution*."[167] Justice Scalia, writing for a six-Justice majority, found that "legitimate privacy expectations are even less with regard to student athletes" than with the general student body.[168] In support, Justice Scalia noted "an element of 'communal undress' inherent in athletic" sports,[169] and the general lack of privacy to be found in Vernonia's public school locker rooms.[170]

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163. *Id.* at 52.

164. THOMAS, CAMBRON-MCCABE & MCCARTHY, *supra* note 17, at 135; *see also* James v. Tallahassee High Sch., 907 F. Supp. 364 (M.D. Ala. 1995), *aff'd per curiam*, 104 F.3d 372 (11th Cir. 1996); Albach v. Odle, 531 F.2d 983, 984-85 (stating that "[p]articipation in interscholastic athletics is not a constitutionally protected civil right").

165. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995). Some commentators, however, have noted that

> [a]lthough students are technically not required to participate in extracurricular activities, they are encouraged to do so to the point where nonparticipation makes them outcasts, and harms their social, physical, and mental well-being. To say that participation in extracurricular activities is optional is to ignore their central, critical importance to public education. Students are not employees of the school, nor are they, in any realistic sense, free to choose non-participation in school activities.

LaCroix, *supra* note 10, at 263.

166. *Vernonia*, 515 U.S. at 657.

167. *Id.* at 648.

168. *Id.* at 657.

169. *Id.* (quoting Schaill v. Tippecanoe Cnty. Sch. Corp., 864 F.2d 1309, 1318 (7th Cir. 1998)).

170. *See id.*

The Court also found that athletes in the school district must meet insurance requirements, must maintain adequate grades, and must "comply with 'any rules of conduct, dress, training hours and related matters as may be established for each sport'" by the school's administration.[171] In light of this reduced expectation of privacy from the nature of the extracurricular activity and the rules governing the extracurricular activity, and considering the unobtrusiveness of the search and the interests of the school district in reducing drug use, the Court held that the school district's random drug testing of students who participate in the district's athletics program does not violate the Fourth Amendment.[172] And importantly, the Court recognized similarities between First and Fourth Amendment jurisprudence in public schools: "*Fourth Amendment* rights, no less than *First* and *Fourteenth Amendment* rights, are different in public schools than elsewhere."[173]

Like the student-athletes in *Vernonia*, Avery Doninger was subject to a higher standard of conduct than normal students.[174] The district court found that "[a]s a student leader, Avery had a particular responsibility under the school handbook and school policy to demonstrate qualities of good citizenship at all times."[175] Principal Niehoff "defined good citizenship as respect for others, behaving appropriately and as a good role model, working to initiate community connections, and promoting positive interactions and conflict resolution," and she testified that "class officers were expected to work toward the objectives of the Student Council, work cooperatively with their advisor and with the administration, and promote good citizenship both in school and out."[176] Avery Doninger was well aware of these requirements, as she signed the school handbook, "which included language regarding the social and civic expectations of

171. *Id.*

172. *Id.* at 664 ("Taking into account all the factors we have considered above—the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search—we conclude that Vernonia's Policy is reasonable and hence constitutional."). *But see id*. at 686 (O'Connor, J., dissenting) ("Having reviewed the record here, I cannot avoid the conclusion that the District's suspicionless policy of testing all student athletes sweeps too broadly, and too imprecisely, to be reasonable under the *Fourth Amendment*." (emphasis added)).

173. *Id*. at 656 (majority opinion) (emphasis added).

