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REGENT UNIVERSITY LAW REVIEW

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THE EVOLUTION OF VIRGINIA'S CONSTITUTIONS: A CELEBRATION OF THE RULE OF LAW IN AMERICA

Leroy Rountree Hassell, Sr.[*]

Dr. Pat Robertson, Dean Jeffery Brauch, Jay Sekulow, and my fellow Virginians—It is an honor to participate in the celebration of 400 years of the rule of law in Virginia and in America.

Our great Commonwealth of Virginia was conceived upon the issuance of the Charter for the Virginia Company of London by King James I on April 10, 1606.[1] This Charter empowered the Virginia Company of London to establish the first permanent English settlement in America.

On Saturday, December 20, 1606, three ships, the Susan Constant, the Godspeed, and the Discovery, left England and began the four and one-half month voyage.[2] The Discovery, whose captain was John Ratcliffe, was the only ship owned by the Virginia Company of London.[3] Christopher Newport was the Captain of the Susan Constant, and he was also the Admiral of the three-ship fleet.[4] One hundred and five men and boys, accompanied by thirty-nine seamen, made the journey from

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* Chief Justice of the Supreme Court of Virginia. This Keynote Address was delivered on April 12, 2007, as part of "Liberty Under Law: 400 Years of Freedom," a symposium hosted by Regent University School of Law.

I would like to thank my law clerk, Nöelle Groves, for her assistance with research and editorial comments.

1 FIRST CHARTER OF VIRGINIA (1606), *in* THE HARVARD CLASSICS: AMERICAN HISTORICAL DOCUMENTS 1000–1904 WITH INTRODUCTIONS, NOTES AND ILLUSTRATIONS, 51, 51 (Charles W. Elliot ed., 1910).

2 PARKE ROUSE, JR., THE VOYAGE TO JAMESTOWN: A SAGA OF SEAMANSHIP 1, 3 (1973).

3 *Id.* at 3.

4 Tom Roberts, *A Look Inside the Flagship Susan Constant*, RICHMOND TIMES-DISPATCH, Dec. 14, 2006, at E1.

London to the New World during the harsh winter months.[5] Only one hundred and four men and boys survived the journey to America.[6]

Sir Walter Raleigh initially suggested the establishment of an English colony in the New World during the reign of Queen Elizabeth I.[7] Ironically, he was a prisoner in the Tower of London, charged with intriguing with Spain, when the three ships left England.[8]

George Percy, the younger son of the Duke of Northumberland, was one of the men who traveled on this journey to the new world. He remained in Jamestown until 1612 and kept a journal.[9] According to one entry in the journal, about four o'clock in the morning, on April 26, 1607, a Sunday, the three ships entered the Chesapeake Bay.[10] A small group of men left the ships and began to explore the land adjacent to the Chesapeake Bay. Indians attacked them, and two members of the group were injured.[11]

The Reverend Robert Hunt had been selected to serve as chaplain and the first parish rector for the settlers by the Virginia Company of London. During the voyage from London to America, he became "weake and sicke" and his fellow voyagers thought he would die.[12] However, Hunt lived, and his miraculous recovery was a source of inspiration to others.

Wednesday, April 29, 1607 is a significant day in Virginia's history because on that date the English settlers erected a cross and gave thanks to God at Cape Henry.[13] Percy stated in his journal: "The nine and twentieth day, we set up a cross at [Chesapeake] Bay and named that place 'Cape Henry.'"[14]

Our celebration in Virginia Beach this evening is very symbolic. Cape Henry is the site where the English settlers knelt in prayer and thanked God for their safe journey in 1607. Exactly 174 years later, on September 5, 1781, Cape Henry was the location of another great event that changed the world forever.

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5 ROUSE, *supra* note 2, at 3–4.

6 *Id.*

7 *Id.* at 1.

8 *Id.*

9 George Percy, *Observations Gathered out of a Discourse of the Plantation of the Southern Colony in Virginia by the English, 1606, in* JAMESTOWN NARRATIVES: EYEWITNESS ACCOUNTS OF THE VIRGINIA COLONY: THE FIRST DECADE: 1607–1617, at 85 (Edward Wright Haile ed., 1998).

10 *Id.* at 90.

11 *Id.*

12 William Simons, *The Third Booke. The Proceedings and Accidents of The English Colony in Virginia, in* 2 THE COMPLETE WORKS OF CAPTAIN JOHN SMITH (1580–1631) 136, 137 (Philip L. Barbour ed., 1986).

13 ROUSE, *supra* note 2, at 4.

14 Percy, *supra* note 9, at 91.

Americans were engaged in a war for freedom and independence from Great Britain. The French fleet was commanded by Admiral de Grasse.[15] The British naval force was commanded by Admiral Graves, who had been sent to provide assistance to Lord General Cornwallis's British Army in Yorktown.[16]

A battle ensued for over three and one-half hours between the French fleet and the British fleet.[17] The French Navy was able to prevent the British Navy from helping Cornwallis, contributing to the eventual surrender of Cornwallis to General George Washington a few weeks later on October 19, 1781.[18] Thus, Virginia Beach represents not only our true birthplace of Virginia, but also our birthplace as a nation, separate and independent from Great Britain.

There are so many aspects of Virginia's rich legal history during the past 400 years that are worthy of discussion. This evening, I would like to limit my discussion to the fascinating evolution of Virginia's constitutions from 1776 through the present, a span of 230 years. As Virginians, and lawyers, often we fail to recognize and acknowledge the significant role of Virginia's constitutions in the development of our nation and our Federal Constitution.

And, too often, lawyers fail to raise state constitutional issues that would be beneficial to their clients. I believe that lawyers fail to raise these significant constitutional issues because our state constitutions have been largely ignored by legal writers and constitutional law professors.

The historical events surrounding the birth of Virginia's first constitution are worth noting. In 1775, Patrick Henry addressed the Virginia Convention, where he uttered his famous words, "[G]ive me liberty or give me death!"[19] That same year, Paul Revere and William Dawes alerted the New England patriots that the British Army was on its way to Lexington and Concord to seize them.[20] George Washington was named Commander-in-Chief of the American forces, and Benjamin Franklin became the first Postmaster General.[21]

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15 CHARLES LEE LEWIS, ADMIRAL DE GRASSE AND AMERICAN INDEPENDENCE 96–97, 156–90 (1945).

16 *Id.* at 152–55.

17 *Id.* at 158–61.

18 *Id.* at 185–90.

19 Patrick Henry, *The "Give Me Liberty or Give Me Death" Speech (1775), in* 8 THE WORLD'S FAMOUS ORATIONS 62, 67 (William Jennings Bryan & Francis W. Halsey eds., Funk & Wagnalls Co. 1906).

20 DAVID HACKETT FISCHER, PAUL REVERE'S RIDE 97 (1994).

21 U.S. POSTAL SERV., THE UNITED STATES POSTAL SERVICE: AN AMERICAN HISTORY 1775–2002, at 6 (2003).

The following year, in 1776, Spain and France agreed to provide arms to the rebelling colonists, and Richard Henry Lee, an outstanding Virginian, made a motion before the Continental Congress on June 7th, "[t]hat these United Colonies are, and of right ought to be, free and independent states."[22]

Virginia's first constitution was both a revolutionary and extraordinary document. Virginia's constitution was the first state constitution to contain a written bill of rights, called the Declaration of Rights.[23] The Preamble to the Virginia Constitution was authored by Thomas Jefferson, while he was in Philadelphia drafting the Declaration of Independence.[24]

George Mason drafted the Declaration of Rights and the first Virginia Constitution, which were never approved by the people of Virginia.[25] Thomas Jefferson and other leading Virginians questioned whether the first constitution was legitimate because it had not been submitted to the male voters for their approval.[26] However, the Supreme Court of Virginia stated in *Kamper v. Hawkins* in 1793:

> The convention of Virginia had not the shadow of a legal, or constitutional form about it. It derived its existence and authority from a higher source; a power which can supercede [sic] all law, and annul the constitution itself—namely, the people, in their sovereign, unlimited, and unlimitable authority and capacity.[27]

The very first paragraph of Virginia's first Declaration of Rights states: "A declaration of rights made by the representatives of the good people of Virginia, assembled in full and free Convention; which rights do pertain to them, and their posterity, as the basis and foundation of government."[28] This was a revolutionary statement in 1776, and in many places around the world today, this principle remains unknown.

The right to vote, no taxation without representation, separation of powers, the concept that an individual cannot be deprived of property for public use without consent—these principles are protected in the Declaration of Rights.

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[22] HENRY BALDWIN, A GENERAL VIEW OF THE ORIGIN AND NATURE OF THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES, DEDUCED FROM THE POLITICAL HISTORY AND CONDITION OF THE COLONIES AND STATES, FROM 1774 UNTIL 1788, at 28 (Lawbook Exch., Ltd. 2000) (1837).

[23] JOHN DINAN, THE VIRGINIA STATE CONSTITUTION: A REFERENCE GUIDE 2 (2006).

[24] 6 A. LONDON FELL, ORIGINS OF LEGISLATIVE SOVEREIGNTY AND THE LEGISLATIVE STATE 20–21 (2004).

[25] DINAN, *supra* note 23, at 2.

[26] *Id.* at 3.

[27] Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20, 74 (1793).

[28] A Declaration of Rights, *in* ORDINANCES PASSED AT A GENERAL CONVENTION OF DELEGATES AND REPRESENTATIVES, FROM THE SEVERAL COUNTIES AND CORPORATIONS OF VIRGINIA 3, 3 (Williamsburg, Alexander Purdie 1776).

The Declaration of Rights also states "[t]hat in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred."[29]

Virginia's Declaration of Rights also protects the right to worship. The Declaration of Rights states:

> That religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity, towards each other.[30]

Many of the protections set forth in the Declaration of Rights were embodied within Virginia's first constitution. For example, our first constitution provided that "[t]he legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other."[31]

The Virginia Constitution of 1776 provided that the governor was to be elected by the General Assembly for a one-year term and could not serve more than three successive terms.[32]

Virginia's first constitution also created the General Assembly of Virginia with the House of Delegates and the Senate. All laws were required to originate in the House of Delegates and had to be approved or rejected by the Senate.[33] This constitution did not have a provision that would enable the Governor to veto acts of the General Assembly. Patrick Henry, who vehemently objected to this omission, argued that "a governor would be a mere phantom, unable to defend his office from the usurpation of the legislature, unless he could interpose on a vehement impulse or ferment in that body; and that he would otherwise be ultimately a dependent, instead of a coordinate branch of power."[34]

The General Assembly elected all judges and the Attorney General; the judges and the Attorney General served for terms of good behavior.[35]

Interestingly, all ministers of the Gospel, of every denomination, were constitutionally incapable of being elected members of the General Assembly or the Privy Council,[36] which was a special council that exercised certain constitutional duties.[37]

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29 *Id.* at 5.

30 *Id.*

31 VA. CONST. of 1776.

32 *Id.*

33 *Id.*

34 DINAN, *supra* note 23.

35 VA. CONST. of 1776.

36 *Id.*

37 *Id.*

Virginia's first constitution and Declaration of Rights served as models for the Federal Constitution and the Federal Bill of Rights.[38] The Supreme Court of Virginia, which predates the United States Supreme Court, served as a model for that Court.

Virginia's constitution was revised in 1830. One hundred and one delegates participated in the Constitutional Convention of 1829 and 1830.[39] These delegates were described as "an assembly of men . . . which has scarcely ever been surpassed in the United States."[40] The Chief Justice of the Supreme Court of the United States, two former Presidents of the United States, distinguished members of the judiciary and the bar, and a future President of the United States participated as delegates.[41]

During discussions about the judiciary, United States Chief Justice John Marshall noted: "[T]he greatest curse an angry heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent judiciary. Will you call down this curse on Virginia?"[42]

The Virginia Constitution of 1830 continued the requirement that "[a]ll laws shall originate in the House of Delegates, to be approved or rejected by the Senate, or to be amended with the consent of the House of Delegates."[43] This constitution also expanded the right to vote to include a greater number of Caucasian male citizens of Virginia.[44]

Delegates at this Convention spent a great deal of time arguing about voting apportionment plans and redistricting,[45] issues that have been a constant source of political contention throughout Virginia's history, continuing through the present.

The Virginia Constitution of 1830 vested judicial power "in a Supreme Court of Appeals, in such Superior Courts as the Legislature

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[38] W. B. Swaney, *The Federal Constitution and First Ten Amendments: Virginia Documents*, 11 VA. L. REV. 210, 212 (1925).

[39] Virginia Historical Society, *Becoming Southerners: Virginia Constitutional Convention*, http://www.vahistorical.org/sva2003/vacc.htm (last visited Oct. 8, 2007).

[40] PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–30, at iii (Richmond, Ritchie & Cook 1830) [hereinafter PROCEEDINGS AND DEBATES].

[41] THE HORNBOOK OF VIRGINIA HISTORY: A READY-REFERENCE GUIDE TO THE OLD DOMINION'S PEOPLE, PLACES, AND PAST 41 (Emily J. Salmon & Edward D.C. Campbell, Jr. eds., 4th ed. 1994).

[42] HUGH BLAIR GRIGSBY, THE VIRGINIA CONVENTION OF 1829-30, at 16 (Da Capo Press 1969) (1854).

[43] VA. CONST. of 1830, art. III, § 10.

[44] *Id.* § 14.

[45] *See generally* William F. Swindler, *Background Note* to Virginia Constitutions, *in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 13, 14 (William F. Swindler ed., 1979).

may from time to time ordain and establish, and the Judges thereof."[46] The Justices of the Supreme Court of Virginia and the other courts served for a term of good behavior and were elected by a joint vote of the House of Delegates and the Senate.[47]

During the debates surrounding this constitution, Chief Justice John Marshall uttered his often quoted observation about judicial independence:

> Advert, Sir, to the duties of a Judge. He has to pass between the Government and the man whom that Government is prosecuting: between the most powerful individual in the community, and the poorest and most unpopular. It is of the last importance, that in the exercise of these duties, [a judge] should observe the utmost fairness. Need I press the necessity of this? Does not every man feel that his own personal security and the security of his property depends on that fairness? The Judicial Department comes home in its effects to every man's fireside: it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that [a judge] should be rendered perfectly and completely independent, with nothing to influence or controul [sic] him but God and his conscience?[48]

Virginia's constitution was revised again in 1851. To fully understand the Constitution of 1851, we must consider the historical developments that occurred during that era.

Tensions were high in the northern states and southern states regarding the expansion of slavery. The Compromise of 1850, sponsored by United States Senator Henry Clay, allowed California, where slavery was forbidden, to be admitted as the 31st state.[49] Utah and New Mexico were deemed territories.[50] The Fugitive Slave Act was amended so that slave-owners could reclaim slaves who had escaped from the south and lived in non-slave holding states.[51]

Of literary interest, Nathaniel Hawthorne's *The Scarlet Letter* was published in 1850,[52] and *Moby Dick*, written by Herman Melville, was

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[46] VA. CONST. of 1830, art. V, § 1.

[47] *Id.*

[48] PROCEEDINGS AND DEBATES, *supra* note 40, at 616.

[49] Act of Sept. 9, 1850, ch. 50, 9 Stat. 452 (1850). The Compromise of 1850 included five statutes, one of which provided for the admission of California as a state. In his Resolutions to the Senate, Senator Henry Clay stated: "California, with suitable boundaries, ought, upon her application, to be admitted as one of the States of this Union, without the imposition by Congress of any restriction in respect to the exclusion or introduction of slavery within those boundaries." S.R. MISC. DOC. NO. 31–36, at 1 (1850). Senator Clay spoke for two days straight in favor of the Compromise Resolutions. 2 THE LIFE & SPEECHES OF HENRY CLAY 601 (Philadelphia, J.L. Gihon, 1854).

[50] *Id.*

[51] Fugitive Slave Act of 1850, ch. 60, § 6, 9 Stat. 462, 463 (1850) (repealed 1864).

[52] NATHANIEL HAWTHORNE, THE SCARLET LETTER (Alfred A. Knopf, Inc. 1992) (1850).

published in 1851.[53] In 1852, *Uncle Tom's Cabin*, written by Harriet Beecher Stowe, was published.[54]

Harriet Tubman was intimately involved in the Underground Railroad,[55] and the American Express Company was founded in 1850.[56] *The New-York Times*,[57] the *Reuters* news service,[58] and Macy's Department Store[59] were also founded in the 1850s.

The Virginia Constitution of 1851 marked a significant departure from prior constitutions because, for the first time, "[b]ills and resolutions [could] originate in either of the two houses of the [G]eneral [A]ssembly, to be approved or rejected by the other, and [could] be amended by either house, with the consent of the other."[60]

The Constitution of 1851 provided that emancipated slaves forfeited their freedom if they remained in Virginia more than twelve months after they became free.[61] This constitution also empowered the General Assembly to impose restrictions and conditions upon the power of slave owners to emancipate their slaves.[62]

This constitution reflected the expanded growth of the Commonwealth and the need for greater government regulation. It created the offices of the Secretary of the Commonwealth, the Treasurer, the Auditor, and the Board of Public Works.[63]

The Constitution of 1851 is remarkable in that it provided for the election of judges by the voters.[64] Though the judges who had been elected under the Constitution of 1830 were entitled to serve for life, the Constitution of 1851 divested them of that life tenure. I remain surprised that a constitutional crisis did not ensue.

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53 HERMAN MELVILLE, MOBY DICK (Literary Classics of the United States, Inc. 1983) (1851).

54 HARRIET BEECHER STOWE, UNCLE TOM'S CABIN (Oxford Univ. Press 1998) (1852).

55 *See* CATHERINE CLINTON, HARRIET TUBMAN: THE ROAD TO FREEDOM 79–108 (2004); Catherine Clinton, *"Slavery is War": Harriet Tubman and the Underground Railroad*, *in* PASSAGES TO FREEDOM: THE UNDERGROUND RAILROAD IN HISTORY AND MEMORY 195, 195–209 (David W. Blight ed., 2004).

56 Becoming American Express: 150+ Years of Reinvention of Customer Service, http://home3.americanexpress.com/corp/os/history.asp (last visited Oct. 6, 2007).

57 New York Times Timeline 1851–1880, http://www.nytco.com/company/milestones/timeline_1851.html (last visited Oct. 6, 2007).

58 History of Reuters, http://about.reuters.com/home/aboutus/history/index.aspx (last visited Oct. 6, 2007).

59 Macy's: A History, http://www.macysinc.com/company/his_macys.asp (last visited Oct. 6, 2007).

60 VA. CONST. of 1851, art. IV, § 11.

61 *Id.* § 19.

62 *Id.* § 20.

63 *Id.* art. V, §§ 11–18.

64 *Id.* art. VI, §§ 6, 10.

The Constitution of 1851 was the first Virginia Constitution that required the judges of the Supreme Court to state reasons for their decisions.[65] This requirement remains intact today.

As a consequence of the 1851 Constitution, for the first time in the history of our Commonwealth, the Governor would be elected by the voters.[66] The term of the Governor was for four years.[67] This constitution also provided for the election of Commonwealth's attorneys.[68]

Virginia's next constitution was the Constitution of 1864. When this constitution took effect, our nation was in a civil war. The Confederate submarine Hunley attacked and destroyed the U.S.S. Housatonic. This naval attack marked the first time that a submarine destroyed an enemy ship.[69] Arlington National Cemetery was established on 200 acres of land owned by General Robert E. Lee, Commander of the Confederate Army.[70]

The Battle of Petersburg began, and General Ulysses Grant led his forces against an army commanded by General Lee.[71] General Sherman, leading the Union forces, occupied Atlanta, Georgia after placing the city under a four-month siege.[72] President Abraham Lincoln was re-elected, and Nevada was admitted as the 36th state.[73]

The Constitution of 1864 is fascinating because it was drafted by only seventeen delegates, all of whom were loyal to the Union forces.[74] This small group of delegates met in Alexandria on February 13, 1864.[75] This constitution was adopted in the spring of 1864 after it was submitted to the people who approved it "by about five hundred votes."[76]

Virginia's Constitution of 1864 was not accepted by many Virginians. In 1900, the president of the Virginia State Bar Association stated:

> I need not notice the Alexandria Constitution of 1864, adopted by a pretended and spurious convention, which did not represent one-

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65 *Id.* § 13.

66 *Id.* art. V, § 2.

67 *Id.* § 1.

68 *Id.* art. VI, § 30.

69 EDWIN P. HOYT, THE VOYAGE OF THE HUNLEY 55–68, 151 (2002).

70 Arlington National Cemetery: Historical Information, http://www.arlingtoncemetery.org/historical_information/arlington_house.html (last visited Oct. 6, 2007).

71 WELCOME THE HOUR OF CONFLICT: WILLIAM COWAN MCCLELLAN AND THE 9TH ALABAMA 260–63, 390 (John C. Carter ed., 2007).

72 WILLIAM R. SCAIFE, THE CAMPAIGN FOR ATLANTA 108–13 (1985).

73 Nevada State Library and Archives, Nevada Facts, http://dmla.clan.lib.nv.us/docs/nsla/services/nvfacts.htm (last visited Oct. 6, 2007).

74 DINAN, *supra* note 23, at 12.

75 Hamilton James Eckenrode, *The Political History of Virginia During the Reconstruction*, *in* 22 JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE 287, 306 (J.M. Vincent et al. eds., 1904).

76 *Id.* at 306–08.

> thousandth part of the people of the Commonwealth, and which would, in fact, but for the serious results which flowed from the game it was suffered to play, have been a ridiculous farce. By no specious reasoning, not even by a resort to the device of a legal fiction, can that convention be ever galvanized into legal vitality.[77]

Not surprisingly, this constitution contained a provision requiring that all voters and officeholders "take an oath to support the United States and the Restored Government of Virginia," which was recognized by the Union as the legitimate government of Virginia.[78] This constitution abolished slavery and involuntary servitude in the State of Virginia.[79]

Virginia's constitution was revised again in 1870. One hundred and five delegates participated in the constitutional convention, and approximately twenty-five of these delegates were black.[80]

The Constitution of 1870 was also a very comprehensive document. Voting rights were granted to every male citizen with certain exceptions. The following persons were excluded from voting:

> No person who, while a citizen of [Virginia], has, since the adoption of this constitution, fought a duel with a deadly weapon, sent or accepted a challenge to fight a duel with a deadly weapon, either within or beyond the boundaries of this state, or knowingly conveyed a challenge, or aided or assisted in any manner in fighting a duel, shall be allowed to vote or hold any office of honor, profit, or trust under this constitution.[81]

Additionally, the 1870 Constitution contained a provision recognizing that laws passed by the Congress of the United States constituted "the supreme law of the land" and that allegiance and obedience to the Federal Constitution were required from every citizen.[82]

For the first time, the Virginia Governor was granted the power to veto legislation;[83] finally, Patrick Henry's position in 1776 was embraced.[84] Additionally, the popular election of judges was eliminated, and the General Assembly, once again, was given the power to elect judges.[85]

The Constitution of 1870 is also very significant because it provided for a superintendent of public instruction who "shall have the general

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77 DINAN, *supra* note 23, at 12 (citation omitted).

78 *Id.* (citation omitted).

79 VA. CONST. of 1864, art. IV, § 19.

80 DINAN, *supra* note 23, at 12.

81 VA. CONST. of 1870, art. III, § 1.

82 *Id.* art. I, § 3.

83 *Id.* art. IV, § 8.

84 DINAN, *supra* note 23, at 2.

85 VA. CONST. of 1870, art. VI, §§ 5, 11.

supervision of the public free school interests of the state."[86] This constitution created the Board of Education and required that the General Assembly establish a uniform system of public free schools.[87]

The Constitution of 1902 was the product of another constitutional convention. Numerous noteworthy historical events occurred around 1901 and 1902, when Virginia enacted this constitution. American League Baseball became Major League Baseball.[88] New York became the first state to require that owners of cars obtain license plates.[89] The Cadillac Motor Company was founded in Detroit, Michigan.[90] President McKinley was assassinated[91] and Theodore Roosevelt became President of the United States.

Theodore Roosevelt invited Booker T. Washington to the White House, and the invitation extended to this famous black American caused racial riots and violence throughout the South.[92] The American Standard Version Bible was first published,[93] and the first Nobel Prize ceremony was held.[94] The Carnegie Foundation was founded.[95] The Rose Bowl, the first American collegiate football bowl game, was played in Pasadena between Michigan and Stanford.[96]

The Constitutional Convention of 1901 and 1902, which drafted the 1902 Constitution, was an omen for racial progress and the rule of law in Virginia. As one commentator noted:

> Of particular concern to the convention delegates was how to restrict the suffrage of [black Virginians], and, relatedly, how to reduce the electoral fraud . . . that had increasingly been resorted to by the white majority, at first in order to ensure white dominance, and increasingly

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[86] *Id.* art. VIII, § 1.

[87] *Id.* art. VIII, §§ 2–3.

[88] *New Baseball Factor: National League Behind the American Association*, WASH. POST, Jan. 15, 1901, at 8.

[89] Joseph Nathan Kane et al., *Motor Vehicles*, *in* FAMOUS FIRST FACTS 718, 719 (H.W. Wilson Co., 6th ed. 2006) (1933).

[90] GM: Corporate History, http://www.gm.com/corporate/about/history/?m=1900 (last visited Oct. 6, 2007).

[91] *See* Sidney Fine, *Anarchism and the Assassination of McKinley*, 60 AM. HIST. REV. 777, 777–82 (1955).

[92] *The Night President Teddy Roosevelt Invited Booker T. Washington to Dinner*, J. BLACKS IN HIGHER EDUC., Spring 2002, at 24, 24–25.

[93] *Biblical Literature and Its Critical Interpretation*, *in* 14 ENCYCLOPEDIA BRITANNICA 903, 915 (15th ed. 2007).

[94] Nobelprize.org, Alfred Nobel—The Man Behind the Nobel Prize, http://nobelprize.org/alfred_nobel/ (last visited Oct. 6, 2007).

[95] The Carnegie Foundation for the Advancement of Teaching, Carnegie Foundation History, http://www.carnegiefoundation.org/about/index.asp?key=13 (last visited Oct. 6, 2007).

[96] Pasadena Tournament of Roses: Rose Bowl Game FAQs, http://www.tournamentofroses.com/rosebowlgame/gamefaqs.asp (last visited Oct. 6, 2007).

> for other purposes as well. [John] Goode[, the president of the Constitutional Convention,] maintained that "our people have no prejudice, no animosity, against the members of the colored race, but they believe, and I believe with them, that the dominant party in Congress not only committed a stupendous blunder, but a crime against civilization and Christianity, when, against the advice of their wisest leaders, they required the people of Virginia and the South, under the rule of bayonet, to submit to universal negro suffrage." The challenges for the convention, therefore, were threefold: to devise a method of restricting [black] suffrage; to do so in a manner that would conform to the U.S. Constitution; and in the process to ensure that "politics in Virginia may be so purified that in all the years to come [Virginia] shall not be stained by any act of fraud, bribery, corruption, false registration, false counting, or any debauching methods in the conduct of the elections."[97]

As a consequence of this convention and the new constitution, voter registration required the payment of a poll tax in each of the three preceding years before an election and the passage of a voter literacy test, referred to as an "understanding" clause.[98] This poll tax remained in effect until 1966 when the United States Supreme Court held that the imposition of the tax as a prerequisite for voting was unconstitutional.[99]

I am pleased to report that even though the Constitutional Convention of 1901 and 1902 achieved its desired purpose, many courageous delegates, principally from the southwestern portion of Virginia, argued against constitutional provisions that would have deprived black Virginians of the right to vote. The literacy test, designed to prevent black Virginians from voting, was also used to prevent Republicans from exercising their rights to vote.[100]

Even though there were numerous legal challenges to the legitimacy of the constitution because it was not submitted to the people for approval,[101] the Supreme Court of Virginia ruled in *Taylor v. Commonwealth* that the 1902 Constitution was lawful.[102]

Our present constitution was approved by the voters in 1971 and is the sixth complete revision of Virginia's constitution since 1776. The 1970s marked a turbulent era in American history. The nation was at war in Vietnam. United States postal workers embarked upon a strike, and approximately 200,000 postal employees refused to work.[103]

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97 DINAN, *supra* note 23, at 15.

98 *Id.* at 16.

99 Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666, 670 (1966).

100 DINAN, *supra* note 23, at 16–17.

101 *Id.* at 18.

102 44 S.E. 754, 755 (Va. 1903).

103 Richard J. Murphy, *The Difference of a Decade: The Federal Government*, PUB. ADMIN. REV., Mar.–Apr. 1972, at 108, 110.

Violent antiwar demonstrations were occurring throughout the nation. At Kent State University, four students were killed and nine were wounded by National Guardsmen.[104] The Apollo 13 spacecraft, which was en route to the moon, was damaged as a result of an oxygen tank explosion, and the crew aborted their mission. They returned to Earth as Americans prayed and waited anxiously for their safe arrival.[105]

Virginia's current Declaration of Rights is substantially identical to the Declaration of Rights adopted in 1776. The Declaration of Rights was amended on November 5, 1996, adding a provision guaranteeing the rights of victims of crime.

Our present constitution has numerous provisions regarding the regulation of the right to vote and requires that the General Assembly establish a uniform system for permanent registration of voters. The principle of separation of powers remains deeply embedded within Virginia's constitution.

Section 14 of Article 4 of the Constitution of Virginia describes the powers of the General Assembly and prescribes certain limitations upon that power. For example, the General Assembly may not, by special legislation, grant relief to persons in any case in which the courts or other tribunals have jurisdiction.[106]

In November 2004, in response to the need for the continuity of the operation and continuation of government after terrorist attacks in New York and in Virginia, Section 16 of Article 5 was added to the Constitution of Virginia. Section 16 provides for a detailed succession to the office of governor.[107]

As one might expect, Article 6 of our constitution, which relates to the judiciary, is very dear to my heart. Section 1 of this Article vests the judicial power of the Commonwealth in the Supreme Court of Virginia and makes such other courts of original or appellate jurisdiction subordinate to the Supreme Court as the General Assembly may from time to time establish.[108]

Virginia's constitution empowers the Supreme Court to adopt rules governing the course of appeals and the practice and procedures to be used in all courts of the Commonwealth.[109] The constitution also states: "When a judgment or decree is reversed, modified, or affirmed by the

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[104] *See* Raymond J. Adamek & Jerry M. Lewis, *Social Control Violence and Radicalization: The Kent State Case*, 51 SOC. FORCES 342, 342–47 (1973).

[105] *See* Thomas O'Toole & Stuart Auerbach, *Apollo Power Loss Aborts Mission; Astronauts Attempting Return Flight*, WASH. POST, Apr. 14, 1970, at A1; *Nixon: 'Join . . . in Offering . . . Prayer . . . of Deep Thanks,'* WASH. POST, Apr. 18, 1970, at A12.

[106] VA. CONST. art. IV, § 14.

[107] *Id.* art. V, § 16.

[108] *Id.* art. VI, § 1.

[109] *Id.* § 5.

Supreme Court, or when original cases are resolved on their merits, the reasons for the Court's action shall be stated in writing and preserved with the record of the case."[110] The judicial branch of government is the only branch of government that is required to explain its decisions in writing.

Today's constitution reflects the tremendous growth in Virginia's government and the complexity of our society. Our constitution includes provisions related to compulsory education,[111] the State Corporation Commission,[112] taxation and finance,[113] property exempt from taxation,[114] distribution of State revenues,[115] lottery proceeds,[116] State debt,[117] State employees' retirement system,[118] public education,[119] and conservation of the Commonwealth's natural resources and historical sites.[120] Our constitution was recently amended by Virginia's voters to include a definition of marriage.[121]

As Americans, as Virginians, as members of government, as lawyers, as professors, we should always remember that we are a nation devoted to the rule of law and that we must never permit the predilections of men and women to undermine our strong adherence to this fundamental concept.

Our constitution is more than a mere legal document. Our constitution is a living document, a reflection of the values and beliefs of all Virginians. This document is an embodiment of the basic rights that we believe are necessary to ensure the enjoyment of liberty, freedom, security, and religious expression.

Our constitutions have not been, and will never be, perfect because they are drafted by men and women who suffer from human frailties, biases, and predilections. As our history demonstrates, some of our constitutions have been unfair to the poor, members of the clergy, black citizens, women, and Native Americans.

Even though our constitutions may be imperfect, we must always seek perfection in our continuous quest to protect the principles of freedom, liberty, justice, and the rule of law.

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[110] *Id.* § 6.
[111] *Id.* art. 8, § 3.
[112] *Id.* art. 9, §§ 1–4.
[113] *Id.* art. 10.
[114] *Id.* § 6.
[115] *Id.* § 7.
[116] *Id.* § 7-A.
[117] *Id.* § 9.
[118] *Id.* § 11.
[119] *Id.* art. 8, §§ 1–9.
[120] *Id.* art. 11, §§ 1–2.
[121] *Id.* art. 1, § 15-A.

As Virginians, as Americans, as people of faith, just as the English settlers thanked God for their successful journey from Great Britain to America on the shores of Virginia Beach 400 years ago, we too should thank God for 400 years of the rule of law and liberty in our great nation. This evening, let us together renew our commitment to the rule of law thereby ensuring liberty, freedom, and justice to future generations of Virginians. May God bless this Commonwealth and our great United States of America.

RELIGION AND THE AMERICAN FOUNDING

Ellis Sandoz[*]

I. INTRODUCTION: COMMON GROUND AND GENERAL PRINCIPLES—*HOMONOIA* (ARISTOTLE)

A. Federalist No. 2 (Jay)

> Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, . . . who . . . have nobly established their general liberty and independence.
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> . . . [I]t appears as if it was the design of Providence that an inheritance so proper and convenient for a band of brethren . . . should never be split into a number of unsocial, jealous, and alien sovereignties.[1]

In justifying union under the Constitution, Publius (Madison) later appeals "to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim and to which all such institutions must be sacrificed."[2] Publius thus invokes Aristotle, Cicero, and *salus populi, suprema lex esto*, as often was also done by John Selden, Sir Edward Coke, and the Whigs in the 17th century constitutional debate.[3] This was understood to be the ultimate ground of all free government and basis for exercise of legitimate authority (not tyranny) over free men—the *liber homo* of the Magna Carta and English common law.[4] James Madison and the other founders knew and accepted this as a fundamental to their own endeavors.

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[*] Hermann Moyse, Jr. Distinguished Professor of Political Science, Director of the Eric Voegelin Institute for American Renaissance Studies, Louisiana State University. This Address was delivered on April 13, 2007, as part of "Liberty Under Law: 400 Years of Freedom," a symposium hosted by Regent University School of Law.

[1] THE FEDERALIST NO. 2, at 38 (John Jay) (Clinton Rossiter ed., 1961).

[2] *Id.* NO. 43, at 279 (James Madison).

[3] *See* CICERO, DE RE PUBLICA, DE LEGIBUS 3.3.8, at 466–67 (Clinton Walker Keyes, trans., Harvard Univ. Press 1961); ELLIS SANDOZ, A GOVERNMENT OF LAWS: POLITICAL THEORY, RELIGION, AND THE AMERICAN FOUNDING 116–18, 174, 197, 227 (Univ. of Mo. Press 2001) (1990).

[4] *See* J.C. HOLT, MAGNA CARTA 9–11, 276–78, 291–95, 455–61, 473 (2d ed. 1992) (discussing the concept of "free man" in the Magna Carta); *cf.* SAMUEL RUTHERFORD, LEX, REX, OR THE LAW AND THE PRINCE 119 (Sprinkle Publ'ns. 1982) (1644) ("The law of the twelve tables is, *salus populi, suprema lex.* The safety of the people is the supreme and cardinal law to which all laws are to stoop.").

B. John Adams to Thomas Jefferson on the Principled Basis of American Cohesion During the Revolution

> The *general Principles*, on which the Fathers Atchieved [sic] 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 those 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; and that those Principles of Liberty, are as unalterable as human Nature and our terrestrial, mundane System.[5]

II. ELEMENTS OF THE PRESENT DISCUSSION

A. English Conceits and Prejudices Illustrated from Virginia's History

The true Christian is an Englishman and he is free! There is an element of arrogant self-assurance in this conviction, obviously, but you may have noticed that politics is not a purely rational enterprise. As Rev. William Crashaw's sermon to the Jamestown colonists in 1606 stated: "He that was *the God of Israel* is still *the God of England.*"[6] The attitude was commonplace, and in various forms it has persisted to define a central aspect of American "exceptionalism."