174. Doninger v. Niehoff, 527 F.3d 41, 52 (2d Cir. 2008).

175. Doninger v. Niehoff, 514 F. Supp. 2d 199, 214 (D. Conn. 2007), *aff'd*, 527 F.3d 41 (2d Cir. 2008).

176. *Id.* at 214.

students."[177] Avery also discussed these responsibilities with Principal Niehoff on April 24, 2007—after the original Jamfest email had been sent out—where Principal Niehoff "indicated to Avery that such an approach to conflict resolution was . . . inappropriate."[178] Defiantly, Avery "posted her blog entry the very evening of the day on which that conversation occurred."[179] This act of insubordination was "a factor of particular relevance" in [Principal Niehoff's] disciplinary decision.[180]

The district court agreed with Principal Niehoff, finding that Avery's LiveJournal blog entry "clearly violates the school policy of civility and cooperative conflict resolution."[181] The district court noted that not only was Avery's LiveJournal post "at best misleading, and at worst, entirely false," but that her encouragement for "her readers to contact Ms. Schwartz specifically to 'piss her off more' [was] hardly the type of constructive approach to [dispute resolution] that a school would wish to encourage."[182] Even worse was that Avery included, in the LiveJournal post, the original e-mail that Principal Niehoff told Avery violated the school's Internet policy.[183] Ms. Doninger even admitted that her daughter's blog entry was offensive, and Avery Doninger "intimated that she opposed the specific punishment chosen rather than denying the appropriateness of any punishment at all[.]"[184] The district court refused to consider the supposed harshness of the penalty administered to Avery, noting that "whether disqualifying Avery from running for class secretary is a 'fitting punishment' in the circumstances, or was overly harsh or even too lenient, is not for this Court to determine."[185] The court deferentially left that question for the school authorities to decide, noting that "[s]uch a question, we believe, represents a judgment call best left to the locally elected school board, not to a distant, life-tenured judiciary."[186]

The Second Circuit found Avery's case to closely parallel that of *Lowery v. Euverard*, "which involved a group of high school football players who

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 214-15.

183. *Id.* at 215.

184. *Id*. Rather than admit she did not deserve to be punished at all, Ms. Doninger testified at oral argument that "the punishment didn't fit the crime." *Id.*

185. *Id.* at 202.

186. *Id.*

were removed from the team after signing a petition expressing their hatred of the coach and their desire not to play for him."[187] In *Lowery*, the Sixth Circuit applied *Tinker* to this group's petition, and found the relevant question to be whether "the petition might foreseeably frustrate efforts to teach the values of sportsmanship and team cohesiveness through participation in sport as an extracurricular activity."[188] The Sixth Circuit noted that it was well established that "student athletes are subject to greater restrictions [on speech] than the student body at large."[189] When players try out for a team, they implicitly agree to follow the coach's rules and to submit to the coach's authority.[190] While the students were free to continue their campaign to have the coach fired, they were not free to "continue to play football for him while actively working to undermine his authority."[191] Though the circumstances of the cases are certainly similar, the Second Circuit should have stopped short of the Sixth Circuit's use of *Tinker*.

Employing *Tinker* to insubordination by members of a student government requires not only that a student break the rules, but also that a school official reasonably conclude that the student's conduct will "materially and substantially disrupt the work and discipline of the school."[192] Yet not all rule-breaking behavior by a student will rise to the *Tinker* standard. Students like Avery Doninger regularly and voluntarily subject themselves to the regulations as a condition of participation.[193] To apply *Tinker* to Avery's conduct as a member of her student council is to ignore the principle courts have recognized: school officials may exercise broad discretion in establishing training and conduct standards for students that participate in extracurricular activities to follow.[194]

Instead, courts should review a school's conditions on extracurricular participation under a reasonableness standard like that of *Hazelwood*.[195]

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187. Doninger v. Niehoff, 527 F.3d 41, 52 (2d Cir. 2008); *see* Lowery v. Euverard, 497 F.3d 584 (6th Cir. 2007).

188. *Doninger*, 527 F.3d at 52 (quoting *Lowery*, 497 F.3d at 593, 596).

189. *Lowery*, 497 F.3d at 597.

190. *Id.* at 600.

191. *Id.*

192. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969). It is reasonable to conclude that not all examples of insubordination within an extracurricular activity would result in the level of disruption required by *Tinker*.