Soteriology of Empire: Dominion over the land was based in the God-centered world of the time as a work done in friendship with the Creator.[7] The form of the polity was intended to reflect that cardinal fact. This was a religious age "in which ideas about God, the church, and religious devotion touched upon nearly all aspects of life, both public and private."[8] Behavior rather than belief ruled the relationship to God in a Mosaic polity in which, in accordance with the Hebraizing Christianity current in England, not primarily personal salvation but salvation

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[5] Letter from John Adams to Thomas Jefferson (June 28, 1813), *in* THE ADAMS-JEFFERSON LETTERS at 339–40 (Lester J. Cappon ed. 1971). For discussion, see ELLIS SANDOZ, *Religious Liberty and Religion in the American Founding, in* THE POLITICS OF TRUTH AND OTHER UNTIMELY ESSAYS 65, 67–69 (1999).

[6] EDWARD L. BOND, DAMNED SOULS IN A TOBACCO COLONY: RELIGION IN SEVENTEENTH-CENTURY VIRGINIA 15 (2000) [hereinafter BOND, DAMNED SOULS]; *see also* Edward L. Bond, *Religion in Colonial Virginia* [hereinafter Bond, *Colonial Virginia*], *in* SPREADING THE GOSPEL IN COLONIAL VIRGINIA 1, 3–4, 8 (Edward L. Bond ed., 2005).

[7] *See* BOND, DAMNED SOULS, *supra* note 6, at 16, 51; *Genesis* 1:28; *Psalms* 8.

[8] BOND, DAMNED SOULS, *supra* note 6, at 50.

through the dominion of a chosen nation on the Old Testament model prevailed. The English became the new elect or chosen people. The specific terms are given in the Virginia law code *Lawes Divine, Morall and Martiall* (1610) that expressed English identity based on labor, worship, and Christian morality and followed the Ten Commandments.[9] "[B]ehavior took on a nearly sacramental character"[10] to the neglect of the experiential faith essential to salvation, a defect Captain John Smith himself deplored at the time: "'Our good deeds or bad, by faith in Christ's merits, is all wee [sic] have to carry our soules to heaven or hell.'"[11]

Thus, early on, the decisive existential tension toward transcendence clearly emerges that distinguishes between terrestrial and celestial empire, between the realms of Caesar and of God.[12] It structures all Western politics after St. Augustine and is characteristic of Virginia's early years. The problematic is not tidy or simple, and its terms change with the times. But the principle remains: human existence participates in all levels of reality but at all times must be lived in the metaxy or "In-Between" or middle-zone of time and eternity, mortality and immortality, and of divine-human interaction. It abidingly limits earthly empires and human pretensions as a chastening ineluctable dimension of reality itself. This is a cardinal insight of both philosophy and Christianity—one systematically subverted in the libidinous pretenses of all great tyrants (call them what you will) both religious and ideological, past and present, from the gnostic deformations of Boniface VIII to those of Karl Marx.[13] Along the way America was born asserting liberty and justice in the face of perceived tyranny and raising the noble banner of a government of laws and not of men. In doing so it drew especially on the prudential science of Aristotle, who argued that:

> Therefore he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law[, nomos,] is reason[, nous,] unaffected by desire.[14]

In Virginia, the Church of England was established by law; thus, the Bible, Book of Common Prayer, Apostles Creed, Ten

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[9] *See id.* at 64, 83–84; Bond, *Colonial Virginia*, *supra* note 6, at 4.

[10] BOND, DAMNED SOULS, *supra* note 6, at 90.

[11] *Id.* at 91 (citation omitted).

[12] *Luke* 20:25 ("Then give to Caesar what is Caesar's, and to God what is God's.").

[13] *See* BONIFACE VIII, UNAM SANCTAM (1302), *reprinted in* PHILIP THE FAIR AND BONIFACE VIII: STATE VS. PAPACY 52, 52–53 (Charles T. Wood ed., 1971); KARL MARX, MARX ON RELIGION *passim* (John Raines ed., 2002).

[14] ARISTOTLE, POLITICS 1287a:28–31 (Benjamin Jowett trans.), *reprinted in* 2 THE WORKS OF ARISTOTLE 445, 485 (W.D. Ross, ed., Encyclopædia Britannica, Inc. 1952).

Commandments, and Sermon on the Mount supplied those "general Principles of Christianity" John Adams later spoke of as grounding American consensus.[15] Order depended on religion, and the core of worship was liturgical practice taken from the Book of Common Prayer. Of the settlers' routine, Captain John Smith wrote: "'Our order was daily to have Prayer, with a Psalm.'"[16] The Book of Common Prayer contained morning and evening services and a complete Psalter indicating which was to be prayed each day.[17] The Bible was read all the way through each year following the liturgical calendar.

Among the Puritans, Dissenters, Presbyterians, Huguenots, and Congregationalists (and Baptists and Methodists after the onset of the Great Awakening of the 1740s), sermons far more than liturgy counted in worship, especially in later Virginia. As can be seen from William Byrd II of Westover and James Blair (1685–1743), preaching loomed large. Byrd wrote that "'Religion is the Duty which every Reasonable Creature owes to God, the Creator and Supream [sic] Governor of the World.'"[18] This duty is best expressed through work, penance, and obedience, in a community where all were admittedly Christians. A merciful and good God had sent his Son into the world, they said, so as "'to bring us to Heaven.'"[19] Such faithful obedience is therapeutic for a human nature defaced by sin in fallen men who originally had been created in God's image. Thus, men and women are exhorted to imitate Christ by living holy lives: "'[E]very man [that] doth not imitate God but [acts] contrary to him, is so far unnatural because he acts contrary to his natural pattern & exemplar.'"[20] The human pilgrimage on earth thereby involves essentially the restoration of that ruined original nature as far as may be possible with the help of divine Grace—as William Byrd taught, and James Blair, the president of William and Mary College, concurred in one of his 117 discourses on the Sermon on the Mount, writings that filled five published volumes.[21] Man's pilgrimage to heaven was exemplified in John Bunyan's *Pilgrim's Progress* but had medieval roots.[22]

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15 *See* THE ADAMS-JEFFERSON LETTERS, *supra* note 5, at 339 (emphasis omitted).

16 BOND, DAMNED SOULS, *supra* note 6, at 70 (quoting JOHN SMITH, THE GENERALL HISTORIE OF VIRGINIA, NEW ENGLAND & THE SUMMER ISLES (1624), *reprinted in* 2 THE COMPLETE WORKS OF CAPTAIN JOHN SMITH (1580–1631), at 171 (Philip L. Barbour ed., Univ. of North Carolina Press 1986)).

17 *See id.* n.54.

18 *Id.* at 250–51 (citation omitted).

19 *Id.* at 251 (citation omitted).

20 *Id.* (citation omitted, third alteration in original).

21 *See id.* at 243–44, 250–51, 258.

22 *See generally* JOHN BUNYAN, THE PILGRIM'S PROGRESS (1678).

"[S]alutary neglect," as Edmund Burke termed it in the 1770s,[23] was emphatically a way of life in Virginia from Jamestown onward, with especially the church chronically lacking clergy, supervision, money, and direction.[24] Ordained ministers were scarce, making baptism difficult and celebration of the Lord's Supper infrequent. There was no American bishop until after the Revolution.[25] Local customs, both political and ecclesial, tended to trump legislation and local practice to become law itself by common usage and prescription.

An indigenous common law evolved in Virginia as it did elsewhere in America. In the absence of an episcopacy, the parish vestries independently engaged the ministers and otherwise governed the church. Composed of leading citizens (George Washington served as a vestryman)[26] and providing lay control by local elites, a new representative ecclesiastical order grew up. Vestries also tended to govern the counties within which they were located, to form (together with the county courts) the core institutions of the Virginia polity standing between the church authorities in London and the governor, council, and burgesses in Williamsburg as the key representative institution of governance.[27] "Local custom and local law both granted vestrymen authority to hire and fire clergy, and they had no intention of forfeiting rights they now [(1681)] counted among their property. A power used was a power assumed . . . ."[28]

> The Anglican notion of the journey, however, possessed its own distinct qualities, emphasizing neither the terrors of the wilderness stage typical of Puritan writers nor the mystical union with God common among Roman Catholic authors. Likewise, they wrote little of the rapturous joy of sinners admitted to redemption. . . . Theirs was a low-key piety, deeply felt and involving the 'whole individual,' but given to order rather than to passion or ecstasy.

BOND, DAMNED SOULS, *supra* note 6, at 245.

[23] Edmund Burke, Speech on Moving His Resolutions for Conciliation with the Colonies (March 22, 1775), *in* 2 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 99, 117 (Little, Brown & Co. 3d ed. 1869); *see* SANDOZ, *supra* note 3, at 164–65.

[24] *See* BOND, DAMNED SOULS, *supra* note 6, at 174–82.

[25] *See id.* at 214–15. James Madison, president of the College of William and Mary and cousin of President James Madison, was appointed the first bishop of Virginia in 1790. Along with two others consecrated in London at the same time for Pennsylvania and New York, these were the first Anglican or Episcopal bishops appointed for America. 6 DICTIONARY OF AMERICAN BIOGRAPHY 182–83 (Dumas Malone ed., 1961).

[26] *See* BENSON J. LOSSING, THE HOME OF WASHINGTON; OR MOUNT VERNON AND ITS ASSOCIATIONS, HISTORICAL, BIOGRAPHICAL, AND PICTORIAL 86, 90 (1870).

[27] *See* BOND, DAMNED SOULS, *supra* note 6, at 203–09, 212–14, 219.

[28] *Id.* at 218.

B. Anthropology

Puritan New England and the other colonial experiences were highly variegated and may be contrasted, of course, but I must generalize and, for reasons already noticed, kinship is palpable. John Winthrop in 1630 onboard *Arrabella* concluded his discourse entitled "A Modell of Christian Charity" with the now celebrated exhortation to the English Puritan settlers to keep their unity of the spirit and bond of peace of the community, diligently to live righteously, and to seek holiness, so that:

> [T]he Lord will be our God and delight to dwell among us, as his owne people . . . [then] wee shall finde that the God of Israell is among us, . . . for wee must Consider that wee shall be as a Citty upon a Hill, the [Eyes] of all people are uppon us . . . .
>
> Therefore lett us choose life . . . .[29]

The Virginia plantation, in many respects, was another story. There the stress was on the commercial imperialism of England's Stuart kings, and the colony became valued for its profitable tobacco crops. As Sir Edward Seymour, one of Charles II's Lords of the Treasury, impatiently put it when the Virginians' religious plight came up and founding a college to alleviate it was proposed: "'*Souls!* Damn your Souls. Make Tobacco!'"[30]

But, faith concerns persisted and were addressed. Decisive for religion in its biblical forms was the understanding of human nature and the meaning and scope of human existence within comprehensive reality. Admittedly God-centered, what did such a view of reality entail? Many things, to be sure, not least of all the familiar Creator-creature relationship affirmed in general language in the Declaration of Independence in 1776 and indelibly vesting each human being with inalienable attributes among which were said to be rights to "Life, Liberty, and the Pursuit of Happiness."[31] Standing behind that summarizing statement cast in neutral language is an anthropology and ontology derived from philosophy and revelation. "Self-evident truths,"[32] these principles were susceptible to interpretation and ambiguous, as a consensual statement had to be. But, they were never supplanted by the secularist revolution of Enlightenment rationalism ongoing in law and thought among some of the elites, as Washington took pains to remind

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[29] John Winthrop, *A Modell of Christian Charity* (1630), *in* POLITICAL THOUGHT IN AMERICA: AN ANTHOLOGY 7, 12 (Michael B. Levy ed., Waveland Press, Inc. 2d ed. 1988).

[30] *See* BOND, DAMNED SOULS, *supra* note 6, at vii, 194 (citation omitted).

[31] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[32] *See id.*

everyone in his Farewell Address.[33] Hence, the Declaration was understood by a faithful community in broadly Christian rather than secular or narrowly sectarian terms, as John Adams commented.[34]

The decisive differentiation between classical Greek philosophical anthropology and the Christian theory of man, in effect, turns on the elaboration of Aristotle's conception of "immortalizing."[35] He found this to be the fruit of the contemplative life that he thought best for man *qua* man as the summit of happiness in the mature man or *spoudaios*.[36] Blessedness (*makarios*) is the more than merely mortal divine fruit of the virtuous life oriented toward Happiness (*eudaimonia*) as the highest good attainable by action.[37] However, immortalizing becomes holiness in the biblical orbit of Christian revelation.[38] It plainly lies beyond nature and the cosmos in the Beatitude of eternal salvation through faith in Christ and Union with God.[39] The Greeks' *agnostos theos* is revealed in Christ, Paul announces.[40] The *summum bonum* or highest Good (*Agathon*) discerned in the culmination of Plato's ascent is experientially absorbed into God venerated as Creator and Savior, as companion and helper in the rise of divine fellowship.[41] Erotic ascent to the Idea and the *philia* of Aristotle forming community, as well as the rise to participation in the immortalizing Good or divine, differentiates as the *agape* of the

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[33] George Washington, Farewell Address (Sept. 19, 1796), *in* MATTHEW SPALDING & PATRICK J. GARRITY, A SACRED UNION OF CITIZENS: GEORGE WASHINGTON'S FAREWELL ADDRESS AND THE AMERICAN CHARACTER 175, 176, 183–84, 188 (1996).

[34] *See* THE ADAMS-JEFFERSON LETTERS, *supra* note 5.

[35] ARISTOTLE, NICOMACHEAN ETHICS 1177b:35 (W.D. Ross trans.), *reprinted in* 2 WORKS OF ARISTOTLE, *supra* note 14, at 339, 432 (*athanatizein*—to become immortal, or immortalizing).

[36] *Id.* at 1176a:15–20, at 430.

[37] *Id.* at 1178b:27–32, at 433 (*makarios*, as the supreme fruit of the contemplative life, *bios theoretikos*, according to Aristotle).

[38] *See, e.g.*, RUDOLF OTTO, THE IDEA OF THE HOLY: AN INQUIRY INTO THE NON-RATIONAL FACTOR IN THE IDEA OF THE DIVINE AND ITS RELATION TO THE RATIONAL 166–74 (John W. Harvey trans., Oxford Univ. Press 2d ed. 1976) (1917) (discussing holiness in the Christian horizon).

[39] As sanctification through faith in *Acts* 26:18; 1 *Corinthians* 6:11. The Christian classic is St. Augustine's *Confessions*. *See* ST. AUGUSTINE, CONFESSIONS bks. VII, X, at 111–32, 179–220 (Henry Chadwick trans., Oxford Univ. Press 1991). For a fine recent study of this class of experience, see ROBERT MCMAHON, UNDERSTANDING THE MEDIEVAL MEDITATIVE ASCENT: AUGUSTINE, ANSELM, BEOTHIES, & DANTE (2006). *Cf.* WILLIAM JAMES, VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE 464–500 (Fountain Books 1977) (1902).

[40] *Acts* 17:23.

[41] PLATO, SYMPOSIUM 209c–211d, at 47–48 (William S. Cobb trans., State Univ. of N.Y. Press 1993); PLATO, REPUBLIC 514a–521b, at 240–49 (Robin Waterfield trans., Oxford Univ. Press 1993). *Cf.* MCMAHON, *supra* note 39, at 1–63; ELLIS SANDOZ, POLITICAL APOCALYPSE: A STUDY OF DOSTOEVSKY'S GRAND INQUISITOR 71 (ISI Books 2d rev. ed. 2000) (1978).

divine partner in being who loves us so that we may love Him.[42] This same divine love as Grace draws sinful man through conversion to rise from ruin (*amor sui* and *superbia vitae*) and move toward reconciliation[43] (through *amor Dei*, in Augustine's terms[44]). The person created in the divine image is once more restored through love to participate in the divine communion in faith and hope.

There is nothing in Greek philosophy which attains the illumination of reality so gloriously as First John 4: "God is love . . . . We love Him because He first loved us."[45] Finally, it may be said that this ontological understanding of ultimate reality forms the heart of Thomas Aquinas's elaborate philosophy of man in terms of *amicitia* and *fides caritate formata* which is the crowning achievement of medieval Scholastic philosophy.[46] And more to the point of our concerns, its substance as existential faith was preached in English accents during the powerful revival movement in 18th century America which we call the Great Awakening, by such luminaries as John Wesley, George Whitefield, Gilbert and William Tennent, and Jonathan Edwards.[47] John Wesley corrected the philosophers' anthropology by finding not reason—and most particularly not the "reason" of those atheist-pests, the Enlightened philosophes—to be the *differentia specifica* of man.[48] Rather, the real distinguishing difference of man is his uniquely human capacity for communion with the divine: only the human being is capable of God.[49]

C. Constitutional Implications

Such a lofty conception of human existence and of the human person obviously bursts the bounds of political systems and must find representation beyond politics in the church—essentially an Augustinian insight and solution which superseded the classic philosopher's search for the paradigmatic polity and, in various degrees of success, forestalled the expansive perfectionism of millenarians, chiliasts, and the various modern gnostic zealots into the present. While partaking of the optimism

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[42] 1 *John* 4:19.

[43] For the move from ruin to reconciliation as the progress of the converted man as recounted in John Wesley, see ELLIS SANDOZ, REPUBLICANISM, RELIGION, AND THE SOUL OF AMERICA 20–22 (2006).

[44] ST. AUGUSTINE, THE CITY OF GOD AGAINST THE PAGANS bk. XIV, ch. 28, at 410–11 (Gerald G. Walsh & Grace Monahan trans., Catholic Univ. of Am. Press 3d prtg. 1981).

[45] 1 *John* 4:16, 19 (NKJV).

[46] *See* ST. THOMAS AQUINAS, 31 SUMMA THEOLOGIAE pt. II-II, art. 3, reply 1, at 125 (Blackfriars ed., T.C. O'Brien trans., Eyre & Spottiswoode 1974); ERIC VOEGELIN, THE NEW SCIENCE OF POLITICS (1952), *in* 5 THE COLLECTED WORKS OF ERIC VOEGELIN: MODERNITY WITHOUT RESTRAINT 75, 150–51 (Manfred Henningsen vol. ed., Univ. of Mo. Press 2000).

[47] *See* SANDOZ, *supra* note 43, at 16.

[48] *Id.* at 22.

[49] *Id.* at 20–21, 28.

of especially the British enlightenment through John Locke and common-sense philosophy, the core of the moderation expected of human enterprise was preserved in the American founding: there were no utopians[50] at the Federal Convention of 1787 we are told! Men were not angels[51] and short of the General Resurrection were unlikely ever to become such in this world. Meanwhile the Creation and its goodness is to be enjoyed, life is to be lived, and a dangerous world kept at bay. The spiritual culture and philosophical sophistication I have limned inoculated America against most of the worst pitfalls of ideological politics—at least so far! (Fingers crossed.) But the anthropology and prevailing ethos of the late 18th century bore direct fruit in the formation of the Union. We still have "a republic[,] if [we] can keep it."[52]

III. CONCLUSION: A TRUE MAP OF MAN[53]

While the American Founders relied on Aristotle and Cicero and cited Montesquieu, they understood with St. Paul that "all have sinned and fall short of the glory of God."[54] They, therefore, accepted the corollary drawn by Richard Hooker that laws can rightly be made only by assuming men are so depraved as to be hardly better than wild beasts[55]—even though they are created "little lower than the angels" and beloved of God their Creator.[56]

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[50] *See* SIR THOMAS MOORE, UTOPIA (Peter K. Marshall trans., Washington Square Press 11th prtg. 1976) (1518). For utopianism as a gnostic perversion of experience, see VOEGELIN, *supra* note 46, at 186.

[51] *See* THE FEDERALIST, *supra* note 1, NO. 51 (James Madison).

[52] James McHenry, *Papers of Dr. James McHenry on the Federal Convention, 1787, in* 11 THE AMERICAN HISTORICAL REVIEW 594, 618 (J. Franklin Jameson ed., 1906).

[53] *See* SANDOZ, *supra* note 43, at 47–52.

[54] *Romans* 3:23 (NKJV); *cf.* 1 *Timothy* 1:15.

[55] *See generally* THE FEDERALIST, *supra* note 1, NO. 6 (Alexander Hamilton). Thus Richard Hooker wrote:

> Laws politic, ordained for external order and regiment amongst men, are never framed as they should be, unless presuming the will of man to be inwardly obstinate, rebellious, and averse from all obedience unto the sacred laws of his nature; in a word, unless presuming man to be in regard of his depraved mind little better than a wild beast, they do accordingly provide notwithstanding so to frame his outward actions, that they be no hindrance unto the common good for which societies are instituted: unless they do this, they are not perfect.

RICHARD HOOKER, OF THE LAWS OF ECCLESIASTICAL POLITY bk. 1, ch. 10.1, at 87–88 (Arthur Stephen McGrade ed., Cambridge Univ. Press 1989) (1593). Similarly, Machiavelli wrote: "All writers on politics have pointed out . . . that in constituting and legislating for a commonwealth it must needs be taken for granted that all men are wicked and that they will always give vent to malignity that is in their minds when opportunity offers." NICCOLO MACHIAVELLI, THE DISCOURSES I.3, at 111–12 (Bernard Crick ed., Penguin Books 1970) (1593). Indeed the tension between the reason of the law and the passion of the human being is fundamental to the philosophical anthropology underlying the whole conception of

To generalize and simplify, but not to argue perfect homogeneity: From the Anglo-Norman Anonymous and John Wyclif to John Wesley, John Adams, and Abraham Lincoln's invocation of "government of the people, by the people, [and] for the people,"[57] lines of religious development undergirded and fostered a shared sense of the sanctity of the individual human being living in immediacy to God and associated the Christian calling to imitate God in their lives with political duty, capacity for self government, *salus populi*, and the ethic of aspiration through love of God. From this fertile ground emerged the institutions of civil society and republicanism perfected in the American founding.

Among other things the Framers—faced with the weighty challenge of how to make free government work—banked the fires of zealotry and political millenarianism in favor of latitudinarian faith and a quasi-Augustinian understanding of the two cities.[58] They humbly bowed before the inscrutable mystery of history and the human condition with its suffering and imperfection and accepted watchful waiting for fulfillment of a Providential destiny known only to God—whose "kingdom is not of this world."[59] But, in addition to understanding government as necessary coercive restraint on the sinful creature, they reflected a faith that political practice in perfecting the image of God in every man through just dominion was itself a blessed vocation and the calling of free men: it was stewardship in imitation of God's care for His freely created and sustained world, one enabled solely by the grace bestowed on individuals and a favored community. They embraced freedom of conscience as quintessential liberty for a citizenry of free men

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rule of law and of a government of laws and not of men, from Aristotle onward. Compare with the *locus classicus*:

> [H]e who bids the law [(nomos)] rule may be deemed to bid God and Reason [(reason, nous)] alone [to] rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire.

ARISTOTLE, POLITICS 1287a:28–32 (Benjamin Jowett trans.), *reprinted in* 2 THE WORKS OF ARISTOTLE, *supra* note 14, at 445, 485. In sum, as stated elsewhere:

> In fact, my axiom of politics (a minor contribution to the science) is this: *[H]uman beings are virtually ungovernable.* After all, human beings in addition to possessing reason and gifts of conscience are material, corporeal, passionate, self-serving, devious, obstreperous, ornery, unreliable, imperfect, fallible, and prone to sin if not outright depraved. And we have some bad qualities besides.

ELLIS SANDOZ, *The Politics of Truth*, *in* THE POLITICS OF TRUTH AND OTHER UNTIMELY ESSAYS, *supra* note 5, at 35, 39.

[56] *Psalms* 8:5 (NKJV).

[57] Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863) (quoting U.S. CONST. pmbl.), *in* BY THESE WORDS: GREAT DOCUMENTS OF AMERICAN LIBERTY, SELECTED AND PLACED IN THEIR CONTEMPORARY SETTINGS 269, 269 (Paul M. Angle ed., 1954).

[58] *See generally* ST. AUGUSTINE, *supra* note 44, bk. XV, ch. 1, at 413–15.

[59] *John* 18:36 (NKJV).

and women, as had John Milton long before, who exclaimed in *Areopagitica*: "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."[60] And, for better or worse, they followed Milton (as well as Roger Williams and John Locke) in heeding his plea "to leave the church to itself" and "not suffer the two powers, the ecclesiastical and the civil, which are so totally distinct, to commit whoredom together."[61] The correlate was religious toleration within limits, as necessary for the existence of a flourishing civil society whose free operations minimized tampering with religious institutions or dogmas. Yet, the historically affirmed vocation of a special people under God still could be pursued through active devotion to public good, liberty, and justice solidly grounded in Judeo-Christian transcendentalism. Citizens were at the same time self-consciously also pilgrims aware that this world is not their home. It is this ever-present living tension with the divine Ground above all else, perhaps, that has made the United States so nearly immune politically to the ideological maladies that have characterized much of the modern world, such as fascism and Marxism.

Like all of politics, the Founders' solutions were compromises, offensive to utopians and all other flaming idealists. But this may be no detraction from their work, since despite all national vicissitudes, we still today strive to keep our republic—under the world's oldest existing Constitution. Moreover, there has yet to appear an American dictator after 230 years of national existence; the United States, at grievous cost in lives and treasure, has steadily stood in wars of global reach as the champion of freedom in the face of raging despotisms of every description.

To conclude, let us not overlook the secret that a sound map of human nature lies at the heart of the Constitution of the United States and its institutional arrangements. Men are not angels and government,

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[60] JOHN MILTON, AREOPAGITICA (1644), *reprinted in* AREOPAGITICA AND OTHER POLITICAL WRITINGS OF JOHN MILTON 3, 44 (Liberty Fund, Inc. 1999).

[61] JOHN MILTON, SECOND DEFENSE OF THE PEOPLE OF ENGLAND (1654), *reprinted in* AREOPAGITICA AND OTHER POLITICAL WRITINGS OF JOHN MILTON, *supra* note 60, at 315, 406. *Cf.* JOHN LOCKE, *'Critical Notes upon Edward Stillingfleet's* Mischief *and* Unreasonableness of Separation'*—Extracts, in* JOHN LOCKE: WRITINGS ON RELIGION 73, 73–83 (Victor Nuovo ed., Oxford Univ. Press 2002). Professor Edwin Gaustad wrote:

> In the past half-century, American society has become noisily and notoriously pluralistic. This has made Roger Williams more relevant, for he had strong opinions about what government should do about religious pluralism: leave it alone. Turks, Jews, infidels, papists: leave them alone .... Religion has the power to persuade, never the power to compel. Government does have the power to compel, but that government is wisest and best which offers to liberty of conscience its widest possible range.

EDWIN S. GAUSTAD, LIBERTY OF CONSCIENCE: ROGER WILLIAMS IN AMERICA 219 (1991).

admittedly, is the greatest of all reflections on human nature:[62] The *demos* ever tends to become the *ochlos*[63]—even if there could be a population of philosophers and saints—and constantly threatens majoritarian tyranny. Merely mortal magistrates, no less than self-serving factions, riven by superbia, avarice, and *libido dominandi*, artfully must be restrained by a vast net of adversarial devices if just government is to have any chance of prevailing over human passions while still nurturing the liberty of free men.

To attain these noble ends in what is called a government of laws and not of men, it was daringly thought, perhaps ambition could effectively counteract ambition[64] and, as one more *felix culpa*, therewith, supply the defect of better motives. This is most dramatically achieved through the routine operations of the central mechanisms of divided and separated powers and of checks and balances that display the genius of the Constitution and serve as the hallmark of America's republican experiment. All of this would have been quite inconceivable without a Christian anthropology, enriched by classical political theory and the common-law tradition, as uniquely embedded in the habits of the American people at the time of the Founding and nurtured thereafter. On this ground an extended commercial republic flourished and America became a light to the nations.

Nagging questions remain: Can a political order ultimately grounded in the tension toward transcendent divine Being, memorably proclaimed in the Declaration of Independence and solidly informed by biblical revelation and philosophy, indefinitely endure—resilient though it may be—in the face of nihilistic assault on this vital spiritual tension by every means, including by the very institutions of liberty themselves? Perhaps these are only growing pains that afflict us, rather than the disintegration of our civilization. The positivist, scientistic, and Marxist climate of opinion is so pervasive and intellectually debilitating in the public arena and universities as often to make philosophical and religious discourse incomprehensible oddities whose meaning is lost to consciousness amid the din of deformation and deculturation. For instance, "the walls of separation between these two [(church and state)] must forever be upheld," Richard Hooker wrote, contemptuously characterizing religious zealots of his distant time.[65] By way of Thomas Jefferson's famous 1801 letter and the United States Supreme Court more recently, that metaphor now lives on as the shibboleth of strange

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[62] *See* THE FEDERALIST, *supra* note 1, NO. 51, at 320–25 (James Madison). "If men were angels, no government would be necessary." *Id.* at 322.

[63] *Cf. id.* NO. 49.

[64] *See id.* NO. 51.

[65] HOOKER, *supra* note 55, at bk. 8, ch. 1.2, at 131.

new fanatics of our own day, including those sometimes identified as atheist humanists.[66]

Thus, even as religious revival today enlivens American spirituality, we still endure the strong cross-currents of intellectual, moral, and social disarray of the republic—and not of the American republic alone. We test our faith that the truth shall prevail and look for hopeful signs on the horizon. We also remember that both revealed truth and philosophical reason ever have been nurtured by resolute individuals' resistance to social corruption and apostasy, in what may perchance once again become some saving remnant.

IV. POSTSCRIPT: FREEDOM OF CONSCIENCE AND RELIGIOUS TOLERATION

Finally, a comment on the vexed problem of toleration or freedom of conscience as Thomas Jefferson and James Madison insisted we call it.[67] Possessors of absolute Truth, especially if it is salvific, do not readily extend benevolence to the benighted who reject or disdain it. Killing in righteous wrath is far more likely, not to say enjoyable, in such a noble cause. Just ask Bloody Mary's allies, or Cromwell's army in Ireland, or survivors of St. Bartholomew or descendants of the 800,000 Huguenots who finally fled France after revocation of the Edict of Nantes in 1685, or read this morning's newspaper. All of this carnage, committed in the name of Truth, is piddling in comparison with the Holocaust, Gulag, and similar events of the ideological and enlightened age in which we live, of course. The point is to be stressed, with one scholar tabulating the victims of the contemporary dogmatomachy (excluding war dead) since 1900 at nearly 120 million murdered by their own governments' hands, over 95 million of them killed by Marxist regimes.[68]

Democracy is said to be the worst form of government—except for all the others. Something similar might be said of toleration, and zealots in our midst might take it to heart. Fanaticism yet lives, as we observe. The great French spiritualist, philosopher, and judge Jean Bodin (d. 1596)—who barely escaped death from the Catholic League—gave a great soul's solution to persecution and religious warfare by concluding that "'true religion is nothing but the intention [*conversio*] of a purified mind toward the true God.'"[69] Lamenting that "diabolical Hell-conceived

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[66] *Id.*; *see* Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947); *cf.* HENRI DE LUBAC, S.J., THE DRAMA OF ATHEIST HUMANISM (Edith M. Riley trans., Sheed & Ward, Inc. 1950).

[67] *See generally* SANDOZ, *supra* note 5, at 73–82.

[68] R.J. RUMMEL, LETHAL POLITICS: SOVIET GENOCIDE AND MASS MURDER SINCE 1917, at xi, 203–211, 223 (1990).

[69] Letter from Jean Bodin to Jean Bautru (1563) (alteration in original), *quoted in* ERIC VOEGELIN, 5 HISTORY OF POLITICAL IDEAS: RELIGION AND THE RISE OF MODERNITY, *in* 23 THE COLLECTED WORKS OF ERIC VOEGELIN 188 (Ellis Sandoz series ed., James L. Wiser vol. ed., Univ. of Mo. Press 1998).

principle of persecution" raging in the Virginia of his youth, James Madison himself seems to have shared just this sentiment.[70] It propelled him into politics as the foundation of his own prudential science and life as statesman. Its first legislative fruit was revision of the Virginia Declaration of Rights of 1776 to make it read: "'That Religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence . . . .'"[71] The masterly case for religious liberty given in the *Memorial and Remonstrance Against Religious Assessments* followed in 1785, and its adoption effectively blocked reestablishment of the Episcopal Church in Virginia.[72] This, in turn, "paved the way" for enactment six months later (while he was in Paris) of Jefferson's long dormant *Statute for Religious Freedom*, "which premises that 'Almighty God hath created the mind free.'"[73] A scholar wrote: "The troops were Baptists and Presbyterians and the tactics were Madison's, but the words . . . were Jefferson's."[74] Then, in the First Congress under the Constitution came Madison's leadership in fashioning the Federal Bill of Rights including the First Amendment which opens with the religion clauses.[75] When compared with the "'[t]orrents of blood'"[76] Madison knew to be a likely alternative, these pragmatic protections of freedom of conscience doubtless compose one of the supreme achievements of American statesmanship.

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[70] SANDOZ, *supra* note 5, at 79 (quoting Letter from James Madison to William Bradford (Jan. 24, 1774)).

[71] *Id.* at 81 (quoting THE VIRGINIA DECLARATION OF RIGHTS of 1776 art. 16, *reprinted in* 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, at 236 (Bernard Schwartz ed., Chelsea House 1971)).

[72] *Id.* at 82–86.

[73] *Id.* at 84 (quoting The Virginia Statute for Religious Freedom (1786), *reprinted in* THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY xvii (Merrill D. Peterson & Robert C. Vaughan eds., Cambridge Univ. Press 1988)).

[74] HENRY F. MAY, *The Enlightenment and After: The Jeffersonian Moment*, *in* THE DIVIDED HEART: ESSAYS ON PROTESTANTISM AND THE ENLIGHTENMENT IN AMERICA 161, 172 (1991).

[75] *See* SANDOZ, *supra* note 3, at 203–08, 215–17.

[76] SANDOZ, *supra* note 5, at 73 (quoting JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* 2 WRITINGS OF JAMES MADISON 189 (Gaillard Hunt ed., G.P. Putnam's Sons 1901)).

RELIGION AND LIBERTY UNDER LAW AT THE FOUNDING OF AMERICA

*Harold J. Berman**

As in most good titles, virtually every word of the title assigned to me has several meanings: "religion," "liberty," "law," "founding," even "America." I shall try to unravel the words of this title and to make it meaningful, not only for the past, but for the future.

In speaking of the founding of America, we should remind ourselves that "America" was the name given in 1507 by a German geographer to the continents that, in the previous decade, had come to be called in Europe "the New World." The Italian explorer Amerigo Vespucci had succeeded in persuading Europeans that it was he, in 1497, not Columbus, in 1492, who had been the first to discover the New World. (You will recall that Columbus thought that he had reached India, and he named the inhabitants Indians!) Fortunately for us, the German geographer chose to name the new world after Amerigo Vespucci's first name and not after his last name!

It was a century later, here at Virginia Beach and at Jamestown, that English settlers first came to the New World to found a royal English colony, and thirteen years later that English Calvinists first came to Plymouth in search of religious independence.

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* Professor Berman departed this life on November 13, 2007, at the age of eighty-nine, as this Address was going to press. He was the Robert W. Woodruff Professor of Law, Emory University School of Law and James Barr Ames Professor of Law, Emeritus, Harvard Law School. A prodigious scholar, Professor Berman's writing manifested broad learning and deep understanding—qualities that distinguished such works as LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983).

Professor Berman was a father of the contemporary effort to recover the religious roots of the law and especially the Christian roots of the Western legal tradition. Readers of his work could well conclude that to apprehend law apart from its religious roots is a poor affair, blind to what gives the law its transcendence and beauty. No surprise, then, that he was a friend of Regent University School of Law. Three summers ago, Professor Berman taught at Regent as the featured lecturer in the Summer Program in Christian Jurisprudence. To the program he brought not only his learning and wisdom, seasoned with gentle grace and humility, but also the remarkable story of his own conversion and commitment to Jesus of Nazareth as God the Son, the Messiah.

It is therefore with special gratitude that Regent University Law Review publishes this Address, delivered on April 13, 2007, as part of "Liberty Under Law: 400 Years of Freedom," among the last works of a dean of legal historians, now alive, as we trust, in the presence of the Author of History.

This Address draws partly on the author's previous articles *Religious Freedom and the Challenge of the Modern State*, 39 EMORY L.J. 149 (1990); *Religion and Law: The First Amendment in Historical Perspective*, 35 EMORY L.J. 777 (1986) [hereinafter Berman, *Religion and Law*]; and *The Interaction of Law and Religion*, 8 CAP. U. L. REV. 345 (1979) [hereinafter Berman, *Interaction of Law*]. [–The Editors]

Of the roughly 3200 religious congregations that existed in the thirteen English colonies of North America in 1776, roughly two-thirds were either Congregationalist, Presbyterian, Baptist, or Quaker; German and Dutch Protestant congregations constituted about fifteen percent, and Anglican congregations constituted another fifteen percent.[1] Fifty-six of the roughly 3200 congregations were Roman Catholic and five were Jewish.[2]

Thus, in 1776 and later, Protestant Christianity predominated, but there was a wide pluralism within it, and Catholicism and Judaism were tolerated. In several of the seceding colonies a particular Protestant denomination was "established" with substantial political and financial prerogatives—for example, in Massachusetts the Congregational church—but even in those colonies other denominations were permitted to exist, and by the mid-1830s establishment of a particular denomination no longer existed in any state of the Union.

The pluralism of Protestant denominations in North America in the seventeenth, eighteenth, and nineteenth centuries must be understood as something more than mere diversity. Their relationships with each other were, on the whole, cooperative. There was repression of individuals of all denominations who were considered to have violated the Puritan ethic, but there was no persecution of denominations as such—not even of Catholics or Jews. Even in those colonies—and later states—where one Protestant denomination predominated, it usually interacted peaceably with other denominations and shared with them religious responsibilities.

What was universally accepted was that "religion"—by which was meant both belief in God and belief in an after-life of reward for virtue and punishment for sin—was essential to a healthy society. As George Washington said in his Farewell Address at the end of his presidency, "national morality"—the moral conduct of the American people—can only prevail if it is founded on religious belief.[3] Indeed, not only the

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[1] Jon Butler, *Why Revolutionary America Wasn't a "Christian Nation," in* RELIGION AND THE NEW REPUBLIC: FAITH IN THE FOUNDING OF AMERICA 187, 192 (James H. Hutson ed., 2000).

[2] *Id.*

[3] George Washington, The Farewell Address, Sept. 19, 1796, *reprinted in* GEORGE WASHINGTON 1732–1799: CHRONOLOGY–DOCUMENTS–BIBLIOGRAPHICAL AIDS 68, 75 (Howard F. Bremer ed., Oceana Publ's, Inc. 1967).

> Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths, which are the instruments of investigation in Courts of Justice? And let us with caution indulge the supposition, that morality can be maintained without religion.—Whatever may be conceded to the influence of refined education on minds of peculiar structure—reason and experience both forbid us to expect, that national morality can prevail in exclusion of religious principle.

Founding Fathers, but also late eighteenth-century Americans generally were in agreement that republican self-government required a virtuous citizenry, and a virtuous citizenry required morality based on religious faith.

Even the free-thinker Thomas Jefferson said in his first message as President that, "the liberties of a nation [cannot] be thought secure when we have removed their only firm basis, a conviction in the minds of the people that their liberties are the gift of God."[4]

And so to talk about the original meaning of the opening clauses of the First Amendment of the United States Constitution in terms of separation of Church and State is entirely misleading. Prohibition of federal (but not state) "establishment" of religion, yes. Federal support of "free exercise" of religion, yes.

At the state and local levels, clergy of parish churches sometimes played important political roles in their communities. Also, sermons at church services often addressed political questions. In that sense, religion interacted with government. More significantly, many of the responsibilities that are now assumed by government, whether municipal, state, or federal, were in the eighteenth, nineteenth, and early twentieth centuries assumed by religion. Education, for example, until the second half of the nineteenth century, was almost entirely the responsibility of church leaders and religious associations; indeed, one of the chief motivations of the nineteenth-century movement to establish, for the first time, compulsory public elementary schooling at the municipal level was the desire to expand, through public schools, the teaching of the Christian religion.[5] Similarly, social welfare—care of both the poor and the sick—was, until the twentieth century, more the responsibility of churches and of religious associations than of government.

Id.

[4] ISAAC A. CORNELISON, THE RELATION OF RELIGION TO CIVIL GOVERNMENT IN THE UNITED STATES OF AMERICA: A STATE WITHOUT A CHURCH, BUT NOT WITHOUT RELIGION 93 (Leonard W. Levy ed., Da Capo Press 1970) (1895).

[5] Not until the 1820s and 1830s did local governments in the United States gradually assume responsibility for the education of youth, and that responsibility was conceived to be fundamentally religious. As Horace Mann, the great apostle of public schooling, said in 1841:

> As educators, . . . our great duty is . . . to train [all children] up to the love of God and the love of man; to make the perfect example of Jesus Christ lovely in their eyes; and to give to all so much religious instruction as is compatible with the rights of others and with the genius of our government . . . .

HORACE MANN, *Lecture V.: An Historical View of Education; Showing Its Dignity and Its Degradation*, *in* LECTURES ON EDUCATION 215, 263 (Boston, Wm. B. Fowle & N. Capen 1845).

I speak here partly from personal experience. I can testify that as recently as eighty years ago, in my childhood, if one asked whether the United States was a Protestant Christian country, the overwhelming majority of Americans would have said yes. That was certainly what I was taught as a youngster in the 1920s at the Noah Webster grammar school, a public school in Hartford, Connecticut. At weekly Wednesday morning assemblies all eight grades were brought together to say the Lord's Prayer, hear readings from the Old and New Testaments, and sing Christian hymns. I recall that when the hymn was "Onward Christian Soldiers," the few of us kids who were Jewish would sing at the top of our voices "Onward Jewish Soldiers . . . with the Star of David going on before!" Hartford, the capital of Connecticut, was a Protestant Christian city, though as increasing numbers of Roman Catholic and Jewish immigrants were moving in, the older Yankee families who ran the city were moving their residences, though not their businesses, out to West Hartford, partly in order to avoid the increase in Hartford's municipal taxes. The old historical culture of Connecticut, dating from colonial times, was rapidly disappearing.

Prior to World War I and into the 1920s, most Americans believed that the Constitution itself and, indeed, our whole concept of law, law with a capital "L," our legal principles and values, were based ultimately on the Ten Commandments, the Bible, and the law of God. The concept that our law is rooted in a religious tradition was shared not only by the Protestant descendants of the English settlers on this continent and their black slaves, but also by millions of immigrants from western, southern, and eastern Europe, a substantial proportion of whom were Roman Catholics and Jews. Indeed, throughout the entire nineteenth and into the early twentieth century, American law students studied their legal tradition from the great treatise on English law by Blackstone, who wrote, "Th[e] law of nature . . . dictated by God himself . . . is binding . . . in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original."[6]

What conclusions are we to draw from this story? In view of the fundamental changes that have taken place in the twentieth and twenty-first centuries of our experience as a people, of what significance today and for the future is the fact that religion and liberty under law were considered to be closely linked at the founding of America and in the first three centuries of our history?

Within the past three generations, the public philosophy of America has shifted radically from a religious to a secular theory of law and from

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6 WILLIAM BLACKSTONE, 1 COMMENTARIES *41.

a moral to a political or instrumental theory. Law is now generally considered—at least in public discourse—to be essentially a pragmatic device for accomplishing specific political, economic, and social objectives. Its tasks are thought to be finite, material, and impersonal—to get things done, to make people act in certain ways. Rarely, if ever, does one hear it said that law is a reflection of an objective concept of justice or of the ultimate meaning or purpose of life. Usually it is thought to reflect, at best, the community's sense of what is useful. We speak of "the rule of law," but we usually mean by it the rule of *laws*, the observance of legal rules, the supremacy of *lex*, not of *jus*, the supremacy of legal policy, not of legal justice.[7]

Likewise, in the last two or three generations, the concept of religion as something wholly private and wholly psychological—as contrasted with the earlier concept of religion as something public, something partly psychological, but also partly social and historical, and, indeed, partly legal—has come to dominate our discourse.

Moreover, we have become a new people ethnically and culturally. We are, in fact, a microcosm of the whole world, with people of every race, every religion, and every social and political philosophy.

And it is in that context that the meaning of the religion clauses of the First Amendment have changed. Now not only the federal government but also the states are prohibited from establishing a religion, and now establishment means not only preferring one denomination to all others, but giving governmental aid specifically to religion of any kind; and further, free exercise of religion can now be lawfully restricted whenever such exercise is considered to be derived from governmental aid specifically to religion. James Madison's belief,[8] generally shared in America in his time and for generations thereafter,[9] that law itself is based on a divine covenant between God and man is no longer reflected in the decisions of the courts that interpret the clauses that he drafted.

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[7] It is noteworthy that all European languages except English have two words for "law," corresponding to the Latin *lex* and *jus* (for example, French *loi* and *droit*, Italian *legge* and *diritto*, German *Gesetz* and *Recht*, and Russian *zakon*, and *pravo*). In order to make a similar distinction, English has definite and indefinite articles and the distinction between singular and plural nouns, so that in English one can distinguish between "a law" or "laws," on the one hand, and "the law," that is, law as a whole, the legal system, or due process of law, on the other. One would not say due process of *laws* or Emory *Laws* School. Also, the capital letter "L" may be used, as when one speaks of a "belief in Law," to emphasize the character of law as a system of justice.

[8] *See* Berman, *Religion and Law*, *supra* note *, at 787 (discussing James Madison, Memorial and Remonstrance Against Religious Assessments (1785), *in* 2 WRITINGS OF JAMES MADISON 184–85 (Gaillard Hunt ed., G.P. Putnam's Sons 1901)).

[9] *See* Berman, *Interaction of Law*, *supra* note *, at 350–51.

The American people as a whole no longer thinks of itself as a Christian people, let alone a Protestant Christian people. The majority of us worship, to be sure, in Protestant churches, but as a nation we accept a wide diversity of belief systems. Indeed, we value positively the freedom that supports that diversity, on the one hand, and that allows us, on the other hand, to struggle to reconcile our differences.

Why, then, do we meet to celebrate the founding?

Here I confess that—as a believer in tradition and in the normative significance of historical experience, and hence as a believer in the positive value of following in the faith of our ancestors, thus speaking, in that sense, as a conservative—I am torn: torn between my loyalty, on the one hand, to the tradition of our founders, who in the first two centuries of our history established a nation with a common Christian belief system, and my loyalty, on the other hand, to the tradition of their successors of the later nineteenth and twentieth centuries who fled to these shores from various forms of discrimination in other countries and were ultimately assimilated as members of a new kind of pluralist community. Indeed, James Madison himself confronted this dilemma; he wrote that "precedent and tradition" pointed to America as a "Christian nation," but that "principle," on the other hand, pointed to a land that would be "an asylum to the persecuted and oppressed of every Nation and Religion."[10]

How is this conflict of loyalties to be resolved?

The answer, I believe, is to be found partly in the common elements of the two traditions. Our earlier ancestors who came to America in the seventeenth and eighteenth centuries for freedom to practice their particular kinds of Protestant Christianity, and our later ancestors who came in the nineteenth and early twentieth centuries for economic opportunity and/or political freedom, both shared great moral virtues of faith and hope and caring, *caritas*—faith in an unpredictable and uncertain future in a new land, hope of success in overcoming a host of economic and social obstacles, and caring membership in the religious, racial, and cultural communities of fellow immigrants.

The answer is also to be found partly in the common commitment of our forbears, both Christian and non-Christian, both religious and secularist, to the creation of a social order that fosters universal spiritual values of brotherhood, values that cross all boundaries of race and creed. It is partly the search for such spiritual values that motivated settlers in the New World ever since it was founded.

And so, I would link our two national historical traditions as we play our part in helping to create a multi-national, multi-religious, multi-civilizational world order.

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[10] Madison, *supra* note 8, at 188.

JUSTICE THOMAS AND PARTIAL INCORPORATION OF THE ESTABLISHMENT CLAUSE: HEREIN OF STRUCTURAL LIMITATIONS, LIBERTY INTERESTS, AND TAKING INCORPORATION SERIOUSLY

Richard F. Duncan[*]

INTRODUCTION

Here is something the average guy in America cannot understand. Why is it constitutionally permissible for a public school to decorate the halls with posters celebrating "gay pride" month even over the reasonable objections of persons (including persons of faith) offended by that government-sponsored ideology, but unconstitutional for a public school to celebrate Christmas by putting up a crèche if even one person is offended? Is this confounding result really required by the Constitution of the United States? If so, is it required by the written Constitution as originally understood, or is it part of the living, breathing, intelligently-designed Constitution[1] crafted by the Justices of the Supreme Court of the United States?

Although one possible answer is to point out that the Establishment Clause imposes a structural limitation on government disabling government from endorsing or sponsoring religion, that merely substitutes one question for another. How does a structural limitation on "Congress" extend to define the structural powers of state and local government? In other words, under the doctrine of incorporation, how is a structural limitation on the power of Congress an individual "liberty" incorporated against the states by the Due Process Clause of the Fourteenth Amendment?[2] If we take the prevailing theory of

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[1] Proponents of the living, breathing, "evolving" Constitution have never explained how the Constitution "evolves" into a new species and in so brief a time. Surely, the sudden appearance of new constitutional rules in the fossil record is best explained by a theory of intelligent design, or Creation if you please, by shifting Supreme Court majorities. For example, Erwin Chemerinsky observes that nonoriginalists believe that "the meaning and application of constitutional provisions should *evolve by interpretation*." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 18 (3d ed. 2006) (emphasis added). "Evolving by interpretation" sure sounds like an account of Creation to me, especially in light of Chemerinsky's acknowledgment that new constitutional rights, such as a right to abortion, can come into being by judicial decisions. *Id.*

[2] *See* Joseph M. Snee, S. J., *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371, 371–73. U.S. CONST. amend. I provides: "Congress

incorporation seriously, why should we think that the structural component of the Establishment Clause may "legitimately be read into the liberty protected by the Fourteenth Amendment?"[3]

Perhaps the best lens through which to view this puzzle is to imagine three separate lawsuits challenging daily recitation of the Pledge of Allegiance in government schools:

Case One

In the first case, *A* sues School District *X* and claims that the requirement that all students recite the Pledge violates his right not to speak under the Free Speech Clause.

Case Two

In the second case, *B* sues School District *Y* and claims that the requirement that all students recite the Pledge violates the Free Exercise Clause, because *B*'s religious beliefs forbid her from pledging allegiance to any nation or human institution.

Case Three

In the final case, *C* sues School District *Z* and claims that recitation of the Pledge in government schools is unconstitutional under the Establishment Clause because of the phrase "one Nation under God."[4]

What is surprising about these cases is the way they come out under black letter First Amendment doctrine. Under *West Virginia State Board of Education v. Barnette*, *A* will win his lawsuit because the school may not compel any student "to confess by word or act" his allegiance to any "matter[] of opinion."[5] However, *A*'s right not to participate in recitation of the Pledge does not include a right to silence his teacher and willing classmates who wish to participate. As Judge Easterbrook explained in *Sherman v. Community Consolidated School District 21*, "so long as the school does not compel pupils to espouse the content of the Pledge as their own belief, it may carry on with patriotic exercises. Objection by the few does not reduce to silence the many who *want* to pledge allegiance . . . ."[6] Similarly, if *B*'s Free Exercise claim succeeds—and under *Employment Division* v. *Smith*[7] it may not succeed—the result will be merely to grant *B* an opt-out from her forced participation

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shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

3 Snee, *supra* note 2, at 372.

4 *See* 4 U.S.C. § 4 (2000).

5 319 U.S. 624, 642 (1943).

6 980 F.2d 437, 445 (7th Cir. 1992). For an excellent discussion of Judge Easterbrook's opinion in this case, see Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451 (1995).

7 494 U.S. 872, 879 (1990) (stating that, as a general rule, the Free Exercise Clause does not protect religious exercise against restrictions imposed by neutral laws of general applicability).

in the activity, not to enjoin teachers and willing students from carrying on with the Pledge exercise.[8] Remarkably, however, if *C* succeeds in convincing a court that the words "under God" in the Pledge violate the Establishment Clause, the result will be that *C*'s right to demand strict separation between church and state includes the right to "silence the many who *want* to pledge allegiance" to one Nation under God.[9] In other words, *C*'s "liberty" under the Establishment Clause includes the power to silence others, to control which lessons government schools may teach and willing pupils may learn. This is an amazing liberty, if liberty it be!

Judge Easterbrook's answer—that the First Amendment treats religious and secular activities differently and that "[s]eparation of church from state does not imply separation of state from state"[10]—is responsive only if the structural requirement of separation between church and "Congress" is somehow understood as an individual liberty incorporated against the states by the Due Process Clause of the Fourteenth Amendment. The purpose of this Article is to focus on the issue of "liberty" under the Establishment Clause and incorporation of that "liberty" under the Fourteenth Amendment. In this regard, the Article focuses particularly on the Establishment Clause jurisprudence of Justice Clarence Thomas and upon his insightful suggestion that "in the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government."[11]

I. THE FOGGY ROAD TO INCORPORATION OF THE ESTABLISHMENT CLAUSE

The Bill of Rights was originally ratified as a check on the power of the federal government, and in *Barron* v. *Mayor of Baltimore*, the Supreme Court held that these amendments were not applicable to the

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[8] *See, e.g.*, Locke v. Davey, 540 U.S. 712, 725 (2004) (holding that a general scholarship program excluding funding for students majoring in devotional theology was constitutional because the state had strong interests in not funding religious indoctrination and because "the exclusion of such funding places a relatively minor burden" on the excluded students); Brown v. Hot, Sexy and Safer Prods., Inc., 68 F.3d 525, 537–39 (1st Cir. 1995) (holding that a compulsory educational assembly requiring fifteen-year-old students to view sexually explicit and sexually suggestive materials and skits did not amount to a constitutionally recognizable burden on the students' or the students' parents' free exercise of religion).

[9] *Sherman*, 980 F.2d at 445; *see, e.g.*, Newdow v. U.S. Cong., 328 F.3d 466, 487 (9th Cir. 2003) (enjoining recitation of the Pledge of Allegiance in a public school district because the phrase "under God" impermissibly endorsed religious principles, inculcated religious views, and coerced religious action), *rev'd on other grounds sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 17–18 (2004) (reversing on the issue of the noncustodial parent's prudential standing to sue in federal court).

[10] *Sherman*, 980 F.2d at 444.

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

states.[12] Chief Justice Marshall explained this holding in no uncertain terms:

> Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention. Had congress engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.
>
> . . . These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.
>
> . . . These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.[13]

However, by early in the twentieth century the Supreme Court found a way to "incorporate" certain provisions of the Bill of Rights against the states as "part of the liberty protected from state interference by the [D]ue [P]rocess [C]lause of the Fourteenth Amendment."[14] Under this concept of "selective incorporation," a particular provision of the Bill of Rights "is made applicable to the states if the Justices are of the opinion that it was meant to protect a 'fundamental' aspect of liberty."[15] In other words, only individual liberties that are deemed to be "'implicit in the concept of ordered liberty'"[16] or "'fundamental to the American scheme of [j]ustice'" are incorporated against the states by the liberty clause of the Fourteenth Amendment.[17] As Justice John Paul Stevens has put it so eloquently, "the idea of liberty" is the source of the incorporation doctrine.[18]

Moreover, under the doctrine of incorporation these fundamental individual liberties are protected only against "deprivations" by the states.[19] Individuals do not have a right to strike down laws that merely offend their sensibilities, because only laws that deprive them of protected liberty—i.e., laws which impose substantial burdens, undue

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12 32 U.S. 243, 250 (1833).

13 *Id.*

14 CHEMERINSKY, *supra* note 1, at 499.

15 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.6, at 799 (4th ed. 2007).

16 *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

17 *Id.* at 800 (quoting Duncan v. Louisiana., 391 U.S. 145, 149 (1968)).

18 John Paul Stevens, *The Bill of Rights: A Century of Progress*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 13, 33 (Geoffrey R. Stone et al. eds., 1992).

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

burdens, or extreme restrictions on their individual liberty—constitute unconstitutional deprivations of liberty under the Fourteenth Amendment. Thus, the incorporated liberty of free exercise of religion is protected (if at all) only against laws that impose "substantial burdens" on an individual's religious exercise.[20] Similarly, freedom of speech protects an individual's right to say what he wishes to say and to refrain from being compelled to speak, not the right to censor the state's message or to silence willing messengers of the government's speech.[21] The right to just compensation for regulatory takings is protected only against "extreme"[22] regulations that deprive an owner of "economically viable use" of her property.[23] Even a woman's "fundamental liberty" to choose to terminate an unwanted pregnancy is protected only against laws that unduly burden her liberty to choose, not against laws that reasonably regulate her access to abortion or which merely seek to persuade her to give life to the child she is carrying.[24]

Thus, under the Court's theory of incorporation, structural provisions of the Constitution—i.e., those which define and limit the

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

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

[22] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 329 (1987) (Stevens, J., dissenting) (stating that "only the most extreme regulations can constitute takings").

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

[24] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (stating that "an undue burden is an unconstitutional burden"). In *Casey*, the Court specifically declared that a state could regulate abortion so long as the regulation did not impose an undue burden on the woman's liberty:

> To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.

Id. at 878.

powers of the national government—"resist incorporation,"[25] because these provisions do not create fundamental individual liberty interests. For example, no one would suggest that the powers of Congress to regulate interstate commerce and to declare war[26] should be incorporated and made applicable to the states by the Fourteenth Amendment.[27] Further, a provision which contains both a structural component and a liberty component is properly subject only to partial incorporation, in the sense that only the liberty component is capable of incorporation as a Fourteenth Amendment "liberty" protected by the Due Process Clause.

Surely, one would think that the Supreme Court must have struggled mightily with this problem when deciding whether to incorporate the Establishment Clause, because, as Akhil Amar has observed, "The original [E]stablishment [C]lause, on a close reading, is not antiestablishment but pro-states' rights."[28] In other words, the Establishment Clause is a structural provision that "is agnostic on the substantive issue of establishment versus nonestablishment and simply calls for the issue to be decided locally."[29] How could a structural clause designed to promote federalism and "states rights" be incorporated as a fundamental individual liberty under the Due Process Clause of the Fourteenth Amendment? How did the Court explain this paradox when it ruled that the Establishment Clause was applicable to the states? As Horace Rumpole, John Mortimer's fictional "Old Bailey hack," might say: "[A]nswer came there none."[30] Indeed, the first Supreme Court decision to incorporate the First Amendment, *Gitlow* v. *New York*, merely "assumed" that "freedom of speech and of the press—which are protected

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[25] *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45–46 (2004) (Thomas, J., concurring) ("I would acknowledge that the Establishment Clause is a federalism provision, which, for this reason, resists incorporation.").

[26] U.S. CONST. art. I, § 8, cl. 3, 11.

[27] *See* Luke Meier, *Constitutional Structure, Individual Rights, and the Pledge of Allegiance*, 5 FIRST AMEND. L. REV. 162, 163–67 (2006). Professor Meier is a colleague of mine; I suggested this topic to him, and we shared many of our thoughts during numerous long discussions.

[28] AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 34 (1998); *see also* STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 18 (1995) (noting that the Religion Clause is "simply an assignment of jurisdiction over matters of religion to the states—no more, no less"). For an excellent and recent reappraisal of the "jurisdictional" understanding of the Establishment Clause, see Steven D. Smith, *The Jurisdictional Establishment Clause: A Reappraisal*, 81 NOTRE DAME L. REV. 1843 (2006).

[29] AMAR, *supra* note 28. Amar continues: "[H]ow can such a local option clause be mechanically incorporated *against* localities, requiring them to pass no laws (either way) on the issue of—'respecting'—establishment?" *Id.*

[30] JOHN MORTIMER, *Rumpole and the Right to Silence*, *in* RUMPOLE À LA CARTE 80, 91, 119 (1990).

by the First Amendment from abridgement by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[31]

Gitlow's incorporation-by-assumption of the Free Speech Clause was followed by conclusory dictum in *Cantwell* v. *Connecticut*, a case concerning free speech and free exercise claims, incorporating not only the Free Exercise Clause but also the Establishment Clause:

> The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act.[32]

Justice Roberts's dictum in *Cantwell* led directly to Justice Black's unreasoned assertion, in *Everson* v. *Board of Education*, concerning the meaning of the Establishment Clause as applied to the states:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[33]

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[31] 268 U.S. 652, 666 (1925); *see generally* DANIEL L. DREISBACH, REAL THREAT AND MERE SHADOW: RELIGIOUS LIBERTY AND THE FIRST AMENDMENT 93–96 (1987).

[32] 310 U.S. 296, 303 (1940). Professor Snee was very critical of *Cantwell*'s "unfortunate bit of dictum" concerning incorporation of the Establishment Clause, because it "has since led the Court down a path strewn with further dicta on the establishment of religion supposedly interdicted to the states by the Fourteenth Amendment." Snee, *supra* note 2, at 371.

[33] 330 U.S. 1, 15–16 (1947) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)). Justice Black made no attempt in *Everson* to explain or justify incorporation of the Establishment Clause. He merely asserted that the First Amendment was "made

Sadly, such is the way that seismic changes in our government and our liberties are all-too-often made in the Supreme Court—by naked power and with neither rhyme nor reason.[34] As Professor Snee observed, "[t]he inclusion of the [E]stablishment [C]lause into the liberty of the Fourteenth Amendment by the Supreme Court has no firm basis in the history of the clause or in logic"[35] and has never been persuasively justified. At a minimum, the Court was grossly irresponsible in *Everson* for failing to justify its transformative decision to incorporate the Establishment Clause, a decision that has spawned serious, lasting, and divisive consequences that continue to haunt us to this present day.[36]

II. JUSTICE THOMAS AND INCORPORATION OF THE ESTABLISHMENT CLAUSE

Justice Clarence Thomas is the Supreme Court's most consistent proponent of the jurisprudence of original intent,[37] and his views on incorporation of the Establishment Clause are the product of serious historical scholarship concerning the "original meaning of the Clause."[38] His views are also very nuanced and sophisticated. Indeed, he really has two separate, but closely-related positions, positions that I am labeling "no incorporation" and "partial incorporation."

For example, in *Elk Grove Unified School District* v. *Newdow*, Justice Thomas observed that the best scholarship on the original understanding of the Establishment Clause supports the conclusion that it is "best understood as a federalism provision—[which] protects state establishments from federal interference but does not protect any

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applicable to the states by the Fourteenth" and cited as authority a post-*Cantwell* decision, *Murdock v. Pennsylvania*. *Id.* at 8 (citing Murdock v. Pennsylvania, 319 U.S. 105 (1943)). *Murdock* did not implicate the Establishment Clause; it was decided as a freedom of the press and free exercise case. *Murdock*, 319 U.S. at 117. Professor Carl H. Esbeck criticizes the Court for incorporating the Establishment Clause "without debate or even seeming appreciation of what it was doing." Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 25 (1998).

[34] Doe v. Bolton, 410 U.S. 179, 221–22 (1973) (White, J., dissenting) (referring to the Court's creation of "a new constitutional right for pregnant mothers" to abort their unborn children as being fashioned "with scarcely any reason or authority" and as "an exercise of raw judicial power"). Professor Esbeck calls the Court's decision to incorporate the Establishment Clause, without even considering its original design as a structural provision designed to promote federalism, "an act of sheer judicial will." Esbeck, *supra* note 33, at 26.

[35] Snee, *supra* note 2, at 407.

[36] William Lietzau is very critical of "the Court's error regarding incorporation" of the Establishment Clause, which, he states, "proves to be much more than a mere misreading of history; it is an assault on the very heart of the [F]irst [A]mendment's religious liberty protections." William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1193 (1990).

[37] *See generally* SCOTT DOUGLAS GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS 193–94 (1999).

[38] *See* Van Orden v. Perry, 545 U.S. 677, 693 (2005) (Thomas, J., concurring).

individual right."[39] Thus, incorporation of the Establishment Clause against the states is incoherent, because it "prohibit[s] precisely what the Establishment Clause was intended to protect—*state* establishments of religion."[40] In other words, incorporation of the Establishment Clause has perverted the purpose of the Clause, because as Justice Stewart once said: "a constitutional provision . . . designed to leave the States free to go their own way . . . [has] become a restriction upon their autonomy."[41]

It is unlikely that Justice Thomas will ever convince a Supreme Court majority to reject more than sixty years of precedent by deciding to "unincorporate" the Establishment Clause. However, his second position on incorporation—what I call "partial incorporation"—merely asks the Court to take its own theory of incorporation seriously by recognizing that "[w]hen rights are incorporated against the States through the Fourteenth Amendment they should advance, not constrain, individual liberty."[42] In other words, the Establishment Clause may mean one thing when applied as a structural limitation on the power of the federal government, and something else when applied only to protect individual liberty against state action.[43]

For example, in *Zelman v. Simmons-Harris* a neutral voucher program that provided tuition aid to economically disadvantaged Cleveland schoolchildren to attend a private religious or nonreligious school chosen by their parents was attacked as a law that unconstitutionally advanced religion under the Establishment Clause.[44] Although the Court upheld the law because it viewed the voucher scheme as consistent with its Establishment Clause test,[45] Justice Thomas concurred and reasoned that the Fourteenth Amendment could not be employed to invalidate a neutral school choice program by incorporating a structural component of the Establishment Clause.[46] As he put it so well: "There would be a tragic irony in converting the

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[39] 542 U.S. 1, 50 (2004) (Thomas, J., concurring). In other words, he views the Establishment Clause as a structural limitation on the federal government and not as a clause that protects individual rights and liberties. *Id.*

[40] *Id.* at 51.

[41] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 310 (1963) (Stewart, J., dissenting).

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

[43] *See id.* at 678–79. As Professor Esbeck has observed, "in order to make a power-limiting clause suitable for absorption into the Fourteenth Amendment, the Court [in *Everson*] had to strain in order to squeeze a structural clause into a 'liberty' mold." Esbeck, *supra* note 33, at 27.

[44] *See Zelman*, 536 U.S. at 647–49.

[45] *Id.* at 653 (upholding the voucher program as a neutral scheme of "true private choice").

[46] *Id.* at 679–80 (Thomas, J., concurring). Justice Thomas made clear that he can and does accept incorporation of "religious liberty rights." *Id.* at 679.

Fourteenth Amendment's guarantee of individual liberty into a prohibition on the exercise of educational choice."[47] The incorporated Establishment Clause does not give *A* a constitutional right to restrict the liberty of *B*, nor to forbid the states from "giv[ing] parents a greater choice as to where and in what manner to educate their children."[48]

Similarly, Justice Thomas's concurring opinion in *Newdow* concluded that voluntary recitation of the Pledge of Allegiance in the public schools does not violate the Establishment Clause, because it does not "implicate the possible liberty interest of being free from coercive state establishments."[49] In other words, state endorsement of the notion that our Nation is "under God" does not violate the Establishment Clause so long as "[t]he Pledge policy does not expose anyone to the legal coercion associated with an established religion."[50] According to Thomas, the incorporated Establishment Clause does not impose a structural limitation on the states stripping them of the power to sponsor, endorse, or recognize a religious idea or symbol; rather, it protects the individual liberty to be free from laws that substantially burden a person's right to choose whether to participate in a religious ceremony or activity. *A*'s right under the Establishment Clause to refrain from participation in the "under God" component of the Pledge ceremony—like *B*'s right under the Free Speech Clause to refrain from any compelled affirmation of belief[51]—does not include the right to censor the curriculum nor to silence his classmates who wish to pledge allegiance to "one Nation under God."[52]

As with school choice and the Pledge, so also with public displays of the Ten Commandments by state or local government. The incorporated Establishment Clause "liberty" is not implicated so long as a person is free to avert her eye. As Justice Thomas stated in *Van Orden:*

> There is no question that, based on the original meaning of the Establishment Clause, the Ten Commandments display at issue here is constitutional. In no sense does Texas compel petitioner Van Orden to do anything. The only injury to him is that he takes offense at seeing the monument as he passes it on his way to the Texas Supreme Court Library. He need not stop to read it or even to look at it, let alone to express support for it or adopt the Commandments as guides for his life. The mere presence of the monument along his path

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47 *Id.* at 680.

48 *Id.*

49 Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 53 (2004) (Thomas, J., concurring).

50 *Id.* at 54.

51 *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633–34 (1943).

52 4 U.S.C. § 4 (2000); *see supra* notes 4–8 and accompanying text.

involves no coercion and thus does not violate the Establishment Clause.[53]

If Justice Thomas is guilty of anything concerning his views on incorporation of the Establishment Clause, his sin is taking the Court's theory of incorporation seriously. No one has a liberty to direct the content of government speech merely because he is offended by the message. Nor does liberty give one the right to silence others or to restrict the liberties of others. The incorporated First Amendment is best understood as protecting the equal liberty of all to choose whether to participate in government programs and ceremonies that touch upon religion. However, so long as the states do not restrict individual religious liberty, they are not bound by the structural limitations of the Establishment Clause that apply to Congress and the federal government.

One common objection to the argument that the Establishment Clause is a federalism provision and should thus be "disincorporated"[54] is that the law applying the Establishment Clause to the states "is well settled and nobody is particularly anxious to change it."[55] Indeed, even most critics of the Court's Establishment Clause jurisprudence accept incorporation as a "deed . . . now done"[56] and recognize that "the sheer force of time would seem to ensure that the Establishment Clause will remain applicable against the states."[57] Justice Thomas's concept of partial incorporation responds to this criticism by accepting incorporation of the Establishment Clause while taking seriously the doctrine that the Fourteenth Amendment incorporates only individual liberty interests, not structural provisions defining the powers of

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[53] Van Orden v. Perry, 545 U.S. 677, 694 (2005) (Thomas, J., concurring).

[54] *See* Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 632 (2006) ("A construction of the Establishment Clause strictly faithful to its original meaning would require disincorporation and the overturning of nearly sixty years of 'no-establishment' jurisprudence.").

[55] Andrew Koppelman, *Akhil Amar and the Establishment Clause*, 33 U. RICH. L. REV. 393, 404 (1999); *see also* Muñoz, *supra* note 54, at 633. Professor Koppelman's assertion that "nobody" is inclined to change the Court's Establishment Clause decisions is perhaps more a reflection of the social circles in which he moves than of reality. *See infra* note 59 and accompanying text. I know many people who would like to change what they perceive to be the anti-religious hostility of the Court's non-establishment jurisprudence. Professors Jeffries and Ryan capture this reality when they note that the issue of prayer and religion in schools reveals "a huge gap between the cultural elite and the rest of America. People generally may have supported school prayer and Bible reading, but the leadership class did not." John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 325 (2001).

[56] *See, e.g.*, KEVIN SEAMUS HASSON, THE RIGHT TO BE WRONG: ENDING THE CULTURE WAR OVER RELIGION IN AMERICA 137 (2005).

[57] Muñoz, *supra* note 54, at 633.

Congress. This accepts what is settled—the incorporation of the Establishment Clause—but requires the Court to carefully rethink each case under the Establishment Clause to ensure that the Clause is incorporated only to protect individual religious liberty from coercive state establishments of religion.[58] The Court's use of the Establishment Clause to cleanse religion from public culture has never been widely accepted by the American people,[59] and partial incorporation asks only that the Court treat liberty under the Establishment Clause the same way it treats every other First Amendment liberty interest—as an individual right protected against substantial burdens imposed by state law, not as a license to dictate what ideas government may endorse or recognize as part of the public culture of a pluralistic society.

III. PARTIAL INCORPORATION: RELIGIOUS LIBERTY WITHOUT RELIGIOUS APARTHEID

If Justice Thomas succeeds in convincing a Supreme Court majority to take the Court's own theory of incorporation seriously with respect to the Establishment Clause, what will be the impact of separating individual liberties from structural limitations under the Clause and applying only the former against the states? It will take years for all the

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[58] *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 53 (2004) (Thomas, J., concurring). In other words, individual liberty under the incorporated Establishment Clause is protected only against "actual legal coercion" imposed by state law. *Id.* at 52.

[59] For example, a recent Fox News poll found that most Americans disagree with many of the Supreme Court's modern Establishment Clause decisions:

> The new poll finds that almost eight in 10 Americans (77 percent) believe the courts have overreached in driving religion out of public life, and a 59 percent majority feels Christianity is under attack.
>
> Majorities of Republicans (89 percent), Democrats (73 percent) and independents (69 percent) think the courts have gone too far in taking religion out of public life.
>
> Overall, most Americans disagree with several Supreme Court rulings on the separation of church and state. For example, an overwhelming 87 percent favor allowing public schools to set aside time for a moment of silence, and 82 percent favor allowing voluntary prayer. Another 82 percent favor allowing public schools to have a prayer at graduation ceremonies, and 83 percent think nativity scenes should be allowed on public property.
>
> Not only do three-quarters of Americans (76 percent) think posting the Ten Commandments on government property should be legal, but also two-thirds (66 percent) say it is a good idea to post the commandments in public schools.