193. Doninger v. Niehoff, 514 F. Supp. 2d 199, 214 (D. Conn. 2007), *aff'd*, 527 F.3d 41 (2d Cir. 2008).

194. THOMAS, CAMBRON-MCCABE & MCCARTHY, *supra* note 17, at 136.

195. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

This standard is consistent with the general rule that courts will typically afford deference to a school's formulation of eligibility rules for extracurricular activities.[196] It is recognized and widely accepted that "[s]chools can impose conditions such as skill prerequisites for athletic teams, academic and leadership criteria for honor societies, and musical proficiency for band and choral groups."[197] Many students are required to undergo physical examinations to participate on athletic teams.[198] In addition, "courts generally approve residency requirements as conditions of interscholastic competition."[199] And, the "nationwide trend among school districts is to condition extracurricular participation on satisfactory academic performance."[200] With respect to school speech doctrines, the logical outcome of this deference to school administrators leads to results consistent with *Vernonia*; namely, that students who participate in extracurricular activities should expect intrusions upon normal rights, and that schools can enforce the conditions of their extracurricular activities.[201]

Thus, instead of relying on *Tinker*, the Second Circuit should have upheld the district court's conclusion that "participation in voluntary, extracurricular activities is a 'privilege' that can be rescinded when students fail to comply with the obligations inherent in the activities themselves."[202] Avery Doninger's insubordination, and her use of incendiary language to describe the school officials she was subject to, was a clear violation of her responsibility to demonstrate qualities of good citizenship at all times. Her conduct also worked against the basic interests of the student council, which needed a cooperative relationship with the school administration to achieve the objectives of the student government. The violation of these rules alone was enough to justify the disciplining of Avery Doninger.

In summary, the Second Circuit should not have used *Tinker* to justify the disciplining of Avery Doninger. This far-reaching employment of the

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196. THOMAS, CAMBRON-MCCABE & MCCARTHY, *supra* note 17, at 136.

197. *Id.*

198. *Id.* at 137.

199. *Id.*; *see also* Doe v. Woodford Cnty. Bd. of Educ., 213 F.3d 921, 923 (6th Cir. 2000) (upholding a school district's decision to exclude a hemophiliac student with hepatitis B from participating on a high school junior varsity basketball team).

200. THOMAS, CAMBRON-MCCABE & MCCARTHY, *supra* note 17, at 138.

201. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995).

202. Doninger v. Niehoff, 527 F.3d 41, 52 (2d Cir. 2008). A court's deference to a school's policies regarding extracurricular activities would not necessarily be automatic. The courts could subject these policies—and the disciplining of a student as a result of the violation of these policies—to a reasonableness standard that is similar to that in *Hazelwood*. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

Tinker test allows a school to punish student speech that is unlikely to cause a disruption—since the topic of the student speech is already resolved. Simply put, *Tinker* should be interpreted to require a school official to look *forward* in determining whether a student's speech should be silenced and/or punished. Instead of allowing Avery Doninger's insubordination to go unpunished, the Second Circuit should have simply recognized well-established limitations on the conduct of a student that participates in extracurricular activities. Avery Doninger broke the rules governing her involvement in student government. It is this fact alone, not the Second Circuit's over-reliance on and misuse of *Tinker* that justifies the punishment administered by the school.

V. CONCLUSION

More than ever, today's students have the means to communicate online.[203] Most students have in-home access to a personal computer.[204] And, student access to the Internet at home continues to rise.[205] Social networking websites like Facebook, Myspace, and LiveJournal, as well as the instant-messaging communication tools seen in *Wisniewski*, are seeing rapid increases in popularity.[206] It is estimated that "two-thirds of the world's Internet population belongs to a social network."[207] The Nielsen Company's research has uncovered that "global consumers spent more than five and half hours [sic] on social networking sites like Facebook and Twitter in December 2009, an 82% increase from the same time last year when users were spending just over three hours on social networking

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203. *See* Donald F. Roberts et al., *Generation M: Media in the Lives of 8-18 Year-olds*, THE HENRY J. KAISER FAMILY FOUNDATION 30 (Mar. 9, 2005), http://www.kff.org/entmedia/upload/Generation-M-Media-in-the-Lives-of-8-18-Year-olds-Report.pdf ("[I]n 1999, 73% of 8- to 18-year olds reported a personal computer in their home; today, 86% report in-home access to a PC. Similarly, the 21% of 8- to 18-year-olds [who] reported having a computer in their bedroom in 1999 has grown to 35% reporting either a bedroom computer or their own laptop. At the same time computer penetration has increased, so too have the computer activities that attract young people.").