Dana Blanton, *12/01/05 FOX Poll: Courts Driving Religion Out of Public Life; Christianity Under Attack*, FOX NEWS, Dec. 1, 2005, http://www.foxnews.com/story/0,2933,177355,00.html. Fox News is not alone in this finding. A survey conducted by the First Amendment Center found that "[n]early two-thirds of the public (65%) agree that 'teachers or other public school officials should be allowed to lead prayers in school . . . .'" *The First Amendment in Public Schools: A Comprehensive Survey of How Administrators and Teachers View the Rights and Responsibilities of the First Amendment*, FREEDOM FORUM, Mar. 1, 2001, http://www.freedomforum.org/templates/document.asp?documentID=13390.

dust to settle, but two things are clear to me—critics will declare, "The sky is falling"; and the critics will be wrong. Although the states would have more room to experiment with laws touching upon religion,[60] equal religious liberty under the First Amendment would continue to be incorporated against the states under the Fourteenth Amendment. Indeed, since the Establishment Clause would be incorporated only to advance, but never to "constrain[] individual liberty,"[61] religious liberty should flourish because no one will have a right to employ the Establishment Clause to dictate what others may say or view in the public square and in the public schools. Moreover, partial incorporation of the Establishment Clause strikes a reasonable "balance between the demands of the Fourteenth Amendment on the one hand and the federalism prerogatives of States on the other."[62] So long as the states do not impose substantial burdens on individual religious liberty, they are free to recognize religion as a part of public culture and to experiment with the curricula of public schools and the financing of educational choice in ways that meet the needs of all their citizens, including religious subgroups who wish to be included in the public square and whose educational needs may be different from those in the majority.[63]

Although the precise line between unincorporated structural limitations on the federal government and incorporated individual religious liberty interests will require development and refinement on a case-by-case basis in the fullness of time, it is possible here to at least begin to sketch an outline of partial incorporation. For example, the so-called *Lemon-Agostini* test[64]—which prohibits laws that "have the 'purpose' or 'effect' of advancing . . . religion"[65]—imposes a structural limitation on government by denying it the power to endorse religion, to sponsor religion, or even to "express an opinion about religious matters"[66] or to "encourage citizens to hold certain religious beliefs."[67] As

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60 Zelman v. Simmons-Harris, 536 U.S. 639, 680 (2002) (Thomas, J., concurring).

61 *Id.* at 678.

62 *Id.* at 679.

63 *See id.* at 676–84.

64 *See id.* at 648–49 (majority opinion) (citing Agostini v. Felton, 521 U.S. 203, 222–23 (1997)); *see id.* at 668 (O'Connor, J., concurring) (citing Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971)).

65 *Id.* at 648–49 (majority opinion) (citing *Agostini*, 521 U.S. at 222–23) (stating that the incorporated Establishment Clause "prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion").

66 Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 109 (2002). Koppelman describes this structural aspect of the Establishment Clause as "a restriction on government speech." *Id.* *See also* Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 297 (1987) ("The principal kind of evil against which the [E]stablishment [C]lause protects is institutional, not individual.").

Justice Thomas points out, by incorporating these structural limitations against the states the Court has "elevate[d] the trivial to the proverbial 'federal case,' by making benign signs and postings subject to challenge"[68] even though the liberty of no person is restricted by their passive display on some public place. In other words, so long as no one is required to participate, the interior decorating of public schools, public courthouses, and the public square is a matter for each state and the People of each state to decide.[69]

For example, *County of Allegheny* v. *ACLU*, in which a crèche display in a county courthouse was enjoined as an unconstitutional endorsement of religion by local government,[70] would almost certainly come out the other way under Justice Thomas's view of partial incorporation. The Fourteenth Amendment does not forbid states from endorsing religion, but only from imposing religion in a way that substantially burdens individual religious liberty.

Although Justice O'Connor has tried to explain the endorsement test as a rule designed to protect an individual's right not to feel like an outsider or a disfavored member of the political community,[71] this view amounts to nothing more than an unconvincing attempt to portray a structural limitation on state government speech as a spurious right to censor public displays that one finds offensive. Why should we think that liberty under the Establishment Clause includes the right to control which holidays state governments may celebrate and which ideas state governments may express? This is an extraordinary "liberty," unlike any other liberty incorporated by the Fourteenth Amendment.

For example, no one would argue that the Free Exercise Clause protects a person's right to censor public displays that offend his sincerely held religious beliefs. Thus, *A* does not have a First Amendment right to enjoin a "gay pride" display in a public park because

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[67] Koppelman, *supra* note 66. Koppelman admits that his view is not concerned with protecting the liberty of "aggrieved" individuals, but rather with limiting the institutional powers of state and local governments. *Id.* at 112.

[68] Van Orden v. Perry, 545 U.S. 677, 694 (2005) (Thomas, J., concurring).

[69] As Judge McConnell has argued, "Not what flunks the [*Lemon-Agostini*] test, but what interferes with religious liberty, is an establishment of religion." Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 941 (1986); *see also* Meier, *supra* note 27, at 174–75 (observing that most Establishment Clause cases are not about protecting individual liberty, but rather are about a plaintiff who wishes to "restrain government from doing something with which the individual disagrees").

[70] 492 U.S. 573, 621 (1989).

[71] *See* Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring) (stating that government action endorsing religion is invalid "because it 'sends a message to nonadherents that they are outsiders, not full members of the political community'") (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984)); *see also* Koppelman, *supra* note 66, at 112.

it offends his religious beliefs and sends a message to him that he is an outsider and a disfavored member of the political community. *A*'s remedy is to avoid the offensive display or to avert his eye when walking past it.[72] Similarly, *B* should not have a First Amendment right to enjoin a Christmas display that she finds offensive. The incorporated Establishment Clause protects individual liberty from substantial burdens imposed by state action, but there is no liberty to not be offended by government speech in the public square. Indeed, a rule cleansing religious displays from the public square actually promotes the evil it seeks to avoid, because by singling out religious displays for exclusion from the public culture the Court is sending a message that people of faith are outsiders, disfavored members of the political community whose holidays and ideas may not be recognized and celebrated in a public square that includes everyone else.[73] As Steven Smith argues, if religious symbols and holidays are cleansed from the public square, many religious citizens may "feel that their most central values and concerns—and thus, in an important sense, they themselves—have been excluded from a public culture devoted purely to secular concerns."[74]

In order to succeed in an Establishment Clause case brought against state or local government, the claimant should be required to demonstrate that the challenged law or policy substantially burdens an individual liberty protected under the Clause.[75] The kind of "psychic harm" one experiences when government endorses a controversial idea or symbol in the public schools or upon the public square[76] does not impose a substantial burden on an incorporated Establishment Clause liberty, unless a dissenter is compelled to affirm his belief in the offensive idea. If *A* has no right to forbid the teaching of evolution in the public schools because that lesson is offensive to his religious beliefs

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[72] *See* William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L.J. 351, 358–59 (1990–1991) ("Outside the establishment area, the state's use of controversial symbols does not give rise to constitutional concern no matter how offensive those symbols might be.").

[73] *See* Smith, *supra* note 66, at 278 ("[I]n a polity in which government regularly acknowledges and accommodates citizen interests of various sorts, deliberate indifference toward one class of interests may easily shade into . . . disapproval—which Justice O'Connor's [endorsement] test would also forbid.").

[74] *Id.* at 310–11.

[75] The individual liberty protected by the Establishment Clause is perhaps best understood as a right of "religious choice," and then the "establishment clause analysis would lead to a proscription of all government action that has the purpose and effect of coercing or altering religious belief or action." McConnell, *supra* note 69, at 940.

[76] *See* Marshall, *supra* note 72, at 357 (referring to the endorsement test as "protecting people from psychic harm" or "from symbolic alienation").

protected under the Free Exercise Clause,[77] then *B* has no right to forbid the teaching of intelligent design in the public schools because that lesson is offensive to his liberty protected under the Establishment Clause. Since the structural component of the Establishment Clause limiting the power of the states to endorse or advance religion is not subject to incorporation, the merits and wisdom of education in the public schools are for school boards and state legislators—not federal judges—to determine, so long as individual liberty under the First Amendment is not substantially burdened.

If we return our attention to the three hypothetical lawsuits regarding the Pledge of Allegiance posed previously in this Article,[78] we will see that they should all come out the same way whether decided under the incorporated Free Speech, Free Exercise, or Establishment Clauses. In each case, individual liberty will be protected from compelled affirmation of belief, but in none of the cases will *A*, *B*, or *C* have a right to censor the curriculum or to silence classmates who wish to Pledge their allegiance to "one Nation under God."[79] This approach to incorporation of the First Amendment recognizes the important principle of uniformity of all the liberties protected by the First Amendment. Individual liberty under the Establishment Clause is neither more important—nor more fragile—than the liberties of belief, expression, and religious exercise protected under the Free Speech and Free Exercise Clauses. Moreover, as Justice Thomas has argued, partial incorporation of the Establishment Clause leaves to the People and the democratic process in the states the ability to enact laws and policies that best promote the interests and needs of all persons,[80] including persons belonging to religious subgroups who often feel like second class citizens in the public schools and public squares of their communities.[81] In other words, under Justice Thomas's approach to incorporation of the Establishment Clause, the equal liberty of all is protected without the

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[77] *See id.* at 375 (concluding that "offense is not cognizable as a component of a free exercise claim"). Marshall argues, however, that under the Establishment Clause, "[g]overnmental actions that improperly endorse religion are unconstitutional per se." *Id.* at 374. Marshall's position recognizes the Establishment Clause as imposing a structural limitation on the states, but he does not explain how this structural limitation is subject to incorporation as a Fourteenth Amendment "liberty."

[78] *See supra* notes 2–11 and accompanying text.

[79] 4 U.S.C. § 4 (2000).

[80] *See* Zelman v. Simmons-Harris, 536 U.S. 639, 679 (2002) (Thomas, J., concurring) (referring to the need to balance liberty under the Fourteenth Amendment with "the federalism prerogatives of [the] States").

[81] *See* Smith, *supra* note 66, at 310–11 (noting that there is "powerful evidence" that many religious people feel alienated from what they perceive to be the "antireligious" nature of public schools and certain other "areas of public life").

kind of judicially-imposed religious apartheid that forbids states from respecting the needs and traditions of religious citizens and subgroups.[82]

The most difficult issue under the jurisprudence of partial incorporation is that of prayer in the public schools. Since structural limitations on religious endorsement and sponsorship are not incorporated against the states, school prayer should be unconstitutional only to the extent that it restricts individual liberty under the Establishment Clause.

Lee v. *Weisman*[83] is an illustrative case. In *Weisman*, a public middle school invited Rabbi Leslie Gutterman to deliver an inclusive and nonsectarian "Invocation" and "Benediction" at its graduation ceremony.[84] Although attendance at graduation was not required, undoubtedly the ceremony was a "significant occasion[]" in the academic careers of all students, including those who were offended by any kind of school-sponsored prayer.[85]

Under both partial incorporation and the Court's opinion in *Weisman,* it is undisputed that liberty under the Establishment Clause "guarantees that government may not coerce anyone to support or participate in religion or its exercise."[86] Thus, it is clear that government may not compel students to participate in school prayer or to affirm their belief in the content of the prayer. Up to this point, both *Weisman* and partial incorporation are in accord in protecting liberty under the Establishment Clause. However, Justice Kennedy's majority opinion in *Weisman* goes a step further and imposes a structural limitation on government participation in "religious debate or expression"[87] that forbids the state from sponsoring a religious message "in a school setting."[88] Thus, even if the school makes clear that participation in a school-sponsored prayer is voluntary, the Establishment Clause protects "freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."[89] Although this sounds as though the Court is concerned about protecting individual liberty from even subtle indoctrination in the public schools, Justice Kennedy made clear that students may be compelled "to attend classes and assemblies and to complete assignments exposing them to ideas they find distasteful or

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82 *See id.*

83 505 U.S. 577 (1992).

84 *Id.* at 580–82.

85 *Id.* at 595–96 ("Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise . . . [without forfeiting the] intangible benefits" of taking part in the ceremony.).

86 *Id.* at 587.

87 *Id.* at 591.

88 *Id.* at 594.

89 *Id.* at 592.

immoral or absurd" or "offensive and irreligious."[90] For all its talk about protecting freedom of conscience from subtle coercive pressure, when its rhetorical veil is pierced *Weisman* is not really concerned with protecting individual liberty, but rather with enforcing a structural limitation prohibiting state-sponsored religious expression.[91] Under the jurisprudence of partial incorporation, *Weisman* should come out the other way; so long as no one is compelled to participate, a commencement prayer at a public school does not impose a substantial burden on individual liberty under the Fourteenth Amendment. Some students may find religious expression at graduation offensive, just as some students may find certain secular ideas expressed at graduation offensive. However, so long as no student is compelled to affirm his or her belief in any idea, individual liberty under the incorporated First Amendment does not give any student the right to censor the program or to dictate which messages other students may hear. As Justice Kennedy put it so well (before choosing to ignore it): "To endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry. And tolerance presupposes some mutuality of obligation."[92]

If religious students must endure a great deal of secular speech that offends their religious sensibilities, it does not seem too much to ask other students to endure a brief invocation to God notwithstanding their preference for a strictly-secular public culture. Both religious and secular students should be welcome in the public schools, but no student has a right to silence others or to demand that any idea be cleansed from school programs. We are not a strictly-secular people, and a strictly-secular public culture is a poor reflection of the diversity of our pluralistic Nation.

CONCLUSION

It is a cliché to observe that the Supreme Court's Establishment Clause jurisprudence is in a hopeless state of disarray.[93] This confusion

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[90] *Id.* at 591.

[91] *See id.* (stating that "the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions").

[92] *Id.* at 590–91.

[93] *See* Van Orden v. Perry, 545 U.S. 677, 694 (2005) (Thomas, J., concurring) (stating that "this Court's [Establishment Clause] jurisprudence leaves courts, governments, and believers and nonbelievers alike confused—an observation that is hardly new"); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 117–20 (1992) (noting "inconsistencies," "contradiction," and "chaos" amid the Court's Establishment Clause jurisprudence, and concluding that: "It is a mess").

in the law no doubt results—at least in part—from the Court's decision to incorporate the Establishment Clause as a structural limitation on the power of the states to endorse or advance religion, thereby transforming a clause designed to promote federalism, by insulating state autonomy over religion from federal interference, into a provision that empowers federal courts to sit in judgment over the curricula of public schools and the decoration of public parks and buildings.

Although Justice Clarence Thomas believes "that the Establishment Clause is a federalism provision, which, for this reason, resists incorporation,"[94] he has also expressed a view that allows the Establishment Clause to be incorporated to the extent that it protects an individual liberty against substantial burdens imposed by state action. Under this theory of partial incorporation, the states are free to recognize and celebrate the role of religion in the history and culture of America, so long as they do not compel individuals to affirm any religious belief or to participate in any religious exercise. Justice Thomas's theory of partial incorporation does not ask the Court to reject the doctrine of incorporation by "disincorporating" the Establishment Clause. Instead it challenges the Court to take its own theory seriously by incorporating the Establishment Clause only to the extent that it advances individual religious liberty.

Under the jurisprudence of partial incorporation, the states should not be bound by structural limitations of the Establishment Clause that apply to Congress and the federal government. So long as the states do not impose coercive burdens on individual religious liberty, they are free to recognize religion as part of public culture and to experiment with the curricula of public schools and the financing of educational choice in ways that meet the needs of all their citizens, including members of religious subgroups who wish to be included in the public square and whose educational needs may be different from those in the majority. The precise line between unincorporated structural limitations and incorporated individual liberty interests will take time to develop in the caselaw; however, decisions imposing structural limitations on the power of the states to endorse or advance religion, or to express an opinion about religion, should not survive re-examination under the theory of partial incorporation.

Of course, state constitutions may impose structural limitations on state and local government concerning endorsement of religion in public schools and public displays. Indeed, as Joseph Snee has stated, the religious freedom of American citizens is perhaps "safer in the hands" of

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[94] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45–46 (2004) (Thomas, J., concurring).

state legislatures and state courts, than in the hands of the federal judiciary.[95]

Although many commentators will undoubtedly flap their wings and cry "the sky is falling," lovers of liberty need not fear. Equal religious liberty will be secure—and indeed will flourish—under partial incorporation. Our Nation is not a strictly-secular one, and our public culture may and should reflect the rich, religious diversity of our people. No one should be compelled to affirm any belief or participate in any religious practice, but no one has the right to silence others, to control which lessons public schools may teach and willing pupils may learn, or to censor the public culture. As Justice Thomas has put it so well, "[w]hen rights are incorporated against the States through the Fourteenth Amendment they should advance, not constrain, individual liberty."[96] Equal liberty under the First Amendment is not equal when the Establishment Clause is interpreted to require a strict cleansing of religion from the public culture. Under Justice Thomas's approach to incorporation of the Establishment Clause, the religious liberty of all is respected without the kind of judicially-imposed religious apartheid that forbids the states from respecting the needs and traditions of religious citizens and subgroups. In other words, by taking the theory of incorporation seriously, Justice Thomas's jurisprudence of partial incorporation results in a triumph for pluralism and equal liberty under the First and Fourteenth Amendments.

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[95] Snee, *supra* note 2, at 407.

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

REPUBLICANISM AND RELIGION: SOME CONTEXTUAL CONSIDERATIONS†

*Ellis Sandoz**

I. INTRODUCTION AND CONTEMPORARY SETTING

Despite the Enlightenment's concerted project of doing away with the Bible as the basis of political and social order in favor of "Reason,"[1] religion today continues to condition politics as an undergirding belief foundation: Men always have God or idols, as Luther long ago said. The present war against terrorism, with its religious dimensions evident to even the most blinkered secularist, underlines the point. Perhaps less evidently, this phenomenon can be seen in the context of a global revival of traditional religiosity, including Christianity, as a major event of the present—following the era of the death and murder of God proclaimed by Hegel and Nietzsche—now called "the revenge of God" by such scholars as Gilles Kepel, Philip Jenkins, and Samuel Huntington.[2]

Leaving aside the radical Islamists and the contemporary revivals of Christianity and Hinduism for present considerations, the principal intellectual fruit of Enlightenment rationalism's systematic deformation of reality—through occlusion against transcendent divine Being and consequent catastrophic ontological result—has proved to be the ascendancy of various competing political "idealisms" in the form of reductionist ideologies. These are largely comprehensible as forms of intramundane religion and magical operations decked out as "science" that immanentize aspects of the Christian faith. They then generate such familiar belief systems as progressivism, utopianism, positivism, nihilism, and Marxist-Leninist revolutionary activism. Such artifacts of modern and post-modern "egophanic revolt" culminate, for instance, in

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1 Robert C. Bartlett, *On the Politics of Faith and Reason: The Project of Enlightenment in Pierre Bayle and Montesquieu*, 63 J. POL. 1, 1–28 (2001); *see generally* ROBERT C. BARTLETT, THE IDEA OF ENLIGHTENMENT: A POST-MORTEM STUDY (2001).

2 *See generally* GILLES KEPEL, THE REVENGE OF GOD: THE RESURGENCE OF ISLAM, CHRISTIANITY, AND JUDAISM IN THE MODERN WORLD (Alan Braley trans., 1994); PHILIP JENKINS, THE NEXT CHRISTENDOM: THE COMING OF GLOBAL CHRISTIANITY (2002); SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1996); SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY 37–58 (2004); KENNETH D. WALD, RELIGION AND POLITICS IN THE UNITED STATES (4th ed. 2003).

the radical humanism that proclaims Autonomous Man as the godmen of this or that description and politically in the totalitarian killers of recent memory.[3] Properly they can be understood as manifestations of the recrudescence of superstition, of resurgent apocalypticism, and of the ancient religiosity called Gnosticism that replaces faith with fanatical certitude beyond experience and reason. Eric Voegelin's more intricate analysis[4] of these phenomena was long preceded by that of acute observers of the French Revolution and its bloodlust disguised as the Religion of Reason, such as Edmund Burke[5] and Alexis de Tocqueville—who is especially clear on the point: That civilizational upheaval, he found, was a religious movement clothing murderous zealotry and enthusiasm in the ingratiating mantle of instrumental reason and republicanism. Tocqueville wrote that its ideal

> was not merely a change in the French social system but nothing short of a regeneration of the whole human race. It created an atmosphere of missionary fervor and . . . assumed all the aspects of a religious revival . . . . It would perhaps be truer to say that it developed into a species of religion, if a singularly imperfect one, since it was without a God, without a ritual or promise of a future life. Nevertheless, this strange religion has, like Islam, overrun the whole world with its apostles, militants, and martyrs.[6]

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[3] For "egophanic revolt," see 4 ERIC VOEGELIN, ORDER AND HISTORY: THE ECUMENIC AGE 260–71 (1974). The *ersatz* religions have been studied in a vast literature since Eric Voegelin first published his *Political Religions* in 1938. *See* ERIC VOEGELIN, POLITICAL RELIGIONS (1938), *reprinted in* 5 THE COLLECTED WORKS OF ERIC VOEGELIN: MODERNITY WITHOUT RESTRAINT (Manfred Henningsen vol. ed., Univ. of Mo. Press 2000). The horrific consequences of such "Utopian politics" in terms of lives taken ("democide") is authoritatively studied in books by R.J. Rummel, who tabulates that since 1900 "independent of war and other kinds of conflict—governments probably have murdered 119,400,000 people—Marxist governments about 95,200,000 of them. By comparison, the battle-killed in all foreign and domestic wars in this [i.e., the twentieth] century total 35,700,000." R.J. RUMMEL, LETHAL POLITICS: SOVIET GENOCIDE AND MASS MURDER SINCE 1917, at xi (1990); *see* R.J. RUMMEL, DEATH BY GOVERNMENT (3d prtg. 1996). A more philosophical recent work that continues the study of "revolutionary gnosticism" in the spirit of Voegelin's work is LUCIANO PELLICANI, REVOLUTIONARY APOCALYPSE: IDEOLOGICAL ROOTS OF TERRORISM 171–86, 261–75 (2003).

[4] ERIC VOEGELIN, THE NEW SCIENCE OF POLITICS 107–31 (1952); ERIC VOEGELIN, 4 HISTORY OF POLITICAL IDEAS: RENAISSANCE AND REFORMATION, *in* 22 THE COLLECTED WORKS OF ERIC VOEGELIN (Ellis Sandoz series ed., David L. Morse & William M. Thompson vol. eds., Univ. of Mo. Press 1998); *see also* BARRY COOPER, NEW POLITICAL RELIGIONS, OR AN ANALYSIS OF MODERN TERRORISM 108 (2004); STEFAN ROSSBACH, THE GNOSTIC WARS: THE COLD WAR IN THE CONTEXT OF A HISTORY OF WESTERN SPIRITUALITY (1999).

[5] *See* 5 EDMUND BURKE, *Three Letters to a Member of Parliament on the Proposals for Peace with the Regicide Directory of France*, *in* THE WRITINGS AND SPEECHES OF EDMUND BURKE (1901) 233, 233–385; 3 EDMUND BURKE, *Letters on a Regicide Peace*, SELECT WORKS OF EDMUND BURKE 59, 59–394 (Francis Canavan ed., Liberty Fund 1999).

[6] ALEXIS DE TOCQUEVILLE, THE OLD REGIME AND THE FRENCH REVOLUTION 12–13 (Stuart Gilbert trans., Anchor Books 1955) (1856).

II. RELIGIOUS ROOTS OF WHIG REPUBLICANISM

Since my primary interest here is in the American experience and its unique experiential contexts, I must also leave aside the totalitarian ideologies, even though they loom large in the immediate background. In turning to that subject, then, let us remember Tocqueville's further observation that the men and women who colonized America "brought . . . a Christianity which I can only describe as democratic and republican; . . . there is not a single religious doctrine hostile to democratic and republican institutions." "It was religion that gave birth to . . . America. One must never forget that."[7]

The question to be addressed is this: How can the religious dimension of Anglo-American republicanism best be understood when viewed against the backdrop of radical political movements and doctrines just mentioned? The answer is not simple, and I can attempt only a synoptic sketch. In giving it I am reminded that, if war is too important to be left to the generals, then history is surely too important to be left to the historians—not to mention political scientists, many of whom blithely write as though the Enlightenment dogma of their own complacent persuasion has rightly ruled for the past three hundred years and seldom mention, except disparagingly, religion as having much to do with the rise of modern democratic republicanism. As Perry Miller remarked a generation ago when confronting an attitude he labeled "obtuse secularism" in accounts of American experience, "A [cool] rationalism such as [Jefferson's] might have declared the independence of [Americans in 1776], but it could never have [persuaded] them to fight for it."[8] There is more to reality and politics, dear Horatio, than your philosophy has dreamt of.

What then? The tangle is dense and the terminology ambiguous at best. Advocates of republicanism in the Anglo-American Whig tradition (to be distinguished firmly from French Jacobinism, which was both atheistic and anti-property) assert liberty and justice in resistance against tyranny and arbitrary government and do so in the name of highest truth. To summarize: In varying degrees they attempt, within limits, to apply Gospel principles to politics: The state was made for man, not men for the state (cf. *Mark* 2:27). The imperfect, flawed, sinful being *Man,* for all his inability, paradoxically yet remains capable with the aid of divine grace of self-government—i.e., of living decent lives as

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[7] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 288–89, 432 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1858).

[8] Perry Miller, *From Covenant to Revival, in* 1 RELIGION IN AMERICAN LIFE: THE SHAPING OF AMERICAN RELIGION 322, 342–43 (James Ward Smith & A. Leland Jamison eds., 1961), *quoted in* ELLIS SANDOZ, A GOVERNMENT OF LAWS: POLITICAL THEORY, RELIGION, AND THE AMERICAN FOUNDING 111 (2001).

individuals; through understanding and free will, able to respond to grace and to accept the terms of eternal salvation; and capable, with providential guidance, of self-government in both temporal and spiritual affairs, in regimes based on consent and churches organized congregationally. This characteristic attitude has a religious and specifically Protestant Christian root in the conviction that evil in the world must be combated by free men out of the resources of pure conscience, true religion, and reformed institutions of power and authority. The fundamental virtue basic to all others is godliness; and the fundamental source of revealed truth is the Bible—to remember John Milton and the seventeenth-century English experience widely revived in eighteenth-century America during the struggle leading up to independence.[9] Favored institutional arrangements drew from classical sources, to be sure—from Aristotle's description of the mixed regime in *Politics* even more than from Polybius—but they drew also from the republic of the Israelites and the rule of seventy Elders (or Sanhedrin or senate) recounted in the Old Testament (*Numbers* 11:17, *Deuteronomy* 16:18).[10] The mixed constitution delineated by Aristotle is extolled by Thomas Aquinas, in whom Lord Acton finds "the earliest exposition of the Whig theory"; and finding it like the ancient "Gothick polity," it also was favored by Algernon Sidney.[11] English republicanism's brief career followed the Puritan Revolution, civil war, and deposition and execution of Charles I for tyranny when England was declared to be "a Commonwealth or Free-State." Oliver Cromwell sought to fill the void left by the regicide with new governing institutions. He saw the situation under Charles I as analogous to the Israelites' bondage in Egypt and himself as a latter-day Moses leading a confused and recalcitrant people through the Red Sea into a promised liberty Christ would show them. The failed experiment ended after little more than a decade with the Stuart Restoration; and English republicanism itself is said to have died on the scaffold with Algernon Sidney and been "buried, in an unmarked grave, by the Settlement of 1689"[12]—only to be resurrected and transformed in America a century afterward. All the old arguments and imagery then were reasserted, and fervid sentiments echoed John

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[9] Martin Dzelzainis, *Milton's Classical Republicanism*, *in* MILTON AND REPUBLICANISM 1, 21 (David Armitage et al. eds., 1995).

[10] *See* JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA (1656), *reprinted in* THE POLITICAL WORKS OF JAMES HARRINGTON 155, 174–77 (J.G.A. Pocock ed., 1977).

[11] Address by Lord Acton, The History of Freedom in Christianity (May 28, 1877), *in* 1 SELECTED WRITINGS OF LORD ACTON: ESSAYS IN THE HISTORY OF LIBERTY 29, 34 (J. Rufus Fears ed., 1985); ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 166–70 (Thomas G. West ed., Liberty Fund, Inc. 1996) (1698).

[12] Tony Davies, *Borrowed Language: Milton, Jefferson, Mirabeau*, *in* MILTON AND REPUBLICANISM, *supra* note 9, at 254, 254.

Milton's convictions that the "whole freedom of man consists . . . in spiritual or civil libertie."

> [W]ho can be at rest, who can enjoy any thing in this world with contentment, who hath not libertie to serve God and to save his own soul, according to the best light which God hath planted in him to that purpose, by the reading of his reveal'd will [in scripture] and the guidance of his holy spirit?[13]

Tyranny and superstition alike were enemies of the "*the Good Old Cause*" of liberty, rule of law, *salus populi,* government based on consent of the people, freedom of speech, press, and conscience. The political theory of republicanism was explicitly identified with Aristotle's mixed regime as the "free commonwealth" he ultimately preferred as the best practicable form of government, because monarchy was too vulnerable to derailment and perversion into tyranny. Along with the New Testament teachings, the whole classical theory of politics especially as given in Aristotle and Cicero was absorbed into Old Whig discourse. This was no merely *Sectarian* affair, Milton stressed, but eagerly drew from all reliable authorities. In abandoning the Commonwealth and allowing restoration of Charles II, Milton thought the English were like apostate Israelites returning to idolatry in Egypt, reversing the Exodus and again installing Nimrod.[14] Thought and speech were "soaked in the Bible," with Magna Carta and Bible quoted side by side and together with the classics. Thus, it was urged in a fast sermon: "'You are a free Parliament, preserve your freedom, our laws and liberties'; 'let not England become a house of bondage, a second Egypt'."[15] Political and religious liberty were seen to be all of a piece, Edmund Burke and John Witherspoon insisted a century later, still invoking the Good Old Cause. The latter went on to say that "[t]here is not a single instance in history in which civil liberty was lost, and religious liberty preserved entire. If therefore we yield up our temporal property, we at the same time deliver the conscience into bondage."[16] No impiety prompted Bishop James Madison occasionally to pray the Lord's Prayer using the words "Thy republic come." Nor did he or the other American patriots ignore the prayer's next clause, lying as it did at the heart of their republicanism: "Thy will be done, on earth as it is

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[13] JOHN MILTON, THE READIE AND EASIE WAY TO ESTABLISH A FREE COMMONWEALTH (1660), *reprinted in* AREOPAGITICA AND OTHER POLITICAL WRITINGS OF JOHN MILTON 415, 439 (Liberty Fund, Inc. 1999).

[14] *Id.* at 435, 439, 444.

[15] William Greenhill as quoted from his 1643 fast sermon, in CHRISTOPHER HILL, THE ENGLISH BIBLE AND THE SEVENTEENTH-CENTURY REVOLUTION 92, 371 (1993).

[16] JOHN WITHERSPOON, THE DOMINION OF PROVIDENCE OVER THE PASSIONS OF MEN (1776), *reprinted in* POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730–1805, at 529, 549 (Ellis Sandoz ed., Liberty Press 1991).

in heaven." "'[P]atriotism without piety is mere grimace[,]'" one American preacher quaintly asserted.[17]

III. THE BIBLE, POLITICS, AND PHILOSOPHICAL ANTHROPOLOGY

That multiple pre-modern sources of political culture were complexly woven into the foundation of the American representative republics as the most eligible form of government (even if we routinely call it *democracy* today) is, of course, beyond dispute—most especially common law constitutionalism and the Greek and Latin classics, among other neglected sources.[18] But the importance of Bible reading and the spiritual grounding nurtured by it can hardly be overrated. From this perspective it is not the institutional *forms* that were decisive (if they ever are), and like many before him James Madison regarded them as "auxiliary precautions" of consequence. Decisive from antiquity onward is dedication to *salus populi* as supreme law (or *bonum publicum,* the universal or common good) and as the end of government and requisite animating spirit of the political community and of any persons vested with authority. These fundamental matters of community and *homonoia* can be glimpsed in *Federalist No. 2* where Publius (John Jay) remarks that

> Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established their general liberty and independence.[19]

The supposed hostility between liberal *individualism* and republican communitarianism can be overdrawn and distorted.

At the bottom of republicanism lies a *philosophical anthropology* of the kind I have limned and which must steadily be held in view, one that concretely exists solely in the hearts and minds of individual human beings, the only concrete reality of political existence. That anthropology is basic to the claim of human dignity. To amplify briefly, it is decisively grounded in biblical faith philosophically elaborated as disclosing hegemonic reality, with its appeal to transcendent truth and to eternal Beatitude (blessedness and felicity, happiness) as humankind's *summum bonum* and ultimate destiny.

> And God said, Let us make man in our image, after our likeness: and let them have *dominion* . . . over all the earth, and over every creeping thing that creepeth upon the earth. So God created man in his

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[17] Sermon by Thomas Coombe (1775), *quoted in* Miller, *supra* note 8, at 329.

[18] *See* JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM (2003).

[19] THE FEDERALIST NO. 2, at 38 (John Jay) (Clinton Rossiter ed., 1961).

> *own* image, in the image of God created he him; male and female created he them.

(*Genesis* 1:26–27) (emphasis added). The Trinitarian structure of the image reflects that of the godhead of Father, Son, and Holy Spirit theorized by Augustine[20] as the *esse, nosse, velle infinitum* of God mirrored in the image's being, wisdom or knowledge, and will or love *finitum* of the creature. The human being is, therefore, the same through *participation*—a likeness reflecting divine Being. But since the creature is divided into mind and body, will and knowledge tend to be in a conflict which—through the mutilation of the Fall—manifests itself in cupidity, lust, avarice, greed, and other sin. Thus, the creature as *imago dei* is a trinity: *it is, it sees, it loves:* God created it (being); it sees, since God illumined it (knowledge); and it chooses or inclines always to love the Good at least in appearance, if (because of human imperfection) not always in reality. We are drawn to seek and to find true Good because "God first loved us" (1 *John* 4:19). In Bonaventure (following Augustine) the Trinitarian structure is analyzed in terms of the faculties of memory, intelligence, will and love (the capacity to choose), which ontologically correlate with eternity, truth, and goodness.[21] The sinful perversions in the creature are identified as the lust of the flesh, lust of the eyes, and the pride of life (1 *John* 2:16).

Philosophical anthropology in its several versions supplies the core of political theory, and it opens into the heart of the republican argument as that builds on natural law and consent of the people as foundations of any just regime. This is not merely ancient and medieval lore long since forgotten by moderns. Rather, natural law as theorized by Aquinas was mediated lock, stock, and barrel into English Protestant theory by

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[20] ST. AUGUSTINE, CONFESSIONS bk. XIII, ch. 11., para. 12, at 279–80 (Henry Chadwick trans., Oxford Univ. Press 1991) [hereinafter CONFESSIONS]; ST. AUGUSTINE, CONCERNING THE CITY OF GOD AGAINST THE PAGANS bk. XI, chs. 26–28, at 459–63 (Henry Bettenson trans., Penguin Books 1984) [hereinafter CITY OF GOD]; ST. AUGUSTINE, ON THE TRINITY bks. X, XIV, at 40–59, 136–66 (Gareth B. Matthews ed., Stephen McKenna trans., Cambridge Univ. Press 2002); JOHN VON HEYKING, AUGUSTINE AND POLITICS AS LONGING IN THE WORLD 187–89 (2001). Mediation of this anthropology into English political thought is from many sources, but Fortescue may especially be mentioned; see the discussion and literature cited in ELLIS SANDOZ, *Sir John Fortescue as Political Philosopher*, *in* THE POLITICS OF TRUTH AND OTHER UNTIMELY ESSAYS 95, 95–103 (1999).

[21] BONAVENTURE, THE JOURNEY OF THE MIND TO GOD 18–22 (Stephen F. Brown ed., Philotheus Boehner trans., Hackett Publ'g Co. 1993). While affirming that even in his deformed nature man's "soul [yet] bears, though almost obliterated, the image of God," Calvin vaguely distances himself from "that speculation of Augustine, that the soul is the reflection of the Trinity because in it reside the understanding, will, and memory, [is] by no means sound." Instead he settles on the view "that the human soul consists of two faculties, understanding and will." 1 JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION 183, 190, 194 (John T. McNeill ed., Ford Lewis Battles trans., Westminster Press 1960) (1536) (noting the anthropology of the Reformers).

Richard Hooker's great work entitled *Of the Laws of Ecclesiastical Polity* (1593). In Hooker's formulation:

> God alone excepted, who actually and everlastingly is whatsoever he may be, and which cannot hereafter be that which now he is not; all other things besides are somewhat in possibility, which as yet they are not in act. And for this cause there is in all things an appetite or desire, whereby they incline to something which they may be . . . . All which perfections are contained under the general name of *Goodness.* And because there is not in the world anything whereby another may not some way be made the perfecter, therefore all things that are, are good. Again since there can be no goodness desired which proceedeth not from God himself, as from the supreme cause of all things . . . : all things in the world are said in some sort to seek the highest, and to covet more or less the participation of God himself. Yet this doth nowhere so much appear as it doth in man: because there are so many kinds of perfections which man seeketh. The first degree of goodness is that general perfection which all things do seek, in desiring the continuance of their being. All things therefore coveting as much as may be to be like unto God in being ever, that which cannot hereunto attain personally doth seek to continue itself another way, that is by offspring and propagation. The next degree of goodness is that which each thing coveteth by affecting resemblance with God, in the constancy and excellency of those operations which belong unto their kind. The immutability of God they strive unto, . . . by tending unto that which is most exquisite in every particular. Hence have risen a number of axioms in Philosophy showing, how *The works of nature do always aim at that which cannot be bettered.* These two kinds of goodness rehearsed are so nearly united to the things themselves which desire them, that we scarcely perceive the appetite to stir in reaching forth her hand towards them. . . . Concerning perfections in this kind, that by proceeding in the knowledge of truth and by growing in the exercise of virtue, man amongst the creatures of this inferior world, aspireth to the greatest conformity with God, this is not only known unto us, whom he himself hath so instructed, but even they acknowledge, who amongst men are not judged the nearest unto him. With *Plato* what one thing more usual, than to excite men unto the love of wisdom, by showing how much wise men are thereby exalted above [other] men; how knowledge doth raise them up into heaven; how it maketh them, though not Gods, yet as gods, high, admirable and divine?[22]

The key to this theory is its root in the manifestly "self-evident" search for the Good beyond all finite goods as that is exhibited in human *inclinations,* as Hooker and before him Thomas Aquinas observed. These are ranked hierarchically toward *summum bonum* or the transcendent

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[22] RICHARD HOOKER, OF THE LAWS OF ECCLESIASTICAL POLITY bk. 1, ch. 5.1–5.3, at 66–67 (Arthur Stephen McGrade ed., Cambridge Univ. Press 1989) (1593) (citations omitted).

Good itself: rising from the creature's persistent desire for self-preservation of one's very being (subsistence itself); next to the desire to procreate and propagate in continuation of one's being and to educate one's children and protect one's family (which is common to all animals); and ultimately including the desire to know the meaning of existence and the truth about the ground of being (God), and to live in political society. The culmination of this meditative and experiential ascent thereby manifests the *differentia specifica* of human Noetic rationality, conscience, synderesis, desire for communion of the creature with the Creator whose image he bears, and the political essence of man showing him to be more than merely gregarious.[23] To greater or lesser degree, this generalized synthesis of biblical revelation and Aristotelian and Scholastic philosophy passes through Hooker to Jonathan Edwards in eighteenth-century America, and along the way to such astute English republican writers as John Milton and Algernon Sidney, to form the spiritual and intellectual matrix of their theoretical argumentation and conviction. It is a broadly grounded birthright to be remembered and nurtured.

Finally, in the vocabulary and rhetorical idiom of *natural rights*, this same constellation of theoretical understanding is exhibited in the thinking of the American Founders themselves. This is achieved by turning the analysis of natural law *inclinations* into a reading of *duties* grounding correlative and reciprocal *rights*. For example, if you have a *duty* to preserve your life (the first law of nature in Locke no less than in Aquinas), liberty, and property, you manifestly also have a *right* to do so.[24] For the purposes of the present illustrative analysis, John Milton's robust prose may again be quoted to emphasize some of the decisive points:

> No man who knows ought, can be so stupid [as] to deny that all men naturally were borne free, being the image and resemblance of God himself, and were by privilege above all the creatures, born to command and not to obey: and that they liv'd so[,] . . . [the] autoritie and power of self-defence and preservation being originally and naturally in every one of them, and unitedly in them all . . . . While as

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[23] *See* ST. THOMAS AQUINAS, SUMMA THEOLOGICA pt. I-II Q. 94, art. 2, *reprinted in* THE POLITICAL IDEAS OF ST. THOMAS AQUINAS 3, 44–46 (Dino Bigongiari ed., 1953); 2 ST. THOMAS AQUINAS, THE DISPUTED QUESTIONS ON TRUTH 300–37 (Henry Regnery ed., James V. McGlynn trans., Henry Regnery Co. 1952); ARISTOTLE, POLITICS 1253a1–17, *reprinted in* 2 THE WORKS OF ARISTOTLE 445, 446 (Benjamin Jowett ed. & trans., Encyclopaedia Britannica, Inc. 1952).

[24] "If all princes are obliged by the law of nature to preserve the lands, goods, lives and liberties of their subjects, those subjects have by the *law of nature a right* to their liberties . . . ." SIDNEY, *supra* note 11, at 406 (emphasis added). See the development of this argument in ELLIS SANDOZ, *American Religion and Higher Law*, *in* THE POLITICS OF TRUTH AND OTHER UNTIMELY ESSAYS, *supra* note 20, at 104, 104–20.

> the Magistrate was set above the people, so the Law was set above the Magistrate. . . . A Tyrant whether by wrong or right comming to the Crown, is he who regarding neither Law nor the common good, reigns onely for himself and his faction . . . .[25]

"[T]he law of God does exactly agree with the law of nature" and ordains rule for the common good, i.e., the "preservation of all men's liberty, peace, and safety"; "if any law or custom be contrary to the law of God or of nature, or, in fine, to reason, it shall not be held a valid law";

> nothing that is contrary to the laws of God and to reason can be accounted a law, any more than a tyrant can be said to be a king, or the servant of the Devil a servant of God. Since therefore the law is right reason [(*recta ratio*)] above all else, then if we are bound to obey a king and a servant of God, by the very same reason and the very same law we ought to resist a tyrant and a servant of the Devil.[26]

In sum, therefore, the principal *religious* springs of republican politics are: a paradoxical sense of the dignity yet frailty of every human being as potentially *imago dei*; individual and political liberty fostered through a rule of law grounded in "the nature and being of man" as "the gift of God and Nature";[27] government and laws based on consent of the people; and above all resistance to tyranny, whether ecclesiastical or political, in the name of truth, justice, and righteousness. These key elements were directly and essentially fostered by the prevalent ("dissenting," Edmund Burke called it) Christianity of the late eighteenth century and by a citizenry well-schooled in them by devoted Bible reading, from the pulpit, and through an enormous controversial literature made widely accessible by the printing press.

It is worth lingering a moment over the last point as George Trevelyan memorably makes it:

> The effect of the continual domestic study of the book [i.e., Bible] upon the national character, imagination and intelligence for nearly three centuries to come [after William Tyndale's translation in 1526–1534], was greater than that of any literary movement in our annals, or any religious movement since the coming of St. Augustine. . . . The Bible in English history may be regarded as a "Renaissance" of Hebrew literature far more widespread and more potent than even the Classical Renaissance which . . . provided the mental background of the better educated.[28]

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[25] JOHN MILTON, THE TENURE OF KINGS AND MAGISTRATES (1648), *reprinted in* AREOPAGITICA AND OTHER POLITICAL WRITINGS OF JOHN MILTON, *supra* note 13, at 53, 58–59, 66.

[26] JOHN MILTON, DEFENCE OF THE PEOPLE OF ENGLAND (1651), *reprinted in* AREOPAGITICA AND OTHER POLITICAL WRITINGS OF JOHN MILTON, *supra* note 13, at 99, 201–03, 263, 270.

[27] SIDNEY, *supra* note 11, at 510.

[28] GEORGE MACAULEY TREVELYAN, HISTORY OF ENGLAND 367 (1926). For a detailed account, *see generally* HILL, *supra* note 15; NORTHROP FRYE, THE GREAT CODE: THE BIBLE

The path to that stage of liberty was less than smooth. Indeed, the rise of Whig liberty, the freedom we cherish, was in no small degree bound up with the efforts of early religious reformers, notably John Wyclif and William Tyndale, to make the text of the Bible available in English—an eminently if inadvertently democratizing effort that expanded the much earlier revolutionary principle already proclaimed in the remarkable *York Tractates,* authored by the person identified as the "Anglo-Norman Anonymous" (ca. 1100), as "the priesthood of all [baptized] believers," with the individual person standing in immediacy to God (1 *Peter* 2:9).

> Our author is intent upon eliminating the idea of laity which he relates to *publicani,* from the Church, clearly espousing the doctrine of the priesthood of all believers . . . . He who puts on Christ in baptism, assumes His royal sacerdotal nature . . . . The Anonymous suggests indeed both the royalty and the priesthood of all believers, reborn in baptism as sons of the heavenly *Rex et Sacerdos.*[29]

Translation of scripture into English was denounced by the authorities as the work of heretics spreading pearls before swine (*Matthew* 7:6). Possession of such a Bible was a capital crime in Britain after 1401, one punished (as were the translators themselves) by condemnation, excommunication, burning at the stake, and the scattering of their bones.[30] The reason in an authoritarian age is not far to seek. As Wyclif wrote in the prologue to his and John Purvey's translation of the Bible (as it appears in the edition of ca. 1395):

> All the books of the New Testament . . . be fully of authority of belief; therefore Christian men and women, old and young, should study fast in the New Testament, for it is of full authority, and open to understanding of simple men, as to points that be most needful to salvation; . . . and each place of holy writ . . . teacheth meekness and charity; and therefore he that keepeth meekness and charity hath the true understanding and perfection of all holy writ, as Augustine proveth in his sermon on the praising of charity. Therefore no simpel man of wit be feared unmeasurably to study in the text of holy writ, for why those be words of everlasting life, as Peter said to Christ in the 6th chapter of John; and the Holy Ghost stirred holy men to speak and write the words of holy writ for the comfort and salvation of meek

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AND LITERATURE (1982); BRIAN MOYNAHAN, GOD'S BESTSELLER: WILLIAM TYNDALE, THOMAS MORE, AND THE WRITING OF THE ENGLISH BIBLE—A STORY OF MARTYRDOM AND BETRAYAL (2002); ADAM NICOLSON, GOD'S SECRETARIES: THE MAKING OF THE KING JAMES BIBLE (2003).

[29] GEORGE HUNTSTON WILLIAMS, THE NORMAN ANONYMOUS OF 1100 A.D.: TOWARD THE IDENTIFICATION AND EVALUATION OF THE SO-CALLED ANONYMOUS OF YORK 143, 144 n.476 (Harvard Univ. Press 1951) (citations omitted).

[30] "[T]he first execution of a Wycliffite [came under King Henry IV] in 1401, shortly before the passing of *De haeretico comburendo.* The English Bible attributed to Wyclif was prohibited in 1407, and the universal condemnation of Wycliffite doctrine was secured at the Councils of Pisa and Constance." MICHAEL WILKS, WYCLIF: POLITICAL IDEAS AND PRACTICE 252 (Anne Hudson ed., 2000). Wyclif's remains were exhumed and burned.

> Christian men, as Peter in the 2nd epistle in the end, and Paul in the 15th chapter of Romans witness. And no clerk [clergy/cleric] be proud of the very understanding of holy writ, for why very understanding of holy writ without charity, and keeping of God's behests, maketh a man deeper damned/condemned, and James and Jesus Christ witness; and [the] pride and covetousness of clerks is [the] cause of their blindness and heresy, and depriveth them from [the] very understanding of holy writ, and make them go quick into hell, as Augustine saith on the Psalter, on that word, *Descendant in infernum viventes*.[31]

To be emphasized, and evident in the passage just quoted, is the inordinate importance of the conviction of Christian *egalitarianism* in the church society, a verity here daringly uttered in the very teeth of a strongly hierarchical society, church, and monarchy. It is nobly emblemized as *every* member's equal and God-given charismatically indelible participation in the one Body of Christ, whatever their gifts or station, as that is nobly stated in Paul's First Letter to the Corinthians (12:12). The symbolism had been variously deployed in theorizing civil liberty and political order by such major figures as John of Salisbury (d. 1180) and later on by Sir John Fortescue (d. ca. 1479) in their respective accounts. It found renewed *political* importance in later centuries as devotion to hierarchy waned and egalitarian sentiments flourished. Thus, Moses was a foundling, David a shepherd boy, the Savior incarnate as a simple carpenter, His apostles fishermen, Saint Paul a tent-maker, the meek, poor in spirit, heavy-laden, and peacemakers were blessed of God, and Christ proclaimed Himself present in "the least of these" (*Matthew* 25:40, 45). In Virginia, Madison's and Jefferson's fiery Baptist constituent, the Elder John Leland, ridiculed as arrogant conceit the notion that the ordinary man of common sense is incapable of judging for himself, and he asked:

> Did many of the rulers believe in Christ when he was upon earth? Were not the learned clergy (the scribes) his most inveterate enemies? Do not great men differ as much as little men in judgment? . . . Is the [B]ible written (like Caligula's laws) so intricate and high that none but the . . . learned . . . can read it? Is not the vision written so plain that he that runs may read it?[32]

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[31] THE HOLY BIBLE, CONTAINING THE OLD AND NEW TESTAMENTS, WITH THE APOCRYPHAL BOOKS, IN THE EARLIEST ENGLISH VERSIONS MADE FROM THE LATIN VULGATE BY JOHN WYCLIFFE AND HIS FOLLOWERS 2–3 (Josiah Forshall & Frederick Madden Eds., Oxford Univ. Press 1850) (modern-spelling edition of the Middle English translation by John Wyclif, by Terence P. Noble) (on file with author); *see* WILKS, *supra* note 30, at 85–89 (exploring Wyclif's direct role (if any) in the production of the Wyclif Bible itself).

[32] John Leland, *The Rights of Conscience Inalienable* (1791), *in* POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, *supra* note 16, at 1079, 1090; *see also* 1 *Corinthians* 1:18–31. "God hath chosen the foolish things of the world to confound the wise; and God hath chosen the weak things of the world to confound the things which are mighty . . . ." 1 *Corinthians* 1:27 (KJV).

The riddle of spiritual equality's uneasy relationship to politics thereby ultimately tended to dissolve into political populism—for better or worse, and as always feared it would—and powerfully fueled the subsequent rise of democracy in America.

IV. FAITH AND CIVIL THEOLOGY IN EIGHTEENTH-CENTURY AMERICA: GREAT AWAKENING AND AFTERMATH

Did the alliance of pulpit and republican politics persist throughout the Revolutionary and early national periods in the United States or did devotion wane? This is a factual question debated among students of these periods.[33] While the matter cannot be settled here, I think a diversified and robust religiousness remained a cardinal experiential force, one undiminished throughout the historical periods mentioned. The momentum of revival and spiritual vitality that reshaped America itself beginning with the Great Awakening from the 1730s onward, identified especially with Jonathan Edwards, John and Charles Wesley, George Whitefield, Gilbert Tennent, Joseph Bellamy, and Isaac and Ezra Stiles (among others), continued in a dynamic of ebb and flow into the later period of the founding, to be renewed shortly thereafter in the Second Great Awakening, which carried well into the nineteenth century.[34] As Mark Noll explains:

> [O]ne of the reasons the War for Independence succeeded was that Protestants sacralized its aims as from God. . . . [T]he patriots' message was embraced by a religious community whose own religious history prepared it for receiving [republicanism]. . . .
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> . . . The Christianity that thrived best in the new democratic America had not dropped from the sky but bore the imprint of its own colonial history. . . . [A]n evangelicalism inspired by face-to-face itinerant preaching, that stressed the all-powerful but also egalitarian grace of God as the source of salvation, that taught converts to connect virtue to the exertions of their hearts instead of to mere social conformity—this was a religion already closer to democracy than the

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[33] *See generally* RELIGION AND THE NEW REPUBLIC: FAITH IN THE FOUNDING OF AMERICA (James H. Hutson ed., 2000).

[34] Pertinent source material is collected in POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, *supra* note 16. On the significance of the Great Awakening as marking an "epoch" in history, see 3 HERBERT L. OSGOOD, THE AMERICAN COLONIES IN THE EIGHTEENTH CENTURY 409–10 (Peter Smith 1958); *see also* THE GREAT AWAKENING: DOCUMENTS ILLUSTRATING THE CRISIS AND ITS CONSEQUENCES xiv–xv (Alan Heimert & Perry Miller eds., 1967) [hereinafter GREAT AWAKENING: DOCUMENTS] ("[T]he Awakening clearly began a new era, not merely of American Protestantism, but in the evolution of the American mind. . . . [It was] a turning point . . . in the history of American civilization."). On the Second Great Awakening, see NATHAN O. HATCH, THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY (1989); *see also* MARK A. NOLL, AMERICA'S GOD: FROM JONATHAN EDWARDS TO ABRAHAM LINCOLN 161–86 (2002); JON BUTLER, AWASH IN A SEA OF FAITH: CHRISTIANIZING THE AMERICAN PEOPLE (1990).

hierarchical establishmentarian communalism of either clerically ordered Congregationalism or inherited Anglicanism.[35]

V. EXPERIENTIAL RELIGION AND HUMAN AGENCY: JOHN WESLEY AND JONATHAN EDWARDS

The epochal effects of the revival and the evangelism that carried it were politically consequential in many ways but especially in two that are of fundamental importance here: (1) experiential formation of the rudiments of an *American* community of shared convictions rooted in faith rising above and beyond colonial and merely British identities; and (2) by what has been termed a *Second Reformation* that conceptually drove home in unique ways the political implications of Christianity as a core element of man's imitation of God as part of his vocation to perfect through faith-grace his life as *imago dei,* the heart of the redemptive process as pursued in the In-Between of historical existence. By these two factors spiritual rebirth came to be gingerly associated with political as well as spiritual and intellectual like-mindedness (*homonoia*).[36] The eschatology of salvation was thereby broadened, quite aside from millenarian expectations, to include civic duty along with stewardship in the creature's emulation of, and participation in, God's loving governance of his Creation, as that is reflected and modestly extended through human agency in time and history. "And God said, Let us make man in our image, after our likeness: and let them have *dominion* [râdâh] over . . . all the earth" (*Genesis* 1:26) (emphasis added). "What is man, that thou art mindful of him? . . . Thou madest him to have *dominion* [mâshal] over the works of thy hands; thou has put all *things* under his feet."[37] Yet all

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[35] NOLL, *supra* note 34, at 192. For details on the revival from the 1760s onward, see ANN TAVES, FITS, TRANCES, & VISIONS: EXPERIENCING RELIGION AND EXPLAINING EXPERIENCE FROM WESLEY TO JAMES 76–117 (1999).

[36] *Homonoia* is found in Plato (REPUBLIC 545c–d; STATESMAN 311b–c) and in Aristotle (NICOMACHEAN ETHICS 1167a23, 1167b5; POLITICS 1306a10) where it is sometimes translated as *concord, see e.g.* ARISTOTLE, NICOMACHEAN ETHICS 1167a23, 1167b5, at 256–57 (Martin Oswald ed. & trans., Macmillan Publ'g Co. 1986), meaning "being of the same mind," "thinking in harmony," or likeminded; it is "primarily a political concept." *Id.* at 309.

> When men live in harmonious existence, in agreement with their true self, and when agreement between them is based on such agreement with themselves, then the relation prevails between them which Aristotle calls homonoia—which may be translated as a friendship [philia] based on likeness in actualization of the nous.

3 ERIC VOEGELIN, ORDER AND HISTORY: PLATO AND ARISTOTLE 321 (1957); *see also id.* at 357, 364. However, *contra* VOEGELIN, *supra*, at 321 n.2 (and elsewhere), the word *homonoia* seems not to occur in the New Testament, where *likeminded* in the King James Version (*Romans* 15:5 and *Philippians* 2:2, 20) translates *isopsuchos*, and *concord* (2 *Corinthians* 6:15) translates *sumphonesis*. THE NEW STRONG'S EXHAUSTIVE CONCORDANCE OF THE BIBLE (James Strong ed., 1984).

[37] *Psalms* 8:4, 6 (KJV) (emphasis added). The King James Version of the Bible was the prevailing translation in eighteenth-century America. "The cadences of the Authorized

that is done serves not man primarily but God: "God's glory is the ultimate end of the creation of the world." It is theophany not egophany that is celebrated, God who is glorified, not man, despite his celebrated high nobility among the creatures of the moral world.[38] This applies especially to the Elect, anciently to Israel, and then to the Christians who now are newly chosen to glorify God under the New Covenant of Love, implying progressive revelation of the living God as manifested in the providential unfolding of history.

> This [glorification of God] is spoken of as the end of the good [i.e., blessed, not reprobate] part of the moral world, or as the end of God's people in the same manner as the glory of God. Is. 43:21, "This people have I formed for myself, they shall show forth my *praise.*" I Pet. 2:9, "But ye are a chosen generation, a royal priesthood, an holy nation, a peculiar people, *that ye should show forth the praises of him,* who hath called you out of darkness into his marvelous light."[39]

Isaac Watts in 1740 wrote of the Trinitarian structure of the image of God in man as first created in terms of his *Moral Image;* his *Natural Image,* which "consisted partly in his spiritual, intelligent and immortal Nature, and the various Faculties thereof; and his *Political Image* (if I may so express it)[, which] consisted in his being made Lord and Governor over all the lower Creation."[40] The process of human recovery of this true Image through rebirth as the New Man through the experience of spiritual conversion and subsequent quickening of the "Principle of true religion in the heart, is *created* by *God* after his Moral Image, wherein he created Man at first, *i.e.* with an holy Temper of Mind and Disposition to the ready Practice of all Righteousness as fast as Occasions and Opportunities arise."[41] John Wesley—himself politically a royalist who eventually opposed the Revolution and withdrew his missionaries, much to the consternation of American Methodists[42]—preached on "The

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Version [(the King James Version)] informed the writing of the elite and the speech of the humble." Mark A. Noll, *The Image of the United States as a Biblical Nation, 1776–1865, in* THE BIBLE IN AMERICA: ESSAYS IN CULTURAL HISTORY 39, 39 (Nathan O. Hatch & Mark A. Noll eds., 1982).

38 Jonathan Edwards, *Concerning the End for Which God Created the World, in* TWO DISSERTATIONS (1765), *reprinted in* 8 THE WORKS OF JONATHAN EDWARDS: ETHICAL WRITINGS 405, 491–492 (Paul Ramsey ed., Yale Univ. Press 1989).

39 *Id.* at 496. *Compare Matthew* 21:43 (KJV) ("The kingdom of God shall be taken from you, and given to a nation bringing forth the fruits thereof."), *with Matthew* 23:37, *and Romans* 9:30–33.

40 ISAAC WATTS, THE RUIN AND RECOVERY OF MANKIND 7 (J. Brackstone 2d ed. 1742).

41 *Id.* at n.7 (glossing *Ephesians* 4:24 and *Colossians* 3:10).

42 JOHN WESLEY, A CALM ADDRESS TO OUR AMERICAN COLONIES (1775) [hereinafter WESLEY, CALM ADDRESS], *reprinted in* POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, *supra* note 16, at 409; A CONSTITUTIONAL ANSWER TO THE REV. MR. JOHN WESLEY'S CALM ADDRESS TO THE AMERICAN COLONIES (1775), *reprinted in* POLITICAL SERMONS OF THE

New Birth" (*John* 3:7, "Ye must be born again.") more than sixty times from 1740 onward. In the published version of the sermon (1771), which was a "distillate" of the oral presentations, Wesley adopted Watts's categories as just noticed after asking, "Why must we be born again?" The short answer is so as to restore the Image of God in man defaced by the Fall. Wesley explains that when God created Man,

> [We] read, "And God", the three-one God, "said, Let us make man in our image, after our likeness. So God created man in his own image, in the image of God created he him." Not barely in his *natural image,* a picture of his own immortality, a spiritual being endued with understanding, freedom of will, and various affections; nor merely in his *political image,* the governor of this lower world, having "dominion over the fishes of the sea, and over the fowl of the air, . . . and over all the earth"; but chiefly in his *moral image,* which, according to the Apostle, is "righteousness and true holiness". In this image of God was man made. "God is love:" accordingly man at his creation was full of love, which was the sole principle of all his tempers, thoughts, words, and actions. God is full of justice, mercy, and truth: so was man as he came from the hands of his Creator. God is spotless purity: and so man was in the beginning pure from every sinful blot. Otherwise God could not have pronounced *him* as well as all the other works of his hands, "very good".[43]

AMERICAN FOUNDING ERA, *supra* note 16, at 421; *see also* JOHN WESLEY, THE LATE WORK OF GOD IN NORTH AMERICA (1778), *in* 3 THE WORKS OF JOHN WESLEY 594, 594–608 (Albert C. Outler ed., Abingdon Press 1986) (basing text on *Ezekiel* 1:16).

[43] JOHN WESLEY, THE NEW BIRTH (1771), *reprinted in* 2 THE WORKS OF JOHN WESLEY, *supra* note 42, at 187, 188; *see Genesis* 1:26–28; *Psalms* 8:6–8 (on *dominion*). For other scriptural references consult WESLEY, *supra.* For related exposition in Wesley's Sermons, see especially JOHN WESLEY, THE GENERAL DELIVERANCE (1782) [hereinafter WESLEY, GENERAL DELIVERANCE], *reprinted in* 2 THE WORKS OF JOHN WESLEY, *supra* note 42, at 436, 436–50. *See also* 2 THE WORKS OF JOHN WESLEY, *supra* note 42, at 284, 400, 409, 438, 474, 537; 3 THE WORKS OF JOHN WESLEY, *supra* note 42, at 75, 256; 4 THE WORKS OF JOHN WESLEY, *supra* note 42, at 63, 163, 292–93. Editor Albert C. Outler writes: "The recovery of the defaced image of God is the axial theme of Wesley's soteriology." 2 THE WORKS OF JOHN WESLEY, *supra* note 42, at 185 n.70. On mysticism and justification, Wesley wrote that "at the same time a man is justified, sanctification properly begins," and his conversion or new birth (*John* 3:3, 6) is marked not by

> an outward change only, as from drunkenness to sobriety, . . . but an inward change from all unholy to all holy tempers: from pride to humility, from passionateness to meekness, from peevishness and discontent to patience and resignation; in a word from an earthly, sensual, devilish mind to the mind that was in Christ Jesus [*cf. Philippians* 2:5].

JOHN WESLEY, ON GOD'S VINEYARD, *reprinted in* JOHN WESLEY 104, 108 (Albert C. Outler ed., Oxford Univ. Press 1964) [hereinafter JOHN WESLEY (Outler. ed.)] (alteration in original); *see id.* at 162 n.44 (Wesley's interest in Thomas à Kempis and publication of his own translation of *De imitatione Christi* as *The Christian Pattern* in 1735). Outler writes: "If Wesley's writings on perfection are to be read with understanding, his affirmative notion of 'holiness' *in the world* must be taken seriously—active holiness in *this* life—and it becomes intelligible only in the light of its indirect sources in early and Eastern spirituality." *Id.* at 252.

But Adam sinned, and the Fall mutilated the divine image in man, which is now to be restored through grace in the faithful. It is at such a renewal and ascent toward Perfection that the evangelist's preaching aimed in proclaiming the Good News far and wide during his ministry and the "Revival" we call the Great Awakening. The specifically political implications of this influential and subtle perspective can more fully be grasped from the following insightful analysis given by a contemporary theologian.

> [Wesley's] mode of thinking is vocational in that it is defined by the call of God to image the governing of God in the care of creation. . . . *Political image* keeps the focus of political institutions and their operations on God's political work, not on themselves.
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> It follows . . . that one does not grasp the true meaning of political institutions apart from faith in the clarifying, revelatory word of God. . . . How do [persons] fit into and serve the whole-making work of God, expressed in the Old Testament as *shalom* and in the New Testament as reconciliation? . . . The framing of these questions, and the possibility of answering them rightly, depend ultimately on trinitarian theology, not on natural law or common agreement or practical experience.
>
> These dimensions of the political work of God shape the true meaning of political institutions . . . . They are fully consonant with John Wesley's transformationist theological language: his vision of the restoration of all things in the ultimate fulfillment of God's activity, and his evangelical call for the recovery of the moral image. In broad terms they conceptualize his vocation of peacemaking. They disclose the social meaning of "going on to perfection." [44]

Theodore Weber further argues that the

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[44] THEODORE R. WEBER, POLITICS IN THE ORDER OF SALVATION: NEW DIRECTIONS IN WESLEYAN POLITICAL ETHICS 407–10 (2001). The original should be consulted for details of a rich analysis. The Great Awakening is considered from the present perspective in SANDOZ, *supra* note 8, at 99, 147, 153, 230, and the literature cited therein. Indispensable is ALAN HEIMERT, RELIGION AND THE AMERICAN MIND: FROM THE GREAT AWAKENING TO THE REVOLUTION (1966); *see also* GREAT AWAKENING: DOCUMENTS, *supra* note 34. The Anglo-American *Second Reformation* (as that term is used herein) and its political significance is fatefully contrasted with German pietistic experiences in ERIC VOEGELIN, DEMOCRACY IN THE NEW EUROPE (1959), *reprinted in* 11 THE COLLECTED WORKS OF ERIC VOEGELIN: PUBLISHED ESSAYS, 1953–1965, at 59, 61–63 (Ellis Sandoz vol. ed., Univ. of Missouri Press 2000); ERIC VOEGELIN, FREEDOM AND RESPONSIBILITY IN ECONOMY AND DEMOCRACY (1960), *reprinted in* 11 THE COLLECTED WORKS OF ERIC VOEGELIN: PUBLISHED ESSAYS, 1953–1965, *supra*, at 70, 72 ("Through the spreading of the Methodist Church and its influence on other churches, the second reformation, initiated by . . . John Wesley . . . became socially effective, with enormous consequences barely understood in their significance on the Continent. For in the critical period of the Industrial Revolution and the forming of the industrial proletariat, the second reformation carried Christendom in England to the people; it Christianized the working population and small middle class and thereby virtually immunized them against later ideological movements. A comparable phenomenon does not exist on the Continent, above all not in Germany.").

> heart of John Wesley's evangelism is the message that God acts to restore the lost moral image, not for the few, but for the entire human race; not coercively, but through the empowerment of the Holy Spirit that enables the response to God's gracious gift. God opens our eyes to our condition of being without God in the world (prevenient grace), bestows forgiveness of sins (justifying grace), and encourages us lovingly to become more loving and to "have that mind which also was in Christ Jesus" ([*Philippians* 2:5] sanctifying grace, Christian perfection). Through this process, this grace-filled ordering of salvation, the moral image is restored, the "capacity for God" returns, true humanity is recovered, and the born-again creature comes to stand before God and to love other creatures in the holiness of grace. This is the good news . . . . It is the order of God's salvation for sinful humanity.[45]

Wesley's anthropology builds on the traditional Christian analysis and mysticism noticed earlier but is sharpened because of his emphasis upon the vital experiential aspects of faith and of the grace-filled life, i.e., the experience of "a movement toward[] immediacy, toward[] direct communion with God through His Holy Spirit, in independence of all outward and creaturely aids . . . ."[46] Made in the image of God, like God, man is spirit but designed to dwell on earth and so "lodged in an earthly tabernacle." His innate principle is *self-motion,* which distinguishes spirit from matter, and like his Creator he was endued with *understanding,* with "a *will,* exerting itself in various affections and passions; and lastly, with *liberty,* or freedom of choice, without which all the rest would have been in vain." It is in these attributes that "the natural image of God consisted."[47] Not only does Wesley stress that the nature of man is *spirit,* but he is at pains to reject the secularizing eighteenth-century Enlightenment's version of the idea that the *differentia specifica* separating human beings from brutes is reason.

> It [is] not reason. . . . But it is *this: Man is capable of God; the inferior creatures are not.* We have no ground to believe that they are in any degree capable of knowing, loving, or obeying God. This is the specific difference between man and brute—the great gulf which they cannot pass over. And [before the Fall] a loving obedience to God was the perfection of men, [just as] a loving obedience to man was the perfection of brutes.[48]

Through Christ and the New Birth the original image can be restored in those who experience it. The road to Perfection of faith-grace can thereby

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[45] *Id.*

[46] GEOFFREY F. NUTTALL, THE HOLY SPIRIT IN PURITAN FAITH AND EXPERIENCE 91–92 (Univ. of Chi. Press 2d ed. 1992).

[47] WESLEY, GENERAL DELIVERANCE, *supra* note 43, at 438–39. This sermon concludes with a vision of cosmic redemption as the climax of the eschatological transformation of man and the world in the end time, the universal deliverance.

[48] *Id.* at 441 (emphasis added).

be found that ultimately leads, beginning if not consummated in the here and now, to eternal blessedness and eschatological fulfillment.

> Here then we see . . . what is real religion: a restoration of man, by him that bruises the serpent's head, to all that the old serpent deprived him of; a restoration not only to favour, but likewise to the image of God; implying not barely deliverance from sin but [to] being filled with the fullness of God. . . . [N]othing short of this is Christian religion.[49]

The high standard, thus, is this, Wesley insisted: "None are [truly] Christians but they that have the mind which was in Christ, and walk as he walked."[50]

The political implications seem never to have been drawn by John Wesley himself, and in his personal politics (as mentioned) he was no republican but a Tory who broke with the American movement for independence prior to the Revolution and withdrew his missionaries.[51] Thus, his theology and his pragmatic politics must be distinguished. Nor was he, as a relentless itinerant evangelist, at all focused on politics but on the redemption of souls for eternity, as were the other leading figures in the Awakening. The republican—and one must say *democratic*—political implications would only emerge fully in the subsequent flowering of Methodism, begun, to be sure, in the eighteenth century but surging in the later frontier revivals, the rise of the "common man" in the Jacksonian period, into the moralistic effusions of the Abolitionist movement that culminated in the catastrophe of Civil War.[52] The result was that by 1850 the Methodist Church was the largest organization in the United States, apart from the federal government itself. These later Methodists brought a new religious vision, one only incipient in Wesley's own theology. They viewed the state itself "as a moral being and political action as a way to introduce God's kingdom."[53] Such attitudes and convictions about national community and personal identity, prefigured in Wesley himself, were shared with Baptists and other denominations, to be sure, and ultimately burst the boundaries of mere church affiliation. They gained such general prominence and power over time as palpably to endure into the present as major components of anything that can be called American civil theology. As prominent scholars have recently argued:

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[49] JOHN WESLEY, THE END OF CHRIST'S COMING (1781), *reprinted in* 2 THE WORKS OF JOHN WESLEY, *supra* note 42, at 471, 482–483.

[50] JOHN WESLEY, THE MYSTERY OF INIQUITY (1783), *reprinted in* 2 THE WORKS OF JOHN WESLEY, *supra* note 42, at 451, 467; *Romans* 12:16; *Philippians* 1:27, 2:2–5 (KJV) ("Let this mind be in you, which was also in Christ Jesus . . . .").

[51] *See* WESLEY, CALM ADDRESS, *supra* note 42, at 409–20.

[52] *See generally* METHODISM AND THE SHAPING OF AMERICAN CULTURE (Nathan O. Hatch & John H. Wigger eds., 2001).

[53] *Id.* at 20, 27.

> The Christianization of the United States was neither a residue of Puritan hegemony nor a transplantation of a European sacred canopy. It was the striking achievement of nineteenth-century activists. . . . Unlike Europe, American popular culture remained more religious than did high culture. David Martin has argued that Methodists, only a counterculture in England, succeeded in America in defining the core of democratic culture: "Arminian evangelical Protestantism provided the *differentia specifica* of the American religious and cultural ethos."[54]

The intellectual and spiritual groundwork was laid in the Great Awakening, and its aftermath, and in the Reformed theology articulate in John and Charles Wesley. The experiential power of Francis Asbury—in 1784 the first bishop ordained by John Wesley along with the "constitution of the Methodist Episcopal Church as an independent . . . body"[55]—and his "boiling hot religion" clearly was present in the revival as preached by the Wesleys, George Whitefield, Jonathan Edwards, and other eighteenth-century evangelists.

A glance at the sources is evidence enough. Especially telling is the dry reportage of Whitefield, who, after preaching in the church of the great philosopher and preacher Jonathan Edwards, in Northampton, wrote: "Preached this morning, and good Mr. Edwards wept during the whole time of exercise. The people were equally affected; and, in the afternoon, the power increased yet more. Our Lord seemed to keep the good wine till the last."[56] Head and heart needed to be as one for *real* Christianity to flower in the man, and the evangelists sought to thread the needle between enthusiasm and formalism in stirring hearts and breaking the dry crust of doctrine and dogma through the power of the Word. The essential goal of them all, to repeat, was "'a movement toward immediacy, toward direct communion with God through his Holy Spirit'" *for every person*—"'in independence of all outward and creaturely aids.'" The goal was to do so in a way neatly captured in the title of a 1750 book by the Edwardsian Joseph Bellamy: *True Religion delineated; or, Experimental Religion, as distinguished from Formality on the one Hand, and Enthusiasm on the other, set in a Scriptural and Rational Light.*[57]

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[54] *Id.* at 37–38 (citing DAVID MARTIN, TONGUES OF FIRE 21 (1990)).

[55] TAVES, *supra* note 35, at 84; METHODISM AND THE SHAPING OF AMERICAN CULTURE, *supra* note 52, at 34; *cf.* NOLL, *supra* note 34, at 161–86, 330–45.

[56] GEORGE WHITEFIELD, GEORGE WHITEFIELD'S JOURNALS 477 (Banner of Truth Trust 6th prtg. 1992) (1738–1741).

[57] W. Reginald Ward & Richard P. Heitzenrater, *Introduction* to 18 THE WORKS OF JOHN WESLEY, *supra* note 42, at 1, 10 (W. Reginald Ward & Richard P. Heitzenrater eds.) (quoting NUTTALL, *supra* note 46, at 91–92); TAVES, *supra* note 35, at 48. This was not unique to the Great Awakening, of course. "During the [English] Civil War testimonies of religious experience were published in great numbers, testimonies which took classic shape in Bunyan's *Grace Abounding*." WESLEY, *supra* (citations omitted).