204. *Id.*

205. *See Home Computer Access and Internet Use*, CHILD TRENDS DATABANK, http://www.childtrendsdatabank.org/?q=node/298 (last updated June 2011) ("[T]he percentage of children who use the internet at home rose from 22 percent in 1997, the first year for which such estimates are available, to 42 percent in 2003 . . . .").

206. Jordan McCollum, *Social Networking Surpasses Email Popularity*, MARKETING PILGRIM (Mar. 5, 2009), http://www.marketingpilgrim.com/2009/03/social-networking-surpasses-email-popularity.html.

207. *Id.*

sites."[208] Increased use of social networking websites by students, teachers, and school administrators—coupled with online access at schools—will undoubtedly lead to an increase in online speech that a school determines to be threatening, disruptive, or offensive. School officials will also increasingly find themselves in the difficult position of trying to foresee the disruption that a student's online speech may cause. With the increased amount of material posted to these websites, legal activity in this arena is bound to increase.[209]

Because the Supreme Court has not defined the scope of a school's authority to discipline a student's online and off-campus speech, lower courts and schools should step lightly in using existing Supreme Court precedent to discipline students. In the absence of a Supreme Court ruling, some schools are filling this void by "adopting policies that attempt to restrict the online, off-campus speech of their students."[210] Even assuming that a school is within its authority to discipline a student's speech that reaches the schoolhouse gate, though it takes place off-campus and online, courts should not extend a school's scope of disciplinary authority beyond what Supreme Court precedent reasonably allows.[211]

Nevertheless, courts must uphold the authority of schools to discipline a student's online speech if it violates the standard of conduct that an extracurricular activity places upon the student. Part of the justification for this conclusion is that students that participate in these activities voluntarily subject themselves to a higher standard of conduct than that imposed on the general student body.[212] Further, participation in extracurricular activities—like student government—is a privilege, not a right, and a school needs discretion in its attempts to maintain order, respect, and discipline within these activities.[213] Where school boards have established rules for

208. *Led by Facebook, Twitter, Global Time Spent on Social Media Sites up 82% Year over Year*, NIELSENWIRE (Jan. 22, 2010), http://blog.nielsen.com/nielsenwire/global/led-by-facebook-twitter-global-time-spent-on-social-media-sites-up-82-year-over-year.

209. THOMAS, CAMBRON-MCCABE & MCCARTHY, *supra* note 17, at 123.

210. Calvert, *supra* note 129, at 219.

211. Understandably, the interpretation and application of Supreme Court precedent to the realm of a student's online speech is a difficult task.

212. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995).

213. This argument poses a question as to when a school's rules governing extracurricular activities are considered to be too much of a burden on a student's First Amendment rights.

suspending or expelling students from extracurricular activities, courts should require student compliance with the rules.[214]

Tinker held that a student's speech, whether expressive or verbal, may not be prohibited or suppressed unless the school reasonably determines that it will "materially and substantially disrupt the work and discipline of the school."[215] This substantial disruption test can be a good test for schools to use, provided that it is not used retroactively to punish a student for online and off-campus speech that could have but did not, and likely will not, cause a substantial disruption. By applying *Tinker*'s test retroactively, and not from the moment LMHS school officials discovered the speech, the Second Circuit in *Doninger* needlessly extended the basic character of the *Tinker* test. Instead, the Second Circuit should have reaffirmed a school's authority to hold students that participate in extracurricular activities to a higher standard of conduct. Disciplinary action that results from a violation of this code of conduct should not be governed by *Tinker*, but by a reasonableness standard similar to that of *Hazelwood*.

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214. *See* THOMAS, CAMBRON-MCCABE & MCCARTHY, *supra* note 17, at 135. Though such a policy by the courts would defer to a school's judgment in establishing its own extracurricular rules, these rules would likely be subject to a reasonableness standard. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

215. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

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