Religious apperceptive *experience* grounded in a spiritual *sensorium* of the psyche was understood to be an indelible mark of the image of God in the person, restored through grace in his life, the fruit of the blessed presence in a person of the Holy Spirit exceeding merely naturalistic powers and modes of perceptual experience.[58] Its discernment and privileged place in the anthropology powerfully armed the rise of a true individualism and a human dignity now solidly anchored in the person's participatory spiritual and intellectual capacities. Man was more than a natural being and participated in the divine. His individualism, inherent liberty, and accountability did not bottom on his animal nature or acquisitive propensities (as in Locke), but in his higher faculties as a gift or infusion of divine grace. Both Jonathan Edwards and John Wesley, in slightly different ways of no concern here, embraced *this* understanding of what it means to be a human being. It carried them and their publics philosophically and theologically far beyond the Lockean-Humean secularizing and naturalist models of experience and individualism. It was insistently and widely propagated and affirmed in the general population through the continuing revival where the stresses fell on each person's salvation or damnation, his ultimate answerability to God for his life and actions at the Judgment. Herein lies the root of the revolutionary conception of every individual person as both *king and priest,* as we have seen the Norman Anonymous long before proclaiming every baptized believer to be.[59]

> Against the British moral philosophers' movement toward a secularized understanding of the affections grounded in an innate "moral sense," Edwards grounded what he deemed to be specifically religious, that is God-given "gracious" affections, in a new "spiritual sense." . . .
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> . . . [He] described the new spiritual sense using the language of Paul's Letter to the Galatians. Arguing that the "Spirit of God" dwelt in true saints, he added that "Christ by his Spirit not only is in them [the saints], but lives in them . . . so that they live by his life; so is his Spirit united to them, as a principle of life in them; they don't only drink

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[58] "Wesley presupposed a 'whole theory of knowledge with its notion of a "spiritual sensorium" analogous to our physical senses and responsive to prior initiatives of the Holy Spirit.'" TAVES, *supra* note 35, at 52 (citation omitted). The term is of interest also because of Eric Voegelin's characterization of the soul as the *sensorium of transcendence* in man. "The leap in being, the experience of divine being as world-transcendent, is inseparable from the understanding of man as human. The personal soul as the sensorium of transcendence must develop parallel with the understanding of a transcendent God." 1 ERIC VOEGELIN, ORDER AND HISTORY: ISRAEL AND REVELATION 235 (1956).

[59] WILLIAMS, *supra* note 29. The argument here is supported by the analyses of COLIN MORRIS, THE DISCOVERY OF THE INDIVIDUAL, 1050–1200 (Univ. of Toronto Press 1987), and also by Louis Dumont, *A Modified View of Our Origins: The Christian Beginnings of Modern Individualism*, 12 RELIGION 1–27 (1982). See the discussion of *liber homo* in J. C. HOLT, MAGNA CARTA 2, 9–11, 276–80, 290–95 (Cambridge Univ. Press 2d ed. 1992).

> living water, but this living water becomes a well or fountain of water, in the soul."
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> . . . In other words, this new spiritual sense was not a new thing perceived by the senses, but an altogether new sense. It was not [merely, as in Locke's sense,] "a new faculty of understanding, but . . . a new foundation laid in the nature of the soul." This new spiritual sense thus provided the theoretical foundation for direct religious experience . . . .
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> While the Spirit of God operated *directly* through its indwelling in the new spiritual sense of the saints, the Spirit, "in all his operations upon the minds of natural men, only moves, impresses, assists, improves, or some way acts upon natural principles." Thus while the Spirit of God operated as a "first cause" with respect to spiritual persons, the Spirit operated only as a "second cause," that is, through natural means, with respect to [unconverted] natural persons.[60]

As with early Christianity, so under the revivalist thrust from the Awakening onward, "to become a Christian was a deliberate personal choice, involving both an interior change (repentance) and an exterior one (baptism and acceptance of Christ as Lord)."[61] The puzzle in the eighteenth century was how to draw the line between nature and the divine, but this was not novel either and had bedeviled Christian thought at least from the time of Aquinas (d. 1274). Is the "moral sense" (often designative of instinctive *storgé*)[62] of Francis Hutcheson and the eighteenth-century British Common Sense philosophers natural, or is it the light of the Lord infused by grace into the soul of His creature man?[63]

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[60] TAVES, *supra* note 35, at 38–39 (second alteration in original) (citations omitted).

[61] MORRIS, *supra* note 59, at 24. The debt to the classical as well as Christian past is stressed by Morris in his analysis of the twelfth-century developments. *Id.* at 159. A similar texture was present in eighteenth-century America, where the Golden Age of the classics coincided with the Revolutionary period. *See generally* MEYER REINHOLD, CLASSICA AMERICANA: THE GREEK AND ROMAN HERITAGE IN THE UNITED STATES (1984).

[62] For the Greek *storgé* in this context, see the discussion of "permutations of self-love" in NORMAN FIERING, JONATHAN EDWARDS'S MORAL THOUGHT AND ITS BRITISH CONTEXT 158–60 (1981). In G. Leibniz's explanation:

> "nature gives to man and also to most of the animals affectionate and tender feelings for those of their species. . . . Besides this general instinct of *society*, . . . there are some more particular forms of it, as the affection between the male and female, the love which father and mother bear toward the children, which the Greeks call [*Storgé*] and other similar inclinations."

Id. at 159 (quoting G. LEIBNIZ, NEW ESSAYS CONCERNING HUMAN UNDERSTANDING 89, 91 (A.G. Langley ed. 1896) (*Storgé* in the quote above is the translation of the foreign language corollary appearing both in the primary and original source).

[63] The debate over "moral sense" and whether it was divine or natural was intense.

> Edwards writes with indirect but obvious reference to Francis Hutcheson that "unless we will be atheists, we must allow that true virtue does primarily and most essentially consist in a supreme love to God." Wesley writes with direct reference to him that "God has nothing to do with [Hutcheson's] scheme of virtue from the beginning to the end. So that to say the truth, his scheme of virtue is atheism all over."

Perhaps the decisive point is the acknowledgment of the *fact* of such a capacity in man—which immediately enlists the concurrence of Aristotle as well as Aquinas, not to mention Thomas Jefferson and John Adams—whatever the metaphysical differences. We may observe, however, that this is a false dichotomy to be set aside by recognition of the further facts that reason and passion are far from being opposites. Rather, they are reconcilable with and texture friendship *(philia)* as well as philosophy per se, understood (very much as Edwards himself ultimately understood it) as the love of wisdom through the love of Being as its source.[64] Also it is evidenced by noticing that the love of God and neighbor supremely expresses in the *shema* of ancient Israel (Deut. 6:4; Lev. 19:18) as well as in the Great Commandment of the Gospel (Matt. 22:37) *both* noetic rationality and profoundest revelatory passion: Plato's erotic rise to the vision of *Agathon* and the Christian mystic's loving rise to the *Beatific Vision* are more alike than dissimilar and tend to obliterate the distinctions between reason and revelation in sharing a common joyful tension toward the mysterious transcendent ground of Being. The mutual interaction of noetic and pneumatic experiences perhaps reaches its apogee in the Johanine *amicitia* proclaimed in the First Epistle of John (4:16, 19: "God is love. . . . We love him because he first loved us."), which was so marvelously elaborated philosophically by Aquinas. Never mind that it was Aquinas himself who routinely also embraced the natural reason-supernatural revelation dichotomy that, with continuing dogmatic authority, thereby inconsistently pits rationality and feeling, head and heart against one another existentially.[65]

RICHARD B. STEELE, "GRACIOUS AFFECTION" AND "TRUE VIRTUE" ACCORDING TO JONATHAN EDWARDS AND JOHN WESLEY 340 (1994) (citations omitted).

[64] These matters are addressed in Edwards's two works, SOME THOUGHTS CONCERNING THE PRESENT REVIVAL OF RELIGION IN NEW ENGLAND (1743), *reprinted in* THE ROLE OF RELIGION IN AMERICAN LIFE: AN INTERPRETIVE HISTORICAL ANTHOLOGY 27 (Robert R. Mathisen ed., 1982) and TREATISE ON THE RELIGIOUS AFFECTIONS (Baker Book House 1982) (1746); see the discussion in TAVES, *supra* note 35, at 36–41. "By locating the higher, spiritual passions in the soul and by postulating a new spiritual sense through which God could act directly on the soul, Edwards could provide separate explanations for the genesis of true and false religion." *Id.* at 40. Also, see especially the first two chapters of Edwards's valedictory work, JONATHAN EDWARDS, *The Nature of True Virtue*, *in* TWO DISSERTATIONS, *reprinted in* 8 THE WORKS OF JONATHAN EDWARDS: ETHICAL WRITINGS, *supra* note 38, at 539, 539–61.

> By these things it appears that a truly virtuous mind, being as it were under the sovereign dominion of *love to God,* does above all things seek the *glory of God,* and makes *this* his supreme, governing, and ultimate end. . . . And it may be asserted in general that nothing is of the nature of true virtue, in which God is not the *first* and the *last.*

Id. at 559–60.

[65] On the technical complexities of the general problem of the relationship of religious faith in pneumatic experience and noetic intuition in philosophical experience see ERIC VOEGELIN, *The Beginning and the Beyond: A Meditation on Truth*, *in* 28 THE

In sum: The adaptation of Platonism from multiple sources (whatever the terminological differences) structured the philosophical and moral theology of both Edwards and Wesley—from the meditative identification of *summum bonum* and highest Being alike with God-revealed-incarnate-in-Christ, to the understanding of morality-virtue in all its amplitude as *derivative* from loving communion with divine Being through the participatory faith-grace relationship as *fruitio dei* evinced in the individual person's pilgrimage through time toward blessedness from conversion and sanctification to Perfection.

The uneasy suspicion of anachronism in pointing to ancient and medieval sources and equivalences in the thought of such seminal eighteenth-century figures as Wesley and Edwards and their catholicity deserves a word of emphasis, so as to counter the prevalent false assumptions Ralph Barton Perry identified as the "fallacy of difference."[66] The sources support the present line of interpretation, as I have tried to make clear even in this concise general account that is unable to do justice to the full complexities—which the reader is free to explore to his own satisfaction by looking for himself at the sources cited herein. On the chief point, for instance, in considering Jonathan Edwards's substantial agreement with Thomas Aquinas on the Beatific Vision, Paul Ramsey explains that the "contention that beatitude cannot consist in the vision of God because such an object absolutely surpasses human capacities is ruled out by Aquinas on theological and philosophical grounds." Ramsey continues:

> It is contrary to faith: since we are assured by faith that God is our ultimate good, we must suppose that our ultimate happiness will consist in a vision of the essence of God which will completely fulfill our highest human capacities as spiritual beings, intellect and will. To deny this destiny is also contrary to what we can know about human nature: if the rational creature were incapable of attaining knowledge of the first cause of things, then its natural tendency to know the causes of things would in the end be doomed to frustration. It is true that God transcends all creaturely knowledge, but this rules out creaturely *comprehension,* not *vision,* of his essence. . . . [T]he human mind must receive an infusion of the grace of glory to permit the human being to enjoy the vision of God. . . . Nothing short of this vision can render human beings ultimately happy. . . .

COLLECTED WORKS OF ERIC VOEGELIN: WHAT IS HISTORY? AND OTHER LATE UNPUBLISHED WRITINGS 173, 173–232 (Thomas A. Hollweck & Paul Caringella vol. eds., Univ. of Missouri Press 1990), especially the epistemological considerations stated at 188–93, which have application to the present discussion.

[66] SANDOZ, *supra* note 8, at 98–99.

> Edwards would agree, including . . . that there is need for an infusion of grace or divine love in the heart.[67]

Grappling more technically with the issues philosophically, Edwards no less than Wesley, both anchored in mystical experiences of transcendent truth, resolutely refuses to concede either reason or faith to the new Philistines, even in the face of a civilization-wide onslaught against both. Their common ground (and that of the emerging American community) is comprehensible in terms of *experience*—not dogmatics or doctrines or mere verbalism as matters indifferent. Indeed, only that can be the ultimate basis both of social *homonoia* and of the saving doubt that make civility in politics and toleration in religion and matters of conscience at all possible.[68] One scholar in comparing Edwards and Wesley writes of their commonality and its consequences as follows:

> [T]he truth of every "Scripture doctrine" is supposed to be manifest in the moral virtues and religious affections of those who profess it. Both epistemologically and theologically, cognition, volition, and emotion are existentially inseparable, even if they may be heuristically distinguishable. Knowledge of, obedience to, and delight in God all presuppose, reinforce, and interpenetrate one another. One who claims to know God without obeying him is an antinomian . . . to know God without loving him, a rationalist . . . to obey God without loving him, a Pharisee . . . to love God without obeying him, a hypocrite . . . to love or obey God without knowing the Scriptures in which he is revealed, an illuminist. Experimental theology, as it was worked out by Edwards and Wesley, attempted to combat all these aberrations, to hold the profession of orthodox doctrine, the practice of "true virtue," and the experience of "gracious affection" in a creative and dynamic equipoise.[69]

In the immediate horizon of our discussion, the debate in context turned (as it still does) on the meaning of *experience,* with a monopoly of acceptability and authenticity increasingly being claimed (following Lockean-Humean epistemology) for "external" experience, with "internal" experience being darkly suspected of irrationality or as being the realm of demonism manifesting itself in enthusiasm and personal and social disorder. Never mind that all experience is *internal* to the experiencing *consciousness* of a concrete human personality. This onslaught by Enlightenment rationalism—deeply and rightly suspected of error and of the theoretical reductionism so grotesquely exhibited in the cadaverous stick-figure "Man" of positivism proffered in subsequent times into our own era—was rejected and resisted as deficient and vigorously fought by

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[67] Paul Ramsey, *Appendix III* to 8 THE WORKS OF JONATHAN EDWARDS: ETHICAL WRITINGS, *supra* note 38, at 706, 722.

[68] This fundamental prerequisite of religious liberty and toleration is expounded in JOHN WESLEY, CATHOLIC SPIRIT, *reprinted in* 2 THE WORKS OF JOHN WESLEY, *supra* note 42, at 79, 79–96.

[69] STEELE, *supra* note 63, at 365.

both Jonathan Edwards and John Wesley. Full analysis of the complex issues lies beyond present purposes, but the points of their agreement have been summarized as follows:

> First, both Edwards and Wesley defined true religion in opposition to both formalism and enthusiasm. Second, they both equated true religion with vital or heart religion as manifest in conversion and a continuing process of sanctification. Third, they both defended the possibility of a direct or immediate experience of the Spirit of God and they both argued that authentic experience must be tried and tested in practice. They differed somewhat in their terminology, with Edwards preferring the phrase "experimental religion" and the "indwelling of the Spirit of God" and Wesley "true Christian experience" and the "witness of the Spirit of God."[70]

The aim of it all, however, is the same in both men: "inward holiness," "the union of the soul with God," "true living faith" and not merely works, so as to become "partakers of the divine nature" (2 Pet. 1:4). Drawing from various meditative traditions of holiness and mysticism, including Thomas à Kempis, Michael Molinos, and especially "Macarius the Egyptian," Albert Outler writes that Wesley's distinctive notion of "perfection" or "'holiness' *in the world* must be taken seriously—active holiness in *this* life." This is the understanding of perfection as a process rather than a state. "Thus it was that the ancient and Eastern tradition of holiness as *disciplined* love became fused in Wesley's mind with his own Anglican tradition of holiness as *aspiring* love" and came to be what he regarded as his most distinctive teaching.[71] In Wesley's exposition, the pilgrim's progress in holiness moves by degrees, mounting upward from the faith of the *servant,* who obeys out of fear (the beginning of Wisdom) but who is exhorted not to stop there but to press on until he obeys out of love, as is the privilege of the children of God.

> Exhort him to press on by all possible means, till he passes 'from faith to faith'; from the faith of a *servant* to the faith of a *son*; from the spirit

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[70] TAVES, *supra* note 35, at 48.

[71] Albert C. Outler, *Introduction* to JOHN WESLEY (Outler, ed.), *supra* note 43, at 3, 9–10; JOHN WESLEY, *The Aldersgate Experience*; *The Fullness of Faith*, *in* JOHN WESLEY (Outler, ed.), *supra* note 43, at 51, 63–66, 251, 252. His third publication, a recent edition of Wesley's English edition of Thomas à Kempis's (d. 1471) classic of *devotio moderna, The Imitation of Christ,* is JOHN WESLEY, THE CHRISTIAN'S PATTERN, OR, AN ABSTRACT OF THE IMITATION OF CHRIST, BY THOMAS À KEMPIS (Abingdon Press 1954). The original—an Augustinian search of the disciple's soul for union with God—is abbreviated and recast as a dialogue between Christ and the Christian. The anthropology (which echoes in Wesley's *Sermons*) is especially to be found in bk. 3, chap. 38 (chap. 60 in the original) as it opens with the Christian's supplication: "O lord, my God, who hast created me after thy image and likeness, grant me this grace which thou hast showed to be so great and necessary to salvation, that I may overcome my wicked nature which draweth me to sin and to perdition." *Id.* at 97.

> of bondage unto fear, to the spirit of childlike love. He will then have 'Christ revealed in his heart' [2 *Corinthians* 4:6; *Ephesians* 3:17].[72]

From here the ascending way of holiness lies open to accept the Apostle Paul's invitation to leave those

> 'first principles of the doctrine of Christ' (namely repentance and faith) '[to] go on []to perfection. . . .' 'To love the Lord your God with all your heart, and with all your soul.' These are they to whom the Apostle John gives the venerable title of *'fathers,'* who 'have known him that is from the beginning,' [1 *John* 2:13, 14] the eternal Three-One God. [73]

Wesley adds:

> And those who are fathers in Christ generally (though I believe not always) enjoy the *plerophory* or "full assurance of hope" [*Hebrews* 6:11]; having no more doubt of reigning with him in glory than if they already saw him coming in the clouds of heaven. But this does not prevent their continually increasing in the knowledge and love of God. . . . [The mystic state is distinguished by this:] in the mystic state, God is not satisfied merely to help us think *about* him. . . . He gives us an experimental, intellectual knowledge of his presence.[74]

Insight into the full range of spiritual experience (briefly hinted in the foregoing) as understood by Wesley and his contemporaries is important in itself but also for its implications for an adequate conception of authentic human existence. There are obvious implications for stewardship and for the latent *political* dimension of theology as involving godliness in man as well as in citizen. Action toward righteousness and justice by the faithful arises from this core experience as dimensions of the human vocation historically manifest in Methodism and in American culture more generally. Thus, at the heart of spiritual individualism lay the *experience* (however accounted for) of the creature's communion with the Creator. Edwards attributed this capacity in the human being to his *spiritual sense* and emphatically argued against an array of critics at the time who espoused the new philosophy in various forms that God had no need for secondary or intermediate means for communicating spiritual knowledge. Norman Fiering writes:

> Edwards meant by spiritual sense not only a new capacity for being affected by the things of God, but also a new inclination or a new will directed toward those things. The new sense of the heart brought about by the workings of grace is also a new disposition or an infused habit that is identical to holy love or holiness. . . . [God] imparts this Knowledge immediately, not making use of any intermediate natural Causes.[75]

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[72] JOHN WESLEY, ON THE DISCOVERIES OF FAITH (1789), *reprinted in* 4 THE WORKS OF JOHN WESLEY 28, 35 (Frank Baker ed., Abingdon Press 1987).

[73] *Id.* at 37.

[74] *Id.* at 37 & n.80.

[75] FIERING, *supra* note 62, at 126, 128 n.51.

He states the key point: "Edwards believed that converting grace was a physical influence on the will that changed the will's delectation from self to God. This 'fact' cannot be broken down into simpler elements."[76] There is nothing very novel in this. It in spirit reaches back to classical and medieval traditions, especially as formed by Platonic *noesis* ("intuitionism") and Augustinian voluntarism, and to Scholastic philosophy and mysticism. We should try not to resent too deeply the fact that the likes of Wesley, Edwards, and the founding generation itself were more profoundly mindful of the Western heritage that is our birthright than are most educated people today. As one writer concisely elogized the abiding insights at hand:

> We are taught in metaphysicks [sic], that being, truth and goodness, are really one. How sweet a rest now doth the spirit, with its understanding, and its will, find to it self [sic] in every being, in every truth, in every state or motion of being, in every form of truth. When it hath a *sense* of the highest love, which is the same with the highest goodness, designing, disposing, working all in all, even all conceptions in all understandings, all motions, in every will, human, angelical, divine? With what a joy and complacency unexpressible doth the will, the understanding, the whole spirit now lie down to rest everywhere, as upon a bed of love, as in the bosom of goodness it self [sic]?[77]

Fiering writes: "For Edwards, true virtue is the spontaneous overflowing of a purified soul . . . . Love to being in general . . . is the essence of true virtue, and this internal habit or disposition produces an enormous superfluity of love, out of which, subordinately, love for the particular beings in the creation will flow."[78]

The aesthetic dimensions of experience are prominently stressed as beauty, goodness, and justice beckon the devout soul, especially in Edwards's work, in keeping with his mystical Platonism. And it has been

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[76] *Id.* at 128 n.51.

[77] *Id.* at 125 (quoting VIVIAN DE SOLA PINTO, PETER STERRY: PLATONIST AND PURITAN, 1613–1672, at 140 (1968)); *cf.* CONFESSIONS, *supra* note 20, bk. XIII, ch. 37, para. 52, at 304; CITY OF GOD, *supra* note 20, bk. XI, ch. 10, at 440–42.

[78] FIERING, *supra* note 62, at 350.

> For Edwards, as for [Nicolas] Malebranche earlier, God is being. He who is, He whose essence is to exist, and He who is absolutely self-sufficient. God is also properly designated "being in general," because God's being is itself the cause of all created essences. All existence, all being, derives from God, who is the one self-sufficient being. It seems clear that Edwards meant by "being in general" the transcendent God *plus* His ordered creation. Similarly, St. Thomas had said that God is not contained in *ens commune* (being in general), but transcends it. Edwards's concept of being in general included all of what is now called "nature" as well as God, who is above nature.

Id. at 326 (citations omitted). Edwards's *The Nature of True Virtue,* the basis of these analytical remarks, was written in 1755 but first published (along with *Concerning the End for which God created the World* as *Two Dissertations*) posthumously in 1765. Edwards died in 1758. *Cf.* TWO DISSERTATIONS, *supra* note 38, at 400.

well-said that Methodism was born in song, often sung to poetry written by Charles Wesley. The hymns communicated and by rote taught the theology as it lifted the hearts of the faithful. The recondite insights of metaphysics and epistemology were thereby democratized and made lucid in the spiritual convictions of everyman: Christ came for all, not merely for the elite. The Wesleys's 1780 *Collection of Hymns for the use of the People called Methodists* was a cornerstone of evangelism in the founding period. John Wesley stated in the preface that the

> "hymns are not carelessly jumbled together, but carefully ranged under proper heads, according to the experience of real Christians." The witness of the Spirit, the idea upon which Wesley built his theological understanding of real Christian experience, was central to the hymn-book and . . . comprised the heart of the distinctively Methodist message.[79]

From this hymnal, for instance, congregations sang (hymn 93) about enlightenment through the witness of the Holy Spirit:

> We by his Spirit *prove*
> And *know* the things of God; . . .
> His Spirit to us he gave,
> And dwells in us, we *know*;
> The witness in ourselves we have,
> And all his fruits we show.[80]

The milestone sermon by John Wesley, "Free Grace," where he for the first time fully expounded his conviction that *all* may hope for eternal salvation through Christ and for a universal deliverance at the end of time (the "Arminian" defection from strict Calvinist predestination that aroused a furor and provoked the breach with George Whitefield in 1740), concludes with one of several poems titled "Universal Redemption." It begins and ends as follows:

> Hear, holy, holy, holy, Lord,
> Father of all mankind,
> Spirit of love, eternal Word,
> In mystic union join'd.
> Hear, and inspire, my stammering tongue,
> Exalt my abject thought,
> Speak from my mouth a sacred song,
> Who spak'st the world from nought.
> . . . .
> A power to choose, a will to obey,
> Freely his grace restores;
> We all may find the Living Way,
> And call the Saviour ours.
> . . . .
> Shine in our hearts, Father of light;

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79 TAVES, *supra* note 35, at 50 (citation omitted).

80 *Id.* at 55–56 (citation omitted).

Jesu, thy beams impart;
Spirit of truth, our minds unite,
And make us one in heart.
Then, only then, our eyes shall see
Thy promised kingdom come;
And every heart by grace set free,
Shall make the Saviour room.
Thee every tongue shall then confess,
And every knee shall bow.
Come quickly, Lord, we wait thy grace,
We long to meet thee now.[81]

The youthful Eric Voegelin admiringly saw in Jonathan Edwards's thought the "independence of the American history of ideas from that of Europe" and, moreover, regarded him as a "pantheistic" mystic who had left far behind merely dogmatic Calvinism. As Voegelin expounds Edwards's posthumous work,

> The divine being is being in general, encompassing universal existence. . . . The goal of world history is an ever more perfect emanation of God in the world, by his making it ever more like himself. "The heart is drawn nearer and nearer to God, and the union with him becomes more firm and close: and, at the same time, the creature becomes more and more conformed to God."

Instead of tending, as in Humean skepticism, toward the *closed* self that emerged and continued in English philosophy after Thomas Reid and the Scottish school, in Edwards and later on in "[America,] the same ideas did not follow any skeptical tradition but worked with the 'openness' of the self; the naïve juxtaposition of God and man remains intact. The theory of knowledge does not suffer from dialectics."[82] The impetus toward understanding *openness* as the very essence of the human being, evident in Edwards (and in Wesley, as we have seen), was carried forward as a general American social characteristic. In American philosophy it can be traced in Charles Peirce and William James and even George Santayana—and, we would add, exceptionally in Europe in Henri Bergson's late work, *Two Sources of Morality and Religion.*[83] Of his first

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[81] JOHN WESLEY, FREE GRACE (1739), *reprinted in* 3 THE WORKS OF JOHN WESLEY, *supra* note 42, at 542, 559–63. This text was set to music and published as a hymn in *Hymns and Sacred Poems* (1740). Whether John Wesley or his brother Charles Wesley composed it is uncertain.

[82] ERIC VOEGELIN, ON THE FORM OF THE AMERICAN MIND (1928), *reprinted in* 1 THE COLLECTED WORKS OF ERIC VOEGELIN 140–42 (Jürgen Gebhardt & Barry Cooper eds., Univ. of Missouri Press 1995). The original of this book, *Über die Form des americanischen Geistes,* his *Habilitationsschrift* at the University of Vienna, was published in 1928 when the author was twenty-seven years old, after he had spent two years in the United States studying and traveling.

[83] *Id.* The English translation of Henri Bergson's *Les deux sources de la morale et de la religion* (1932) was published in 1935 by Henry Holt. *See* HENRI BERGSON, THE TWO SOURCES OF MORALITY AND RELIGION (R. Ashley Audra & Cloudesley Brereton trans., Univ.

experience in America Voegelin more than four decades later remarked: "I began to sense that American society had a *philosophical background* far superior in range and existential substance . . . to anything that I found represented in the methodological environment in which I had grown up [in Vienna]."[84]

VI. REVOLUTION AND RELIGION

At the *common-sense* level—conceived as a generally held residual substratum of understanding anchoring the contemplative experiences and philosophizing we have been considering—ordinary pragmatic moral and result-oriented political *action* will be demanded of statesmen. The utilitarian perspective disdained by Wesley and Edwards, as evangelists intent not on this world but on saving souls for the next, will fade into the background, and one consequence will be the kind of outlook captured in Davy Crockett's motto (which echoed Benjamin Franklin's maxim): "Be sure you're right, then go ahead[!]" The hierarchy of being—the layered structure of existence familiar from ordinary experience—is matched by a hierarchy of modes of response to experiences of reality's truth. Human affairs of a political order, with life and death held in the balance, cannot be conducted like a mystic's meditation or a philosophy seminar, but at best merely in light of understanding and conviction grounded in highest truth—and even that is often only faintly present or missing entirely. Thus, at the political and military (pragmatic) levels of action where the brute facts count and concrete actions must be taken, the resolute attitude formulated by Crockett was evidenced after 1765 in the movement increasingly fueling opposition to perceived tyranny and in favor of liberty and (ultimately) independence leading to the founding—as it must ever be in practical human affairs, if we are true to ourselves. Crockett's attitude is still patently exemplified in American political policy and action.[85]

The debt to loftier considerations and moralism may be present but is not necessarily an unmixed blessing. If we take social and political morality to be only private morality writ large, we run into problems that have bedeviled American policy-makers from the beginning of the republic, through the presidencies of Lincoln and Woodrow Wilson, until

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of Notre Dame Press 1977) (1935). The *open soul* and society, and the *closed soul* and society, are key terms of Bergson's analysis—but cannot be the source of Voegelin's terminology here, since his book was published four years earlier than Bergson's.

[84] ERIC VOEGELIN, AUTOBIOGRAPHICAL REFLECTIONS 29 (Ellis Sandoz ed., 1989) (emphasis added) (The original text dates from 1973).

[85] D.H. MEYER, THE INSTRUCTED CONSCIENCE: THE SHAPING OF THE AMERICAN NATIONAL ETHIC 110 (1972). Meyer points out the analogous sentiment in Benjamin Franklin's maxim: "Resolve to perform what you ought; perform without fail what you resolve." *Id.* at 186 n.2.

today. This often consists in some variety of suspended judgment or utopian hopefulness (metastatic faith) that ignores the delimitation on rational action in the world concisely signaled for all time in the Gospel's "My kingdom is not of this world" (*John* 18:36): for familiar instance, fighting a war to end war, or one to rid the world of evil. As one writer formulates the poignant practical dilemma that still plagues us and flaws such thinking: "[I]t was inconceivable that we can be morally obliged to do what we ought not do."[86] The abiding structure of reality is not so malleable as ideologues, optimists, and well-intentioned millenarians compulsively suppose. At the surface, the watchword here is as old as Aristotle's dismissive critique of Plato's community of women, children, and property proposed by Socrates in the *Republic,* and it is sagely exemplified during the founding era nowhere better than in John Dickinson's famous comments in the Constitutional Convention of 1787: "Experience must be our only guide. Reason may mislead us[!]"[87] Dickinson had primarily the *philosophes* and their defective brand of "rationalism" in mind.[88] The root in both instances is a failure to observe the autonomy of the different strata of reality, especially as here those identified as spiritual and noetic reality on one hand and the political reality of statesmen on the other, and to distinguish between them.

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[86] *Id.* at 118 (referencing slavery and FRANCIS WAYLAND'S, THE LIMITATIONS OF HUMAN RESPONSIBILITY (1838)).

[87] Convention Floor Debate (Aug. 13, 1787), *in* JAMES MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787 (1840), *reprinted in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 267, 278 (Max Farrand ed., Yale Univ. Press 1966); see the discussion in SANDOZ, *supra* note 8, at 220–22; ARISTOTLE, *supra* note 23, at 1260b37–1265b18, at 455–60.

[88] What this usage of the term *rationalism* specifically means in modern political theory has been explored by Michael Oakeshott in his essay *Rationalism in Politics, in* RATIONALISM IN POLITICS AND OTHER ESSAYS 5, 37 (Liberty Press 1991) (1962), who speaks of "the disease of Rationalism" and shows it to involve "an identifiable error, a misconception with regard to the nature of human knowledge, which amounts to a corruption of the mind." John Adams (and some of his colleagues) perfectly understood all the essentials of this already at the time, even before the dawn of behaviorism in psychology and behavioralism in the social sciences, and without benefit of Oakeshott's masterful analysis. Thus, at his acerbic best, Adams wrote in his marginalia:

> "It is to Ideology, to that obscure metaphysics, which, searching with subtlety after first causes, wishes to found upon them the legislation of nations, instead of adapting the laws to the knowledge of the human heart and to the lessons of history, that we are to attribute all the calamities that our beloved France has experienced."
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> . . . .
>
> "The political and literary world are much indebted for the invention of the new word IDEOLOGY. Our English words Ideocy, or Ideotism [sic], express not the force or meaning of it. It is presumed its proper definition is the science of ideocy [sic]."

ZOLTÁN HARASZTI, JOHN ADAMS & THE PROPHETS OF PROGRESS 167 (Grossett & Dunlap Universal Library ed. 1964) (Adams quoting a comment by Napoleon and Adams's reply).

Human life is a unity; but it is a complex unity, one not susceptible of simplistic treatment without courting disaster through inadvertent perversion. Thus, on further reflection, Aristotle was both right and wrong, as was also John Dickinson. The former ignored the noetic character of the argument setting forth the contours of the paradigmatic *polis* of the Idea in the *Republic* in favor of a kind of literalist fundamentalism—a move bordering on what we might call a cheap shot, one that Aristotle must have recognized as such as a connoisseur of Plato's thought. The latter tacitly acknowledged the deformed rationality (i.e., irrational rationalism: already fully diagnosed by John Adams) of the intellectuals' prevailing climate of opinion. He spoke to the problem at hand in those terms, but all the while in so speaking he restored the fullness of rationality to his own discourse and thereby tacitly appealed to that same amplitude in his auditors. As experienced men of affairs themselves, the other framers were largely uncorrupted by trendy Enlightenment fashions and, therefore, intuitively responded to Dickinson's caveat.

The American Revolution itself, of course, had been preached as a revival and had the astonishing result of succeeding, Perry Miller once remarked, and we have seen evidence that he was right in that judgment. The theology of the evangelists varied considerably, of course, but substantively it lay close to that of John Wesley and Jonathan Edwards as just glimpsed. Their differences over free will, election, predestination, free grace, universal reconciliation, and other burning theological issues provide a backdrop of importance as between especially John Wesley and Whitefield. But first things first. In George Whitefield's blunt statement: "Let a man go to the grammar school of faith and repentance, before he goes to the university of election and predestination. A bare head-knowledge of sound words availeth nothing. I am quite tired of Christless talkers."[89]

An intimate connection between civic action and the holy work of redemption through faith and grace was widely assumed and manifested, whatever the details and precise rationale. As Ezra Stiles said in invoking a favorite biblical metaphor for providential favor, "It is truly important that this vine, which God hath planted with a mighty hand in this [A]merican wilderness, should be cultivated into confirmed maturity."[90] The matter cannot be stressed too much and is surely of central importance. Indicative is the fact that Congress declared at least

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[89] WHITEFIELD, *supra* note 56, at 491. The thorny issues at stake can be seen from *A Letter to the Rev. Mr. John Wesley in Answer to his Sermon entitled Free Grace. Id.* at app. 2. For the offending sermon itself (signaling the great "Arminian" split from orthodox Calvinism in the Awakening), see WESLEY, *supra* note 81, at 542, 542–63.

[90] Ezra Stiles, *A Discourse on the Christian Union, in* GREAT AWAKENING: DOCUMENTS, *supra* note 34, at 605; *cf. Psalms* 80:15.

sixteen national days of prayer, humiliation, and thanksgiving between 1776 and 1783; and Presidents Washington and Adams continued the practice under the Constitution.[91] The onset of the so-called Second Great Awakening conventionally is dated from around 1790, but in fact it seems to have begun earlier. New Side and New Light evangelism stirring personal spiritual experience continued throughout the period, and the political sermons often were extraordinary in power and substance. Religious services were routinely held in the newly completed Capitol itself in Washington, in the House and Senate chambers as these became available. President Thomas Jefferson and his cabinet attended, along with the members of Congress and their families, inaugurating a practice that continued until after the Civil War. The newly formed United States Marine Corps band supplied the music for holy services at President Jefferson's instigation, we are told. When the playing of sacred music fell short of expectations, the President suggested recruitment of some professional Italian musicians to help out, and eighteen were in fact enlisted as Marines and brought from Italy for the purpose—where they found, to their dismay, the mud streets and "log huts" of the young nation's new capital.[92] One authority has cogently argued that there was, indeed, a *Revolutionary revival* in America: "Far from suffering decline, religion experienced vigorous growth and luxuriant development during the Revolutionary period. . . . In a host of ways, both practical and intellectual, the church served as a school for politics."[93]

Swarms of witnesses might be called in support of the present line of analysis, but I shall mention only three as representative. Thomas Paine in *Common Sense* (1776) argued the biblical foundations of republican liberty. Thus, he wrote:

> Near three thousand years passed away from the Mosaic account of the creation, till the Jews under a national delusion requested a king. Till then their form of government . . . was a kind of republic administered by a judge and the elders of the tribes. Kings they had none, and it was

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[91] On the national days of prayer, fasting, and thanksgiving in the founding period, see DEREK H. DAVIS, RELIGION AND THE CONTINENTAL CONGRESS, 1774–1789: CONTRIBUTIONS TO ORIGINAL INTENT 83–91 (2000), and his further remark that

> all of the presidents since Jackson have issued prayer proclamations, either annually or in connection with important or critical events, such as American entries into war. Moreover, in 1952 the Congress passed a law providing for a National Day of Prayer, observed annually since, and which from 1988 has been observed on the first Thursday in May.

Id. at 90. See also SANDOZ, *supra* note 8, at 125–62, for texts and commentary.

[92] HELEN CRIPE, THOMAS JEFFERSON AND MUSIC 24–26 (1974).

[93] Stephen A. Marini, *Religion, Politics, and Ratification*, *in* RELIGION IN A REVOLUTIONARY AGE 184, 188 (Ronald Hoffman & Peter J. Albert eds., 1994). See the related discussion in ELLIS SANDOZ, *Philosophical and Religious Dimensions of the American Founding*, *in* THE POLITICS OF TRUTH AND OTHER UNTIMELY ESSAYS, *supra* note 20, at 43, 43–64.

> held sinful to acknowledge any being under that title but the Lord of Hosts.[94]

Benjamin Rush, signatory of the Declaration of Independence, fervently urged (1786) the schools of Pennsylvania to adopt the Bible as the basic textbook, writing:

> The only foundation for a useful education in a republic is to be laid in RELIGION. Without this, there can be no virtue, and without virtue there can be no liberty, and liberty is the object and life of all republican governments. . . . The religion I mean to recommend in this place is the religion of JESUS CHRIST. . . . A Christian cannot fail of being a republican.[95]

Last, we hear the aged John Adams, in the marvelous correspondence with Thomas Jefferson, identifying the two principal springs of their original revolutionary republicanism and the community that undergirded it as *Whig Liberty* and *Christianity*. Adams movingly wrote (1813): "'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; and those Principles of Liberty, are as unalterable as human Nature and our terrestrial, mundane System.'"[96]

These sentiments did not die with the original founders. In the middle of the nineteenth century and a time of great crisis, Abraham Lincoln borrowed Paul's symbol of *corpus mysticum* from 1 Corinthians 12 and applied it to the America evoked through the Declaration of Independence:

> "We have besides these men—descended by blood from our ancestors—among us perhaps half our people who are not descendants at all of these men, they are men who came from Europe—German, Irish, French and Scandinavian . . . . [T]hey cannot carry themselves back into that glorious epoch and make themselves feel that they are parts of us, but when they look through that old Declaration of Independence they find that those old men say that 'We hold these truths to be self-evident that all men are created equal,' and then they feel that that moral sentiment taught in that day evidences their relation to those men, that it is the father of all moral principle in them, and that they have a right to claim it as though they were blood of blood and flesh of flesh of the men who wrote that Declaration, and so they are. That is the electric cord in that Declaration that links the hearts of patriotic

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[94] THOMAS PAINE, COMMON SENSE (1776), *reprinted in* COMMON SENSE, THE RIGHTS OF MAN, AND OTHER ESSENTIAL WRITINGS OF THOMAS PAINE 21, 30 (New Am. Library 1969).

[95] SANDOZ, *supra* note 8, at 132 (quoting BENJAMIN RUSH, A PLAN FOR THE ESTABLISHMENT OF SCHOOLS (1786), *reprinted in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760–1805, at 675, 681–82 (Charles S. Hyneman & Donald S. Lutz eds., 1983)).

[96] ELLIS SANDOZ, *Religious Liberty and Religion in the American Founding*, *in* THE POLITICS OF TRUTH AND OTHER UNTIMELY ESSAYS, *supra* note 20, at 65, 68 (citation omitted).

and liberty-loving men together, that will link those patriotic hearts as long as the love of freedom exists in the minds of men throughout the world."[97]

VII. ESCHATOLOGY AND EXPERIENCE

As a study in contrast, Girolamo Savonarola and his community reestablished the Florentine republic at the end of the fifteenth century as a "civil and political government," one observed by Machiavelli, who gained immortality partly as theorist of classical republicanism.[98] For his trouble Fra Girolamo and two principal associates were at length excommunicated and burnt together as heretics in 1498 in the central marketplace of the city, where a plaque in the pavement still marks the spot. He was graciously spared the worst torments of this horrendous death by first being strangled, since he was an old friend of Pope Alexander VI, and friends in high places should count for something. In the history of republicanism the Machiavellian Moment might with almost equal warrant be known as the Savonarolan Moment: Modern free popular republican government was off to its rocky start after a scant four years of existence. Savonarola's was preached as a republic of virtue and godliness, one thirsting for revival and aimed at purifying and

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[97] JOSEPH R. FORNIERI, ABRAHAM LINCOLN'S POLITICAL FAITH 154–55 (2003) (quoting Abraham Lincoln, Speech at Chicago, Illinois (July 10, 1858), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 484, 499–500 (Roy P. Basler ed., Rutgers Univ. Press, 1953).

[98] DONALD WEINSTEIN, SAVONAROLA AND FLORENCE: PROPHECY AND PATRIOTISM IN THE RENAISSANCE 308 (1970); *see* LORENZO POLIZZOTTO, THE ELECT NATION: THE SAVONAROLAN MOVEMENT IN FLORENCE, 1494–1545 *passim* (1994).

> Savonarola . . . took seriously many of Saint Paul's teachings. Savonarola indicated that he sought to please God, not men, "because as the Apostle says, 'if I should still please men, I would not be a servant of Christ.'" . . . It was never in Savonarola's vision to please men. He believed in the wisdom of Saint Paul's words: "To those [who think they are wise] I shall say, together with the Apostle: 'We are fools for Christ: you, however, are the wise'" [*cf.* 1 *Corinthians* 3:18–19].

MARION LEATHERS KUNTZ, THE ANOINTMENT OF DIONISIO: PROPHECY AND POLITICS IN RENAISSANCE ITALY 234–35 (2001) (citation omitted) (first alteration in original). For Savonarola's vision, see his TREATISE ON THE CONSTITUTION AND GOVERNMENT OF THE CITY OF FLORENCE (1498), *reprinted in* HUMANISM AND LIBERTY: WRITINGS ON FREEDOM FROM FIFTEENTH-CENTURY FLORENCE 231, 231–60 (Renée Neu Watkins ed. & trans., Univ. of S.C. Press 1978). "This government is made more by God than by men, and those citizens who, for the glory of God and for the common good, obey our instructions and strive to make it perfect, will enjoy earthly happiness, spiritual happiness, and eternal happiness." *Id.* at 256. William Penn's perspective is brought to mind in this regard:

> Now, what is this Kingdom of God, but God's Government? And where is this Kingdom and Government to be set up, but in Man? So Christ tells us, *Behold the Kingdom of God is within you.* . . . We are taught to pray for it . . . . *Thy Kingdom come, thy Will be done.*

WILLIAM PENN, AN ADDRESS TO PROTESTANTS OF ALL PERSWASIONS, MORE ESPECIALLY THE MAGISTRACY AND CLERGY, FOR THE PROMOTION OF VIRTUE AND CHARITY (1679), *reprinted in* THE POLITICAL WRITINGS OF WILLIAM PENN 137, 190–91 (Andrew R. Murphy ed., Liberty Fund 2002) (quoting *Luke* 11:2, 17:21).

reforming not only corruption in the church but the evil world itself—the beginning of an eschatological and holy *sacrum imperium* with Florence the New Jerusalem of a chosen people, an Elect protected by the Holy Ghost, apocalyptically envisaged as *perhaps* leading mankind's transition into the Millennium and the final Eighth Day of eternal Sabbath ending history.

An array of comparable chiliastic and millenarian sentiments was well represented in America during the Revolutionary period and potently influenced the political theology of the fledgling nation as perhaps destined to be the new Israel or chosen people and even the site of the inauguration of the thousand-year reign of God's saints on earth. Since Christianity still plays a large role in America, echoes of these sentiments can be heard to this very day.[99] But "enthusiasm" already was restrained in Milton's work with *reason* the centerpiece, and the validity of traditional authority was readily embraced unless in conflict with scripture.[100] Now muted were the earlier radical expectations of the *Parousia,* or imminent divine intervention, when God "shall come skipping over the mountains and over difficulties" and Christ "shall reign

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[99] See Stephen A. Marini, *Uncertain Dawn: Millennialism and Political Theology in Revolutionary America, in* ANGLO-AMERICAN MILLENNIALISM FROM MILTON TO THE MILLERITES 159, 159–76 (Richard Connor & Andrew C. Gow eds., Brill Press 2004), and the literature cited therein. *See also* WALD, *supra* note 2, 42–72.

> America's anointment as the world's political messiah did not end . . . in 1919. . . . Transcending party politics and most ideological boundaries, nearly all of the language of universality and emancipation, of the 'city on a hill' and the world's rebirth, of light and dark, Messiah and Armageddon, reverberates down to the present moment.

RICHARD M. GAMBLE, THE WAR FOR RIGHTEOUSNESS: PROGRESSIVE CHRISTIANITY, THE GREAT WAR, AND THE RISE OF THE MESSIANIC NATION 22 (2003). Further, a German scholar writes:

> With respect to the religious underpinning of cultural life, the U.S. is a non-secularized modern society. . . . Wilsonianism became the synonym for the moralism, liberal or conservative American foreign policies of the twentieth century. It merged national interest and the American Creed and proclaimed America custodian of a new world order. The rise to global world leadership . . . confirmed the notion of an 'Almost Chosen People' engaged in war against evil . . . under the benevolent guidance of the American God.

Jürgen Gebhardt, *Conservatism and Religion in the United States, in* CONSERVATIVE PARTIES AND RIGHT-WING POLITICS IN NORTH AMERICA: REAPING THE BENEFITS OF AN IDEOLOGICAL VICTORY? 151, 159 (Rainer-Olaf Schultze et al. eds., 2003).

[100] *Cf.* MILTON, *supra* note 26, at 172, 238; MILTON, *supra* note 13, at 425–29, 435. But "libertie hath a sharp and double edge fitt onelie to be handl'd by just and vertuous men . . . ." JOHN MILTON, MR. JOHN MILTON'S CHARACTER OF THE LONG PARLIAMENT AND ASSEMBLY OF DIVINES (1681), *reprinted in* AREOPAGITICA AND OTHER POLITICAL WRITINGS OF JOHN MILTON, *supra* note 13, at 446, 453.

upon earth, here in this world" with His saints.[101] Wesleyan theology served as a moderating force in this respect. In his great election sermon of 1783 at the war's end, Ezra Stiles (president of Yale College) cautiously found "reason to hope, and, . . . to expect, that God [might] . . . make us high among the nations in praise, and in name, and in honor."[102] In 1790 Samuel Adams replied to cousin John Adams's startling (perhaps ironic, perhaps not) inquiry: "You ask what the World is about to become? [A]nd, Is the Millennium commencing?" Samuel Adams cautiously continued:

> The Love of Liberty is interwoven in the soul of Man, and can never be totally extinguished . . . . What then is to be done?—Let Divines, and Philosophers, Statesmen and Patriots unite their endeavors to renovate the Age, by . . . inculcating in the Minds of youth the fear, and Love of the Deity, and universal Phylanthropy; [sic] and in subordination to these great principles, the Love of their Country—of instructing them in the Art of *self* government, . . . in short of leading them in the Study, and Practice of the exalted Virtues of the Christian system, which will happily tend to subdue the turbulent passions of Men, and introduce that Golden Age beautifully described in figurative language [*Isaiah* 11:6–9]; when the Wolf shall dwell with the Lamb, and the Leopard lie down with the Kid—the Cow, and the bear shall feed; their young ones shall lie down together, and the Lyon shall eat straw like the Ox—none shall then hurt, or destroy; for the Earth shall be full of the Knowledge of the Lord. When this *Millennium* shall commence, if there shall be any need of Civil Government, indulge me in the fancy that it will be in the republican form, or something *better*.[103]

Within this rich context of faith and common sense, American republicanism, as it came from the hands of the founders in 1787 and 1791, provided a redefinition of the concept. It took on sobriety and a substantially different aspect. It retained covenantal form as a newly conceived compound representative republic, one federally organized. But it became more emphatically a republic for sinners rather than saints—for a people at best hopeful under divine Providence of salvation through faith and divine grace—rather than for the wholly virtuous or perfect (*Matthew* 5:48).[104] Above all else, American statesmen were both realists and men of faith who relied on experience and common sense, who

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[101] Quoted from a 1641 tract, HANSERD KNOLLYS, A GLIMPSE OF SION'S GLORY (1641), *reprinted in* PURITANISM AND LIBERTY: BEING THE ARMY DEBATES (1647–9) 233, 236, 240 (A.S.P. Woodhouse ed., J.M. Dent & Sons Ltd. 3d prtg. 1956); *see id.* at 233–41.

[102] EZRA STILES, THE FUTURE GLORY OF THE UNITED STATES (1783), *reprinted in* THE PULPIT OF THE AMERICAN REVOLUTION 401, 438–39 (John Wingate Thornton ed., Burt Franklin 1970) (1860).

[103] Letter from Samuel Adams to John Adams (Oct. 4, 1790), *in* 4 THE WRITINGS OF SAMUEL ADAMS 340, 340–43 (Harry Alonzo Cushing ed., Octagon Books, Inc. 1968) (1908).

[104] THE FEDERALIST NO. 9 (Alexander Hamilton), NOS. 10, 39, 47–51, 55 (James Madison).

profoundly understood the history and operations of the sophisticated constitutional order of which they were heirs and adapters.

These attributes are reflected in John Adams's *Defence of the Constitutions* (1787), written in response to Turgot's criticisms of America's early state constitutions. There, Adams stressed the rationality of his countrymen's statesmanship and their reliance on "the simple principles of nature," and insisted that it should "never be pretended that any persons employed in that service had interviews with the gods, or were in any degree under the inspiration of Heaven . . . ."[105] But lest it be inferred that atheism and rationalism suddenly had triumphed in America (as is sometimes done) Adams goes on to clarify his meaning in so denouncing enthusiasm and bigotry. Tyranny and superstition in the form of popery remained the enemies of liberty of an enlightened American people.

> Thirteen governments thus founded on the natural authority of the people alone, without a pretence of miracle or mystery ['even the pious mystery of holy oil had no more influence than that other one of holy water'] . . . are a great point gained in favor of the rights of mankind. The experiment is made, and has completely succeeded; it can no longer be called in question, whether authority in magistrates and obedience of citizens can be grounded on reason, morality, and the Christian religion, without the monkery of priests, or the knavery of politicians.[106]

VIII. CONCLUSION: A TRUE MAP OF MAN

While the American founders relied on Aristotle and Cicero and cited Montesquieu, they understood with Saint Paul that "all have sinned, and come short of the glory of God" (*Romans* 3:23; cf. 1 *Timothy* 1:15). They, therefore, accepted the corollary drawn by the judicious Hooker that laws can rightly be made only by assuming men so depraved as to be hardly

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[105] JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA (1787–1788), *reprinted in* 4 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 271, 292 (Charles Francis Adams ed., Little, Brown & Co. 1865) [hereinafter THE WORKS OF JOHN ADAMS].

[106] *Id.* at 293 (emphasis added). On Adams's dim view of the Middle Ages as a conspiracy of monarchs and priests to keep the people "ignorant of everything but the tools of agriculture and war" and the Reformation as the dawn of liberty, see JOHN ADAMS, DISSERTATION ON THE CANON AND FEUDAL LAW (1765), *reprinted in* 3 THE WORKS OF JOHN ADAMS, *supra* note 105, at 450–51 *passim*; see also the discussion in JOHN R. HOWE, JR., THE CHANGING POLITICAL THOUGHT OF JOHN ADAMS 40–45, 133–55 (1966); HARASZTI, *supra* note 88, at 139–64 (on Turgot and the *Defence*). The fatal flaw of philosophers, and especially of French *philosophes*, such as Condorcet, is this, Adams writes: "Not one of them takes human nature as it is for his foundation"—as Americans had in fact done. HARASZTI, *supra* note 88, at 258.

better than wild beasts[107]—even though they are created little lower than the angels and beloved of God their Creator (*Psalms* 8).

To generalize and simplify, but not to argue perfect homogeneity: From the Anglo-Norman Anonymous and John Wyclif to John Wesley, Jonathan Edwards, John Adams, and Abraham Lincoln's evocation of "government of the people, by the people, and for the people," lines of religious development undergirded and fostered a shared sense of the sanctity of the individual human being living in immediacy to God and associated the Christian calling to imitate God in their lives with political duty, capacity for self government based on consent, *salus populi,* and the ethic of aspiration through a reciprocal love of God. From this fertile ground emerged the institutions of civil society and republicanism so admirably devised in the American founding.

Among other things, the framers—faced with the weighty challenge of how to make free government work—banked the fires of zealotry and political millenarianism in favor of latitudinarian faith and a quasi-Augustinian understanding of the two cities. They humbly bowed before the inscrutable mystery of history and the human condition with its suffering and imperfection and accepted watchful waiting for fulfillment

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[107] *Cf.* THE FEDERALIST NO. 6 (Alexander Hamilton). Thus:

> Laws politic, ordained for external order and regiment amongst men, are never framed as they should be, unless presuming the will of man to be inwardly obstinate, rebellious, and averse from all obedience unto the sacred laws of his nature; in a word, unless presuming man to be in regard of his depraved mind little better than a wild beast, they do accordingly provide notwithstanding so to frame his outward actions, that they be no hindrance unto the common good for which societies are instituted: unless they do this, they are not perfect.

HOOKER, *supra* note 22, bk. 1, ch. 10.1, at 87–88. Similarly Machiavelli: "All writers on politics have pointed out . . . that in constituting and legislating for a commonwealth it must needs be taken for granted that all men are wicked and that they will always give vent to malignity that is in their minds when opportunity offers." MACHIAVELLI, THE DISCOURSES 1.3, at 111–12 (Leslie J. Walker & Brian Richardson trans., Bernard Crick ed., Penguin Books 1970). Indeed, the tension between the reason of the law and the passion of the human being is fundamental to the philosophical anthropology underlying the whole conception of rule of law and of a government of laws and not of men, from Aristotle onward. *Cf.* the *locus classicus*:

> He who asks law [*nomos*] to rule is asking God and intelligence [reason, *nous*] alone to rule; while he who asks for the rule of a human being is importing a wild beast too; for desire is like a wild beast, and anger perverts rulers and the very best of men. Hence the law is intelligence without appetition.

ARISTOTLE, *supra* note 23, at 1287a23–31, at 485. In sum, as stated elsewhere:

> In fact, my axiom of politics (a minor contribution to science) is this: *[H]uman beings are virtually ungovernable.* After all, human beings in addition to possessing reason and gifts of conscience are material, corporeal, passionate, self-serving, devious, obstreperous, ornery, unreliable, imperfect, fallible, and prone to sin if not outright depraved. And we have some bad qualities besides.

ELLIS SANDOZ, *The Politics of Truth, in* THE POLITICS OF TRUTH AND OTHER UNTIMELY ESSAYS, *supra* note 20, at 35, 39.

of the hoped-for providential destiny known only to God—whose "kingdom is not of this world" (*John* 18:36). But as we have seen—in addition to understanding government as a necessary coercive restraint on the sinful creature—they reflected a faith that political practice in perfecting the image of God in every man through just dominion was *itself* a blessed vocation and the calling of free men: It was stewardship in imitation of God's care for his freely created and sustained world, one enabled solely by the grace bestowed on individuals in a favored community. They embraced freedom of conscience as quintessential liberty for a citizenry of free men and women, as had John Milton long before, who exclaimed in *Areopagitica:* "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties." And, for better or worse, they followed Milton (as well as Roger Williams and John Locke) in heeding his plea to "leave the church to itself" and "not suffer the two powers, the ecclesiastical and the civil, which are so totally distinct, to commit whoredom together . . . ."[108] The correlate was religious toleration within limits, as necessary for the peaceful existence of a flourishing civil society whose free operations minimized tampering with religious institutions or dogmas. Yet the historically affirmed vocation of a special people under God still could be pursued through active devotion to public good, liberty, and justice solidly grounded in Judaeo-Christian transcendentalism. Citizens were at the same time self-consciously also pilgrims aware that this world is not their home, that they were merely sojourners passing through this mysterious process of historical existence in the attitude of *homo viator,* since nothing better than hope through faith avails them. It is this ever-present balanced living tension with the divine Ground above all else, perhaps, that has made the United States so nearly immune politically to the ideological and eschatological maladies that have ravaged the modern world, such as fascism and Marxism and now Islamism.

Like all of politics, the founders' solutions were compromises, offensive to utopians and all other flaming idealists. But this may be no detraction from their work, since despite all national vicissitudes, we still

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[108] JOHN MILTON, AREOPAGITICA (1644), *reprinted in* AREOPAGITICA AND OTHER POLITICAL WRITINGS OF JOHN MILTON, *supra* note 13, at 3, 44; JOHN MILTON, SECOND DEFENCE OF THE PEOPLE OF ENGLAND (1654), *reprinted in* AREOPAGITICA AND OTHER POLITICAL WRITINGS OF JOHN MILTON, *supra* note 13, at 315, 406; *see also* JOHN LOCKE, WRITINGS ON RELIGION 73–82 (Victor Nuovo ed., Clarendon Press 2002); EDWIN S. GAUSTAD, LIBERTY OF CONSCIENCE: ROGER WILLIAMS IN AMERICA 219 (1991) ("In the past half-century, American society has become noisily and notoriously pluralistic. This has made Roger Williams more relevant, for he had strong opinions about what government should do about religious pluralism: leave it alone. Turks, Jews, infidels, papists: leave them alone. . . . Religion has the power to persuade, never the power to compel. Government does have the power to compel, but that government is wisest and best which offers to liberty of conscience its widest possible range.").

today strive to keep our republic—under the world's oldest existing constitution. Moreover, there has yet to appear an American dictator after more than two centuries of independent national existence; and the United States, at grievous cost in lives and treasure, has steadfastly stood in wars of global reach as the champion of human freedom in the face of raging despotisms of every description.

To conclude then: Let us not overlook the great secret that a *sound map of human nature* (as John Adams insisted) uniquely lies at the heart of the Constitution of the United States and its elaborate institutional arrangements. Men are not angels, and government, admittedly, is the greatest of all reflections on human nature: The *demos* ever tends to become the *ochlos*—even if there could be a population of philosophers and saints—and constantly threatens majoritarian tyranny. Merely mortal magistrates, no less than self-serving factions, riven by *superbia,* avarice, and *libido dominandi,* must be restrained artfully by a vast net of adversarial devices if just government is to have any chance whatever of prevailing over self-serving human passions while still nurturing the liberty of free men. To attain these noble ends in what is called a government of laws and not of men, it was daringly thought, perhaps ambition could effectively counteract ambition and, as one more *felix culpa,* therewith supply the defect of better motives. This is most dramatically achieved, at least in theory, through the routine operations of the central mechanisms of divided and separated powers and of checks and balances that display the genius of the Constitution and serve as the well-known hallmark of America's republican experiment itself. *All of this would have been quite inconceivable without a Christian anthropology, enriched by classical political theory and the common law radition, as uniquely embedded in the habits of the American people at the time of the founding and nurtured thereafter.* On this ground an extended commercial republic flourished where love of God and love of mammon somehow sweetly kissed, and America became a light to the nations. Alexis de Tocqueville noticed this incongruity in the 1830s and wrote: "'I know of no country, indeed, where the love of money has taken a stronger hold on the affections of men.'" One scholar attributes this striking alliance to the prevalent form taken by American Christianity, in "a society that was awash in religion and in making money—and confident of divine favor upon both endeavors. American Methodism was the prototype of a religious organization taking on market form."[109]

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[109] Nathan O. Hatch, *The Puzzle of American Methodism, in* METHODISM AND THE SHAPING OF AMERICAN CULTURE, *supra* note 52, at 23, 38 (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 53 (Henry Reeve trans., Random House 1945) (1858)). Cf. the conclusion of Calvin's role in this by Dumont, *supra* note 59, at 23.

As is evident, a true map of man is vital, and so are the principles of what the founders termed the "divine science of politics." Love of liberty and even love of God, vital as both assuredly are, of themselves clearly are not enough in politics. Thus, representative of the many cautions on this head by John Adams is this one: "John Milton was as honest a man as his nation ever bred, and as great a friend of liberty; but his greatness most certainly did not consist in the knowledge of the nature of man and of government . . . ." All philosophers ancient and modern had missed the mark and for one basic reason, he thought: "Not one of them takes human nature as it is for his foundation."[110] The true *political* anthropology, divine science of politics, and the principles of government Adams had in view and helped to formulate were later refined for our compound constitutional republic and collected in a book written for forensic purposes and entitled *The Federalist Papers*.[111] This does not mean that Adams substituted his political faith for his religious faith, of course, as he explained to Jefferson in 1818:

> I believe in God and in his Wisdom and Benevolence: and I cannot conceive that such a Being could make such a Species as the human merely to live and die on this Earth. If I did not believe in a future State I should believe in no God. This Un[i]verse; this all; this [*to pan*]; would appear with all its swelling Pomp, a boyish Fire Work.
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> And if there be a future State Why should the Almighty dissolve forever all the tender [t]ies which [u]nite [u]s so delightfully in this [w]orld and forbid [u]s to see each other in the next?[112]

Nagging questions remain: Can a political order ultimately grounded in the tension toward transcendent divine Being, memorably proclaimed in the Declaration of Independence and solidly informed by biblical revelation and philosophy, indefinitely endure—resilient though it may be—in the face of nihilistic assault on this vital spiritual tension by every means, including by the very institutions of liberty themselves? Perhaps these are only growing pains that afflict us, rather than the symptoms of the disintegration of our civilization. The positivist, scientistic, and Marxist climate of opinion is so pervasive and intellectually debilitating in the public arena and universities as often to make philosophical and

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[110] ADAMS, *supra* note 105, at 466; HARASZTI, *supra* note 88, at 258.

[111] On *forensics,* in this sense, and *forensic history,* see JOHN PHILLIP REID, THE ANCIENT CONSTITUTION AND THE ORIGINS OF ANGLO-AMERICAN LIBERTY 8–16 (2005).

[112] Letter from John Adams to Thomas Jefferson (Dec. 8, 1818), *in* THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS, at 530 (Lester J. Cappon ed., Simon & Schuster 1959); *cf.* DAVID LYNN HOLMES, THE RELIGION OF THE FOUNDING FATHERS 130–31 (2003). Holmes concludes as follows: "The six Founding Fathers surveyed in this study appear to have been neither wholehearted Deists nor orthodox Christians. . . . In the spirit of their times, they appeared less devout than they were—which seems a reversal from modern politics." *Id.*; *see also* John Witte, Jr., *Facts and Fictions about the History of Separation of Church and State*, 48 J. CHURCH & ST., Winter 2006, at 15, 15–45.

religious discourse incomprehensible oddities whose meaning is lost to consciousness amid the din of deformation and deculturation. And the damage to common sense itself, and to the middling range of publicly effective prudential understanding basic to the science of human affairs—first elaborated by Aristotle and adapted for our republic by the American founders' divine science of politics—by neglect, miseducation, and deculturation is incalculable. For instance, the "walls of separation between these two [church and state] must forever be upheld," Richard Hooker wrote in contemptuously characterizing religious zealots of his distant time. By way of Thomas Jefferson's famous 1801 letter and the U.S. Supreme Court more recently, that metaphor now lives on as the shibboleth of strange new fanatics of our own day, including those sometimes identified as atheist humanists.[113] The abiding truths of politics and of faith atrophy together before our eyes, even as we weigh their distinctiveness and autonomy as independent spheres of human knowledge and action. But like every other consideration, this one too becomes a meaningless gesture to clever reductionists and nihilists in our midst who find no truth worth living for, preserving, or, for that matter, worrying about.

Even as religious revival today enlivens American spirituality, we observe the strong countercurrents of intellectual, moral, and social disarray of the republic—and not of the American republic alone. We test our faith that the truth shall prevail and look for hopeful signs on the horizon. But this is not new either. Perhaps we remember and take heart from the epochal images of Elijah on Horeb and of Socrates in the Heliaia, to recall that revealed truth and philosophical reason ever have been nurtured by resolute *individuals'* resistance to apostasy, injustice, and corruption. Those called to be representatives of truth play their modest parts in the drama of history. At time's decree, they pass the mantle to younger hands, thereby vivifying through the generations some adventitious saving remnant that perseveres and, against all odds, may help illumine the darkness encompassing our mysterious existence.

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[113] HOOKER, *supra* note 22, bk. 8, ch. 1.2, at 131; Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947); *cf.* the classic study by HENRI DE LUBAC, THE DRAMA OF ATHEIST HUMANISM (Edith M. Riley trans., Sheed & Ward 1950) (1944).

DOCKING THE TAIL THAT WAGS THE DOG: WHY CONGRESS SHOULD ABOLISH THE USE OF ACQUITTED CONDUCT AT SENTENCING AND HOW COURTS SHOULD TREAT ACQUITTED CONDUCT AFTER *UNITED STATES V. BOOKER*

Remember those in prison as if you were their fellow prisoners, and those who are mistreated as if you yourselves were suffering. Hebrews 13:3 (NIV)

INTRODUCTION

"What could instill more confusion and disrespect than finding out that you will be sentenced to an extra ten years in prison for the alleged crimes of which you were acquitted?"[1] Currently, courts may calculate a sentence based on conduct that underlies charges from which a jury has formally acquitted the defendant.[2] In the aftermath of *United States v. Booker*,[3] eight federal district courts have questioned the wisdom and constitutionality of this practice.[4] One district court aptly described "[s]entencing a defendant to time in prison for a crime that the jury found he did not commit" as a "Kafka-esque result."[5]

In *United States v. Watts*, the Supreme Court held that courts may consider acquitted conduct to determine a sentence because Congress through 18 U.S.C. § 3661 barred any limitation on conduct considered at sentencing.[6] The Court also noted that provisions in the United States Sentencing Guidelines ("Guidelines") permit courts to consider acquitted conduct.[7] When the Court decided that considering acquitted conduct is constitutional, federal district courts were required to impose a sentence

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1 United States v. Ibanga, 454 F. Supp. 2d 532, 539 (E.D. Va. 2006).

2 *See infra* text accompanying notes 69–72. This Note adopts Professor Barry L. Johnson's definition of "acquitted conduct" as "acts for which the offender was criminally charged and formally adjudicated not guilty, typically by the finder of fact after trial." Barry L. Johnson, *If at First You Don't Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. REV. 153, 157 (1996).

3 543 U.S. 220 (2005).

4 *See infra* note 67 and accompanying text.

5 *Ibanga*, 454 F. Supp. 2d at 536. Franz Kafka's description of acquittals in a totalitarian state resembles today's jury acquittals: "non-final 'acquittals.' . . . 'That is to say, when [the accused] is acquitted in this fashion the charge is lifted from [his] shoulders for the time being, but it continues to hover above [him] and can, as soon as an order comes from on high, be laid upon [him] again.'" *Id.* at n.2 (alteration in original) (quoting FRANZ KAFKA, THE TRIAL 173 (Willa Muir & Edwin Muir trans., rev. ed., Alfred A. Knopf, Inc. 1992)).

6 519 U.S. 148, 151 (1997).

7 *Id.* at 152.

in accordance with the Guidelines.[8] Almost ten years later in *United States v. Booker*, the Court decided that the Guidelines are advisory and not mandatory because the Guidelines may result in unconstitutional sentences.[9] The Court has not revisited the specific practice of using acquitted conduct at sentencing since *Booker*. Thus, courts of appeal have continued to allow its use because *Watts* remains good law and Congress has not amended 18 U.S.C. § 3661.[10]

This Note argues that Congress should amend 18 U.S.C. § 3661 to prohibit the use of acquitted conduct at sentencing. Part I considers the United States Sentencing Commission's philosophy and explains how the Guidelines permit the use of acquitted conduct. Part II discusses the Supreme Court's holding in *United States v. Watts*, its revamped sentencing jurisprudence in *United States v. Booker*, and the lower federal courts' approach to acquitted conduct post-*Booker*. Part III analyzes Fifth and Fourteenth Amendment procedural due process and Sixth Amendment trial by jury arguments against the use of acquitted conduct. Part IV examines policy arguments against using acquitted conduct. Part V proposes that Congress should enact legislation abolishing the use of acquitted conduct and presents model legislation. Part V also discusses how federal district courts may avoid using acquitted conduct at sentencing post-*Booker* with reduced risk of reversal on appeal.

I. THE HISTORY AND MECHANICS OF USING ACQUITTED CONDUCT AT SENTENCING

A. The United States Sentencing Commission's Philosophy

To cure the unpredictability of the federal sentencing system, Congress enacted the Sentencing Reform Act of 1984 ("SRA").[11] Before the SRA, federal judges were afforded unfettered discretion in

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[8] 18 U.S.C. § 3553(b) (2000).

[9] 543 U.S. at 226–27.

[10] *See infra* text accompanying notes 62–66.

[11] Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3559, 3561–3566, 3571–3574, 3581–3586 (2000), and 28 U.S.C. §§ 991–998 (2000)); *see also* U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING, 1–2 (2006), http://www.ussc.gov/booker_report/Booker_Report.pdf [hereinafter FINAL REPORT]. Both the House of Representatives and Senate recognized the injustices of a federal sentencing system in which similarly situated defendants often received different sentences. *Id.* at 2. "'[G]laring disparities . . . can be traced directly to the unfettered discretion the law confers on those judges and parole authorities [that implement] the sentence.'" *Id.* at 2 n.16 (quoting S. REP. NO. 97-307, at 956 (1981)). "'The absence of Congressional guidance to the judiciary has all but guaranteed that . . . similarly situated offenders . . . will receive different sentences.'" *Id.* (quoting H.R. REP. NO. 98–1017, at 34 (1984)).

determining a sentence within a broad statutory range.[12] The SRA created the United States Sentencing Commission ("Commission"), an independent agency within the judicial branch[13] and gave it the authority to promulgate the United States Sentencing Guidelines.[14]

Through the Guidelines, the Commission sought to tailor punishment to each individual defendant and achieve greater uniformity in sentences among similarly situated defendants.[15] The Commission rejected a system in which every defendant convicted of the same offense receives the same sentence.[16] While the offense of conviction largely determines the sentence, the final sentence also reflects a particular defendant's culpability through consideration of "relevant conduct."[17] Relevant conduct allows the sentencing court to consider the "totality of [the offender's] conduct from the planning stages of the offense to post-offense behavior."[18] Examples of relevant conduct include "use of a firearm in commission of the underlying offense, infliction of extreme psychological injury, [or] selection of an especially vulnerable victim."[19]

The Guidelines describe the scope of "relevant conduct" broadly enough to encompass using acquitted conduct.[20] For instance, in *United*

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[12] *Id.* at 2 ("Because each judge was 'left to apply his own notions of the purposes of sentencing,' the federal sentencing system exhibited 'an unjustifiably wide range of sentences to offenders convicted of similar crimes.'" (quoting S. REP. NO. 97-307, at 5 (1981))).

[13] Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 2017 (1984) (codified as amended at 28 U.S.C. §§ 991 (2000 & Supp. IV 2004), 992–93 (2000), 994 (2000 & Supp. IV 2004), 995–98 (2000)).

[14] FINAL REPORT, *supra* note 11, at 3 nn.23–24 (citing 28 U.S.C. §§ 991 (2000 & Supp. IV 2004), 994 (2000 & Supp. IV 2004), 995(a)(1) (2000)).

[15] William W. Wilkins, Jr., & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 495 (1990).

[16] Johnson, *supra* note 2, at 160–61. The Commission rejected a pure "charge of offense" system that bases the offender's sentence only "on the offense for which the offender was charged and convicted." *Id.* at 160.

[17] *Id.* at 162. *See* U.S. SENTENCING COMM'N GUIDELINES MANUAL §§ 1B1.3–1B1.4 (2006) [hereinafter GUIDELINES MANUAL].

[18] Wilkins & Steer, *supra* note 15, at 520; *see generally id.* at 504–06. Through relevant conduct, the judge at sentencing may accordingly adjust a sentence for an offender's acceptance of responsibility or for obstruction of justice. *Id.* at 520–21. Relevant conduct also allows a defendant to be held accountable for an accomplice's conduct. *Id.* at 521. For "offenses involving fungible items" such as "drugs or monetary value offenses," relevant conduct permits the sentencing court to consider "the entire range of a defendant's similar offense behavior." *Id.* at 514–15, 520–21.

[19] Johnson, *supra* note 2, at 160 (citing GUIDELINES MANUAL, *supra* note 17, §§ 2B3.1(b)(2), 3A1.1, 5K2.3).

[20] *Id.* at 162; *see* GUIDELINES MANUAL, *supra* note 17, §§ 1B1.3 to .4 (2006). While the Guidelines Manual does not directly comment on the use of acquitted conduct, the Commission has most likely allowed this practice to continue because judges considered acquitted conduct to determine a defendant's sentence before the Guidelines were issued. Johnson, *supra* note 2, at 153–54.

States v. Poyato, the jury acquitted the defendant of possessing a firearm.[21] Despite the jury acquittal, the Eleventh Circuit held that the district court erred because it did not increase the defendant's sentence by five years for possessing a firearm.[22] The appellate court reasoned that the Guidelines require sentencing courts to consider whether the defendant possessed a firearm because possession constitutes "relevant conduct."[23]

B. Sentencing Mechanics

Based on the sentencing court's considerations and the jury's verdict, the United States Sentencing Commission Guidelines Manual ("Guidelines Manual" or "Manual") provides formulaic procedures to calculate the sentence. The Manual provides a Sentencing Table[24] to determine the Guidelines sentencing range ("GSR"), a smaller range of months within the prescribed statutory range. This range sets the upper and lower limits of the range from which the judge selects the exact sentence.[25] The intersection of the vertical axis with the horizontal axis on the Sentencing Table determines the exact GSR.[26] The vertical axis represents the defendant's total "Offense Level" based on the offense for which the defendant was convicted;[27] the horizontal axis represents the defendant's "Criminal History Category" based on the "number and seriousness of the defendant's sentences for prior convictions."[28] A portion of this Sentencing Table is reproduced below:[29]

Sentencing Table

(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
Zone B	9	4-10	6-12	8-14	12-18	18-24	21-27
	10	6-12	8-14	10-16	15-21	21-27	24-30

[21] 454 F.3d 1295, 1296 (11th Cir. 2006).

[22] *Id.* at 1299–1300.

[23] *Id.* at 1299.

[24] GUIDELINES MANUAL, *supra* note 17, at 380–82.

[25] Johnson, *supra* note 2, at 159.

[26] *Id.* at 158–59.

[27] *Id.* at 158. The judge may adjust the offense level based on "aggravating and mitigating facts or circumstances." *Id.*

[28] *Id.* at 159.

[29] GUIDELINES MANUAL, *supra* note 17, at 381.

For instance, a Criminal History Category of five and Offense Level of eight derives a GSR of fifteen to twenty-one months.

C. Uses of Acquitted Conduct at Sentencing

Generally, the procedural safeguards present at trial are not required at sentencing.[30] In considering acquitted conduct at sentencing, the court may base its findings upon evidence, such as hearsay, that is inadmissible at trial.[31] Moreover, the court need only find by a preponderance of the evidence that the wrongful acts occurred.[32] Using these relaxed procedural standards, courts often consider acquitted conduct at sentencing either as relevant conduct or as a basis for imposing a sentence higher than the one prescribed in the GSR.[33]

Acquitted conduct is commonly used at sentencing as relevant conduct to determine a defendant's GSR.[34] For example, courts may use acquitted conduct as relevant conduct to calculate drug quantities.[35] In *United States v. Ibanga*, the jury convicted Ibanga of conspiracy to launder money but acquitted him of actual money laundering, conspiracy to distribute methamphetamine, and distributing methamphetamine.[36] The Guidelines required the court to consider relevant conduct or "the offense level for the underlying offense from which the laundered funds were derived."[37] The court found by a preponderance of the evidence that the defendant was responsible for distributing 124.03 grams of methamphetamine, the very charge of which the jury had acquitted the defendant.[38] As a result, the offense level was 33 instead of 23, resulting in a GSR of 151 to 188 months instead of 51 to 63 months—a difference of about 10 years.[39]

Courts often use acquitted conduct to depart upward from the GSR, imposing a sentence higher than one within the GSR.[40] For example, courts may use "acquitted conduct contemporaneous with the charged

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30 *Id.* § 6A1.3(a). To calculate a sentence, the court may consider "relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." *Id.*; *see also infra* text accompanying notes 96–101.

31 GUIDELINES MANUAL, *supra* note 17, § 6A1.3(a).

32 *Id.* § 6A1.3 cmt.

33 Johnson, *supra* note 2, at 164.

34 *Id.*

35 *Id.* at 164–65.

36 454 F. Supp. 2d 532, 532–33 (E.D. Va. 2006).

37 GUIDELINES MANUAL, *supra* note 17, § 2S1.1(a).

38 *Ibanga*, 454 F. Supp. 2d at 535.

39 *Id.* at 532, 535.

40 GUIDELINES MANUAL, *supra* note 17, § 5K2.0(a); *see also* Johnson, *supra* note 2, at 165.

offense" to justify departure.[41] In *United States v. Carroll*, the jury acquitted Carroll of conspiracy to distribute methamphetamine and possession with intent to distribute methamphetamine.[42] The jury convicted him only of possessing and attempting to possess methamphetamine.[43] Despite the jury acquittal, the Eleventh Circuit approved the district court's decision to "depart[] upward from the Guideline[s] range based on a finding that Carroll had distributed the drugs."[44] The district court doubled his sentence from twelve months to twenty-four months, adding six months to each conviction based on the acquitted conduct.[45]

II. THE SUPREME COURT'S SENTENCING JURISPRUDENCE AND LOWER COURT DECISIONS AFTER *BOOKER*

A. The Supreme Court's Assessment of Acquitted Conduct

In *United States v. Watts*, the Supreme Court held that use of acquitted conduct by a preponderance of the evidence standard at sentencing did not violate the Double Jeopardy Clause.[46] The Court reasoned that 18 U.S.C. § 3661 afforded broad discretion to the judge at sentencing because it forbids any limitation on information used to sentence a defendant.[47] Further, different evidentiary standards govern at trial than at sentencing, and the preponderance of the evidence standard satisfies the Due Process Clause of the Fifth Amendment.[48] An acquittal serves not to clear the defendant of guilt but as an "'acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt.'"[49]

B. Booker *and Its Predecessors*

Before *United States v. Booker*,[50] a sentence within the larger statutory range, yet outside the jury-authorized range, was considered constitutional because "there [was] no Sixth Amendment right to jury

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41 Johnson, *supra* note 2, at 166–68 (discussing United States v. Fonner, 920 F.2d 1330 (7th Cir. 1990) and United States v. Ryan, 866 F.2d 604, 608–09 (3d Cir. 1989) as examples of upward departures based on acquitted conduct).

42 140 F. App'x 168, 169 (11th Cir. 2005).

43 *Id.*

44 *Id.*

45 *Id.*

46 519 U.S. 148, 156–57 (1997).

47 *Id.* at 151.

48 *Id.* at 156.

49 *Id.* at 155 (quoting United States v. Putra, 78 F.3d 1386, 1394 (9th Cir. 1996) (Wallace, C.J., dissenting)).

50 543 U.S. 220 (2005).

sentencing, even where the sentence turns on specific findings of fact."[51] The Court changed its course in *Apprendi v. New Jersey* and held that the Due Process Clause of the Fourteenth Amendment requires that any fact, other than a prior conviction, authorizing an increase in the statutory maximum "must be submitted to a jury[] and proved beyond a reasonable doubt."[52] Four years later, the Court in *Blakely v. Washington* held that a judicial determination increasing the sentence beyond the jury-authorized sentencing range violates the Sixth Amendment right to trial by jury, even when the final sentence is within the larger statutory range.[53]

Booker extended *Apprendi* and *Blakely* to the United States Sentencing Guidelines.[54] After *Booker*, a judicial determination that results in a sentence higher than one within the range authorized by the jury verdict alone violates the Sixth Amendment's guarantee of trial by jury.[55] In *Booker*, the Court sought to cure the growing trend that "the judge, not the jury, . . . determined the upper limits of sentencing, and the facts determined were not required to be raised before trial or proved by more than a preponderance."[56] Thus, the Court clarified that a sentence must exceed only the maximum Guidelines range authorized by the jury verdict, not the statutory maximum, to pose a Sixth Amendment violation.[57]

The Court in *Booker* remedied the Sixth Amendment violation by excising the statutory provisions that made the Guidelines mandatory in the second half of its opinion.[58] It also severed those provisions requiring a de novo standard of review on appeal for departures from the

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[51] McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986).

[52] 530 U.S. 466, 490 (2000).

[53] 542 U.S. 296, 308 (2004). In *Blakely*, the state statutory maximum penalty was 10 years imprisonment. *Id.* at 303. The jury verdict authorized a sentencing range of forty-nine to fifty-three months. *Id.* at 299–300. The judge imposed a sentence of ninety months, which was within the statutory range but exceeded the jury-authorized maximum sentence of fifty-three months. *Id.*

[54] The Court in *Booker* ended the first part of its opinion by repeating its holding in *Apprendi* in different terms: "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Booker*, 543 U.S. at 244.

[55] *Id.* at 245.

[56] *Id.* at 236.

[57] The jury verdict in *Booker* authorized a sentence of 210 to 262 months in prison, but the judge found additional facts at a post-trial sentencing that authorized a sentence of 360 months to life imprisonment. *Id.* at 227. Both sentencing ranges were within the maximum statutory punishment. *Id.*

[58] *Id.* at 259 (invalidating 18 U.S.C. § 3553(b) (2000)); *see* 18 U.S.C. § 3553(b)(1) (Supp. IV 2004).

applicable Guidelines range.[59] While the Guidelines are only advisory, *Booker* held that the Sentencing Reform Act "requires judges to take account of the Guidelines together with other sentencing goals" listed in 18 U.S.C. § 3553(a).[60] Also, after *Booker*, appellate courts review a sentence only for reasonableness when considering factors in 18 U.S.C. § 3553(a).[61]

*C. Lower Court Consideration of Acquitted Conduct Post-*Booker

1. Appellate Court Consideration of Acquitted Conduct

After *Booker*, lower federal appellate courts still allow sentencing courts to use acquitted conduct found by a preponderance of the evidence to increase a defendant's offense level.[62] This increase in offense level

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[59] *Id.* (invalidating 18 U.S.C. § 3742(e) (2000)); *see* 18 U.S.C. § 3742(e) (2000 & Supp. IV 2004).

[60] *Booker*, 543 U.S. at 259. 18 U.S.C. § 3553(a) outlines the factors considered at sentencing:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for—
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
>
> . . . .
>
> (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code . . . ;
>
> (5) any pertinent policy statement—
>
> (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code . . . ;
>
> . . . .
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a) (2000 & Supp. IV 2004).

[61] *Booker*, 543 U.S. at 261.

[62] The United States Courts of Appeal for the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits have all permitted consideration of acquitted conduct at sentencing to increase a defendant's offense level. *See* United States v. Castillo, 186 F. App'x 25, 27 (2d Cir. 2006); United States v. Samet, 200 F. App'x 15, 22 (2d Cir. 2006); United States v. Wu, 183 F. App'x 34, 35 (2d Cir. 2006); United States v. Hayward, 177 F. App'x 214, 215 (3d Cir. 2006) ("[A] 'jury's verdict of acquittal does not

alters the Guidelines range and increases the sentence length.[63] Appellate courts have reasoned that considering acquitted conduct at sentencing does not violate a defendant's Sixth Amendment right to trial by jury or Fifth Amendment right to due process because the Supreme Court did not overrule *United States v. Watts*[64] and did not excise 18

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prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.'" (quoting United States v. Watts, 519 U.S. 148, 157 (1997))); United States v. Cooper, 201 F. App'x 155, 155–56 (4th Cir. 2006); United States v. Jones, 194 F. App'x 196, 197–98 (5th Cir. 2006); United States v. High Elk, 442 F.3d 622, 626 (8th Cir. 2006) ("Even post-*Booker*, for purposes of calculating the advisory guidelines range, the district court may find by a preponderance of the evidence facts regarding conduct for which the defendant was acquitted." (citing United States v. Radtke, 415 F.3d 826, 844 (8th Cir. 2005))); United States v. Armstrong, 165 F. App'x 768, 772 (11th Cir. 2006); United States v. Coleman, 184 F. App'x 848, 849–50 (11th Cir. 2006); United States v. Gilart, 162 F. App'x 880, 883 (11th Cir. 2006); United States v. Faust, 456 F.3d 1342, 1347 (11th Cir. 2006) ("[W]e held nothing in *Booker* prohibits courts from considering relevant acquitted conduct when the Sentencing Guidelines are applied as advisory." (citing United States v. Duncan, 400 F.3d 1297, 1304–05 (11th Cir. 2005))); United States v. Hamaker, 455 F.3d 1316, 1336 (11th Cir. 2006); United States v. Motes, 196 F. App'x 877, 881 (11th Cir. 2006) ("'[R]elevant conduct of which a defendant was acquitted nonetheless may be taken into account in sentencing for the offenses of conviction, as long as the government proves the acquitted conduct relied upon by a preponderance of the evidence,' and the judge does not impose a sentence that exceeds what is authorized by the jury verdict." (quoting *Duncan*, 400 F.3d at 1304–05)); United States v. Phillips, 177 F. App'x 942, 961–62 (11th Cir. 2006); United States v. Poyato, 454 F.3d 1295, 1297 (11th Cir. 2006); United States v. Dorcely, 454 F.3d 366, 372 (D.C. Cir. 2006) ("While the Court did not expressly address the sentencing court's consideration of acquitted conduct, we believe its language is broad enough to allow consideration of acquitted conduct so long as the court 'deems [it] relevant.'" (alteration in original) (quoting *Booker*, 543 U.S. at 233)); United States v. Vaughn, 430 F.3d 518, 521 (2d Cir. 2005) ("[A]fter *Booker*, district courts may also continue to take into account acquitted conduct when sentencing defendants without violating the Due Process Clause . . . ."); United States v. Williams, 399 F.3d 450, 453–54 (2d Cir. 2005); United States v. Ashworth, 139 F. App'x 525, 527 (4th Cir. 2005); United States v. Williams, 150 F. App'x 221, 224–25 (4th Cir. 2005); United States v. Price, 418 F.3d 771, 787 (7th Cir. 2005) ("[A] court is permitted to consider a broad range of information for sentencing purposes, including conduct related to charges of which the defendant was acquitted."); United States v. Manning, 147 F. App'x 24, 29 (10th Cir. 2005) ("We have held that *Booker* does not alter the ability of sentencing courts to increase a defendant's sentence on the basis of acquitted conduct as long as the government demonstrates responsibility for the acquitted conduct by a preponderance of the evidence." (citing United States v. Magallanez, 408 F.3d 672, 683–85 (10th Cir. 2005))); United States v. Bragg, 148 F. App'x 855, 860 (11th Cir. 2005); United States v. Carroll, 140 F. App'x 168, 170 (11th Cir. 2005); United States v. Duncan, 400 F.3d 1297, 1304–05 (11th Cir. 2005); United States v. McKeever, 149 F. App'x 921, 925 (11th Cir. 2005); United States v. Paz, No. 04-13385, slip op. 2005 WL 1540136, at *6 (11th Cir. July 1, 2005); United States v. Small, 149 F. App'x 841, 842–43 (11th Cir. 2005); United States v. Tynes, 160 F. App'x 938, 940 (11th Cir. 2005).

[63] *See supra* text accompanying notes 42–45.

[64] In *United States v. Booker*, the Court confined the application of *Watts* to cases where there is "[no] contention that the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment." 543 U.S. at 240. The Court in *Booker* further noted that "*Watts* . . . presented a very narrow question

U.S.C. § 3661, the statute construed by the *Watts* Court to permit sentencing courts to consider acquitted conduct.[65] The Tenth and Eleventh Circuits have expressed concern regarding the use of acquitted conduct, but nonetheless continue to allow its use.[66]

2. District Court Consideration of Acquitted Conduct

After *Booker*, eight district courts have declined to consider acquitted conduct at sentencing or have required proof of that conduct by a higher standard than a preponderance of the evidence.[67] Because the Guidelines Manual requires consideration of acquitted conduct for

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regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument." *Id.* at 240 n.4.

[65] *See Dorcely*, 454 F.3d at 371–72; *Ashworth*, 139 F. App'x at 527; *Duncan*, 400 F.3d at 1304–05; *Magallanez*, 408 F.3d at 684–85; *Price*, 418 F.3d at 787–88; *Vaughn*, 430 F.3d at 525–27.

[66] Judge Barkett on the Eleventh Circuit wrote a concurrence in *United States v. Faust*, expressing discontent with the continued use of acquitted conduct:

> I join the majority in affirming Faust's conviction, but concur in its sentencing decision only because I am bound by Circuit precedent. Although *United States v. Duncan*, 400 F.3d 1297 [(11th. Cir. 2005)], expressly authorized the district court to enhance Faust's sentence for conduct of which a jury found him innocent, I strongly believe this precedent is incorrect, and that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment.

Faust, 456 F.3d at 1349 (Barkett, J., concurring).

The Tenth Circuit has also acknowledged that a defendant "might well be excused for thinking that there is something amiss" with using acquitted conduct "to sentence him to an additional 43 months in prison in the face of a jury verdict finding facts under which he could be required to serve no more than 78 months." *Magallanez*, 408 F.3d at 683.

[67] *See* United States v. Wendelsdorf, 423 F. Supp. 2d 927, 935 (N.D. Iowa 2006); United States v. Ibanga, 454 F. Supp. 2d 532, 539 (E.D. Va. 2006); United States v. Baldwin, 389 F. Supp. 2d 1, 2 (D.D.C. 2005); United States v. Pimental, 367 F. Supp. 2d 143, 154 (D. Mass. 2005); United States v. Huerta-Rodriguez, 355 F. Supp. 2d 1019, 1028 (D. Neb. 2005); United States v. Carvajal, No. 04 Cr. 222(AKH), 2005 WL 476125, at *4–6 (S.D.N.Y. Feb. 17, 2005); United States v. Coleman, 370 F. Supp. 2d 661, 670 (S.D. Ohio 2005); United States v. Gray, 362 F. Supp. 2d 714, 720 (S.D. W. Va. 2005). *But see* United States v. Brown, 439 F. Supp. 2d 134, 137 (D.D.C. 2006) ("'[E]nhancement of [a] sentence for [a] convicted offense based on relevant acquitted conduct proven only by a preponderance of the evidence does not present a Sixth Amendment violation.'" (quoting United States v. Edwards, 427 F. Supp. 2d 17, 20 (D.D.C. 2006) ("*Booker* leaves intact the longstanding authority of the sentencing judge to consider acquitted conduct proven by a preponderance of the evidence, without violating the Sixth Amendment."))); United States v. Santiago, 413 F. Supp. 2d 307, 318 (S.D.N.Y. 2006) (noting that district courts may find facts relevant to sentencing by a preponderance of the evidence "'where the jury acquitted the defendant of that conduct.'" (quoting *Vaughn*, 430 F.3d at 527)); United States v. Agostini, 365 F. Supp. 2d 530, 534 (S.D.N.Y. 2005) ("The Supreme Court's decision in *Booker* did not alter the court's ability to enhance a defendant's sentence on the basis of acquitted conduct.").

certain offenses,[68] a court must account for its refusal to consider it. These district courts have employed the following legal rationales (complete with literary references):[69]

- *Watts* permits, but does not require, courts to consider acquitted conduct at sentencing;[70]
- acquitted conduct should be considered by a reasonable doubt or by a clear-and-convincing standard at sentencing;[71]
- considering acquitted conduct is incongruent with the sentencing factors of promoting respect for the law and providing just punishment for the offense.[72]

The last section of this Note discusses the logic of these rationales.

III. CONSTITUTIONAL ARGUMENTS AGAINST THE USE OF ACQUITTED CONDUCT AFTER *BOOKER*

A. Use of Acquitted Conduct May Violate the Sixth Amendment Right to a Jury Trial

1. Appellate Courts May Presume That a Sentence Within the Guidelines Range is Reasonable

The Supreme Court in *Rita v. United States* recently determined that the law permits courts of appeal to "presume that a sentence imposed within a properly calculated . . . Guidelines range is a reasonable sentence."[73] A sentence outside of the Guidelines range, however, will not be presumed unreasonable.[74] The Court allows this presumption of reasonableness because both the sentencing judge and

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[68] *See supra* text accompanying notes 25–29.

[69] The court in *Ibanga* ended its opinion with an observation from Mr. Bumble, a character in *Oliver Twist*: "If the law supposes that, . . . the law is an ass—an idiot." *Ibanga*, 454 F. Supp. 2d at 543 (quoting CHARLES DICKENS, OLIVER TWIST 463 (Signet Classics 3d ed. 1961) (1838)). Likewise the court in *United States v. Wendelsdorf* admitted that its reading of *Watts*—holding acquitted conduct as an optional consideration—is much like Balthasar in his "creative reading" to literally avoid exacting a "pound of flesh." *Wendelsdorf*, 423 F. Supp. 2d at 929 n.1 (citing WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1).

[70] *Id.* at 935.

[71] United States v. Baldwin, 389 F. Supp. 2d 1, 2 (D.D.C. 2005); United States v. Pimental, 367 F. Supp. 2d 143, 154 (D. Mass. 2005); United States v. Coleman, 370 F. Supp. 2d 661, 670 (S.D. Ohio 2005).

[72] *Ibanga*, 454 F. Supp. 2d at 539; *see* 18 U.S.C. § 3553(a)(2)(A) (2000).

[73] 127 S. Ct. 2456, 2459 (2007).

[74] *Id.* at 2459, 2462.

the Commission are charged with carrying out the goals in 18 U.S.C. § 3553(a).[75] Thus, a sentence within the Guidelines range reflects that both the sentencing judge and the Sentencing Commission have reached the same conclusion.[76] The Court emphasizes that only appellate courts may apply this presumption[77] and admits that such a presumption may "encourage sentencing judges to impose Guidelines sentences."[78]

Concurring in *Rita*, Justice Scalia argued that the majority's endorsement of substantive review for reasonableness signifies an inevitable return to pre-*Booker* sentencing practices.[79] In conducting a substantive review, an appellate court examines the sentencing court's consideration of the Section 3553(a) factors with respect to the defendant's unique circumstances. For example, in *Rita* the Court reviewed the sentencing court's consideration of the defendant's "physical ailments"[80] and "lengthy military service"[81] and agreed that these circumstances are "insufficient to warrant a sentence lower than the Guidelines range of 33 to 45 months."[82] The Court in *Rita* acknowledged that a substantive review may "increase[] the likelihood that the judge, not the jury, will find 'sentencing facts' . . . ."[83] To meaningfully guard against Sixth Amendment violations, Justice Scalia proposed a procedural review for reasonableness.[84] He explained that the Guidelines range is typically calculated using judge-found facts.[85] Reviewing the procedures used to calculate the Guidelines range would reveal whether the judge's, rather than the jury's, fact-finding determined the upper limits of a sentence.[86] Thus, he concluded a procedural, rather than substantive, review for reasonableness more

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75 *Id.* at 2462–63.

76 *Id.* at 2463.

77 *Id.* at 2465.

78 *Id.* at 2467. One district court has acknowledged that "[t]here is no question that a district judge sitting within the Fourth Circuit varies from a Guidelines sentence at his or her peril." United States v. Ibanga, 454 F. Supp. 2d 532, 538 (E.D. Va. 2006).

79 *Rita*, 127 S. Ct. at 2476–79 (Scalia, J., concurring in part).

80 *Id.* at 2469 (majority opinion).

81 *Id.*

82 *Id.*

83 *Id.* at 2465. Despite this increased likelihood, the Court concluded that the presumption of reasonableness does not violate the Sixth Amendment. *Id.* The Court reasoned that the Sixth Amendment does not "automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence." *Id.* at 2465–66. It only "forbids a judge to increase a defendant's sentence [when] the judge finds facts that the jury did not find (and the offender did not concede)." *Id.* at 2466 (emphasis omitted).

84 *Id.* at 2476 (Scalia, J., concurring in part).

85 *Id.* at 2477.

86 *Id.* at 2482–83.

effectively guards against the Sixth Amendment violations found in *Booker*.[87]

Rita's effect on using acquitted conduct at sentencing may depend on whether appellate courts review a sentencing court's determinations substantively or procedurally. When the Guidelines require sentencing courts to use acquitted conduct in calculating the Guidelines range,[88] *Rita* allows an appellate court to presume that a sentence within that range is reasonable.[89] A substantive review may allow an appellate court to overlook the constitutionality of using acquitted conduct because the procedures used to calculate the range will not be scrutinized and the Guidelines range will be presumed reasonable. The appellate court only reviews the trial court's consideration of Section 3553(a) sentencing factors. In conducting a procedural review, however, the appellate court examines whether the trial judge has unconstitutionally "increase[d] a defendant's sentence . . . [based on] facts that the jury did not find (and the offender did not concede)."[90] A procedural review requires an appellate court to examine whether the sentencing court used acquitted conduct to increase the defendant's offense level, thereby increasing the Guidelines range. Thus, the appellate court will be directly confronted with using acquitted conduct at sentencing post-*Booker* to increase the sentence.

A substantive reasonableness review, however, does not necessarily preclude a procedural reasonableness review. The majority opinion in *Rita* does not forbid a procedural reasonableness review and indirectly implies such a review; the presumption of reasonableness only applies to a sentence "imposed within a *properly calculated* . . . Guidelines range . . . ."[91] Thus, an appellate court may still examine whether the Guidelines range was improperly calculated using facts that a jury did not find and the defendant did not admit. The *Rita* Court's emphasis on a substantive—not procedural—reasonableness review may simply reflect that the issue in *Rita* concerned the substantive not procedural components of Rita's sentence.[92] Only future cases will demonstrate *Rita*'s effects on using acquitted conduct at sentencing.

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87 *Id.* at 2482–84.

88 *See supra* text accompanying note 52.

89 *Rita*, 127 S. Ct. at 2459.

90 *Id.* at 2466.

91 *Id.* at 2459 (emphasis added).

92 Rita's counsel had argued that his "[p]hysical condition, vulnerability in prison and the military service," justified a sentence lower than one within the Guidelines range in light of the sentencing factors in 18 U.S.C. § 3553(a). *Id.* at 2461. The Court reviewed the sentence substantively by considering the effect Rita's special circumstances had on the final sentence. *Id.* at 2469–70.

2. The Tail of Acquitted Conduct Wags the Dog of Sentencing

Using acquitted conduct may also violate the Sixth Amendment right to trial by jury if the acquitted conduct alone disproportionately increases the sentence. In *Apprendi v. New Jersey*, the Court held that "due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.'"[93] The length of the sentence reflects the degree of "'criminal culpability'" because a "heightened stigma [is] associated with an offense the legislature has selected as worthy of greater punishment . . . ."[94] The *Apprendi* Court found that a judicial determination that doubled a sentence from ten to twenty years is "'a tail which wags the dog of the substantive offense.'"[95] Similarly, in *Jones v. United States*, the Court considered a federal carjacking statute as containing three separate offenses rather than one crime with three possible maximum penalties because the potential penalty might increase by two-thirds through a judicial determination.[96] In *Ibanga*, a post-*Booker* case, the Guidelines range calculated with the acquitted conduct would have increased the sentence by two-thirds, yet the court was obliged to explain its decision not to use acquitted conduct at sentencing.[97]

The reasoning in *Apprendi* and *Jones*, together with *Booker*, strengthens the argument that using acquitted conduct violates the Sixth Amendment when the acquitted conduct disproportionately increases the sentence.[98] The first half of *Booker* emphasizes that any fact increasing the maximum sentence, unauthorized by a jury verdict, "must be admitted by the defendant or proved to a jury beyond a reasonable doubt."[99] A jury acquittal leaves no doubt that the jury has rejected the sentence-enhancing fact by a reasonable doubt.

B. Using Acquitted Conduct Does Not Violate Procedural Due Process

Because a criminal trial and sentencing hearing are viewed as separate proceedings, procedural Due Process does not require courts to

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[93] 530 U.S. 466, 484 (2000) (quoting Almendarez-Torres v. United States, 523 U.S. 224, 251 (1998) (Scalia, J., dissenting)).

[94] *Id.* at 495 (citation omitted).

[95] *Id.* (quoting McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986)).

[96] 526 U.S. 227, 243–44, 251–52 (1999).

[97] United States v. Ibanga, 454 F. Supp. 2d 532, 538–42 (E.D. Va. 2006).

[98] The Court in *Watts* commented that the use of acquitted conduct by a preponderance of the evidence standard to substantially increase a sentence might be unconstitutional. 519 U.S. 148, 156–57 (1997). The Court ultimately declined to decide the issue because "[t]he cases before [it] . . . [did] not present such exceptional circumstances . . . ." *Id.*

[99] *Booker*, 543 U.S. at 244.

use the Federal Rules of Evidence or a specific standard of proof at sentencing, even with respect to acquitted conduct.[100] The Fourteenth Amendment requires proof beyond a reasonable doubt at a criminal trial but not at the sentencing proceeding.[101] The Court in *McMillan v. Pennsylvania* held that a judicial determination by a preponderance of the evidence did not violate the Due Process Clause, even though the judicial determination resulted in a mandatory minimum sentence of five years.[102] The *McMillan* Court, relying on *Williams v. New York*, noted that "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all."[103] In *Williams*, the jury returned a guilty verdict and recommended a life sentence, but the judge imposed the death penalty based on "additional information" that could not be presented to the jury.[104] The *Williams* Court explained that "[h]ighly relevant—if not essential—to [a judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."[105]

C. Assessment of Constitutional Arguments

The constitutional arguments against using acquitted conduct at sentencing are stronger after *Booker*, but still weak considering the Court's comprehensive sentencing jurisprudence. The exact point at which the use of acquitted conduct disproportionately controls the length of the sentence is arbitrary. This disproportional-length argument seeks to curtail the more flagrant results of an already questionable practice. It does not answer why a jury acquittal fails to protect a defendant from punishment for conduct underlying the acquitted charge. Moreover, the "tail wags the dog" and presumption arguments are not unique to the use of acquitted conduct. These arguments apply equally to any factual determination made by a judge at sentencing. The Supreme Court's denial of certiorari to appeals from circuit courts that approve using acquitted conduct at sentencing also indicates these constitutional arguments are, at this time, likely futile.[106]

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[100] *See supra* text accompanying note 47.

[101] *See In re* Winship, 397 U.S. 358, 364 (1970). While *Winship* was decided in the pre-Guidelines era, post-Guidelines cases have clarified that the reasonable doubt standard is not required at sentencing proceedings. *See Watts*, 519 U.S. at 151; McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986).

[102] 477 U.S. at 81, 91–92.

[103] *Id.* at 91 (citing *Williams*, 337 U.S. at 246–47).

[104] *Williams*, 337 U.S. at 242–43.

[105] *Id.* at 247.

[106] United States v. Wu, 183 F. App'x 34, 35 (2d Cir.), *cert. denied*, 127 S.Ct. 320 (2006); United States v. Hayward, 177 F. App'x 214, 215 (3d Cir.) ("[A] 'jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the

IV. PUBLIC POLICY ARGUMENTS AGAINST THE USE OF ACQUITTED CONDUCT

A. Restoring the Jury Trial's Power

While constitutional arguments are relatively weak, public policy arguments against acquitted conduct center on preserving a meaningful jury trial. Using acquitted conduct jeopardizes the jury trial's role in legitimizing punishment. It also denies the jury meaningful participation in the administration of government.

1. The Jury Trial's Significance

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[107] This presumption of innocence alongside the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free" define the foundation of American criminal law.[108] A judge's consideration of acquitted conduct nullifies these principles and usurps the jury's historic role as fact finder.[109]

Traditionally, "it was the duty of the court to expound the law and that of the jury to apply the law."[110] Trial courts in early America had "minimal flexibility in the imposition of a sentence" because punishments were "legislatively fixed."[111] Courts were not confronted with today's expansive statutory ranges.[112] The judge's role during colonial times was confined to the "ministerial task" of

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evidence.'" (quoting United States v. Watts, 519 U.S. 148, 157 (1997)), *cert. denied*, 127 S. Ct. 270 (2006)); United States v. Armstrong, 165 F. App'x 768, 772 (11th Cir.), *cert. denied*, 127 S. Ct. 109 (2006); United States v. Gilart, 162 F. App'x 880, 883 (11th Cir.), *cert. denied*, 126 S. Ct. 2055 (2006); United States v. Vaughn, 430 F.3d 518, 521 (2d Cir.) ("[A]fter *Booker*, district courts may also continue to take into account acquitted conduct when sentencing defendants without violating the Due Process Clause . . . ."), *cert. denied*, 547 U.S. 1060 (2006); United States v. Ashworth, 139 F. App'x 525, 527 (4th Cir.), *cert. denied*, 546 U.S. 1045 (2005); United States v. McKeever, 149 F. App'x 921, 925 (11th Cir. 2005), *cert. denied*, 546 U.S. 1129 (2006); United States v. Tynes, 160 F. App'x 938, 940 (11th Cir. 2005), *cert. denied*, 547 U.S. 1085 (2006).

[107] Coffin v. United States, 156 U.S. 432, 453 (1895). "Greenleaf traces this presumption to Deuteronomy, and quotes Mascardus De Probationibus to show that it was substantially embodied in the laws of Sparta and Athens." *Id.* at 454 (citation omitted).

[108] *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

[109] *See infra* text accompanying notes 110–15.

[110] Sparf v. United States, 156 U.S. 51, 106 (1895).

[111] Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1210 (1993).

[112] For instance, the statutory sentencing range for laundering money is "a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both." 18 U.S.C. § 1956(a)(1) (2000).

"[p]ronounc[ing] . . . the sentence" because the judge "[had] limited discretion once a jury convicted . . . ."[113] The Supreme Court in the nineteenth century realized that the judge and jury functions "cannot be confounded or disregarded without endangering the stability of public justice, as well as the security of private and personal rights."[114] Confounding the functions of judge and jury resulted in the dilemma in *Booker*: "[H]ow the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government . . . ."[115]

The remedial *Booker* opinion implies that juries cannot be entrusted with complex decisions;[116] but the jury's power of nullification and review refutes this implication. Jury nullification refers to the jury's power to disregard a law altogether, whereas jury review refers to the jury's power to refuse to enforce laws the jury finds unconstitutional.[117] Jury nullification occurs when the jury finds that a defendant committed the charged offense yet "refuses . . . convict[ion] for equitable, prejudicial, or arbitrary reasons."[118] While jury nullification violates the juror oath, "courts may not wage direct war against jury independence."[119] With respect to jury review, Justice Samuel Chase was almost impeached because he refused "to instruct the jury regarding its power to review [the law] for unconstitutionality"[120] and blocked counsel from arguing law to the jury in a criminal case.[121] The jury's authority has eroded with Supreme Court jurisprudence, and perhaps, the jury should not be entrusted with all legal matters.[122] Nonetheless, the jury remains competent to serve as arbiter over complex factual matters.[123]

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[113] Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 SUFFOLK U. L. REV. 419, 424 (1999).

[114] *Sparf*, 156 U.S. at 106.

[115] *Booker*, 543 U.S. at 237.

[116] *Id.* at 254 ("How would courts and counsel work with an indictment and a jury trial that involved not just whether a defendant robbed a bank but also how?").

[117] Lear, *supra* note 111, at 1228.

[118] Chaya Weinberg-Brodt, Note, *Jury Nullification and Jury-Control Procedures*, 65 N.Y.U. L. REV. 825, 826 (1990); *see* Lear, *supra* note 111, at 1228.

[119] Weinberg-Brodt, *supra* note 118; *see* Lear, *supra* note 111, at 1236–37.

[120] Lear, *supra* note 111, at 1228.

[121] Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183, 1191–92 (1991).

[122] *Id.* at 1194–95.

[123] *See* United States v. Kandirakis, 441 F. Supp. 2d 282, 331 (W.D. Mass. 2006) ("As any trial judge will confirm, an American jury can skillfully and impartially handle all these matters with discernment and dispatch."). The court in *Kandirakis* allowed the jury to make complex factual decisions regarding Guidelines sentencing enhancements; it then considered the jury's determinations at sentencing. *Id.* Other courts have implemented this practice, as well, demonstrating that juries are capable of deciding complex factual issues.

2. Jury Duty as Meaningful Democratic Participation

"The jury as an institution not only guards against judicial despotism, but also provides an opportunity for lay citizens to become both pupils of and participants in our legal and political system."[124] The jury experience was thought to "'[teach] men to practice equity . . . to judge his neighbor as he would himself be judged . . . .'"[125] In exercising such judgment, the jury functions as a "conduit for community conscience in culpability assessment."[126] A sentence in opposition to the jury verdict teaches the juror as pupil and legal participant that her "efforts in assessing the evidence and weighing the different charges were of limited importance, overridden by the contrary opinion of one judge."[127]

Using acquitted conduct also denigrates the juror's participation in the administration of government and "skews the power relationship between the federal prosecutor and the petit jury."[128] The jury system, as Tocqueville noted, "invests the people, or that class of citizens, with the direction of society."[129] The jury, through an acquittal, wielded influence over law-enforcement decisions.[130] Specifically, the federal petit jury, "through the Sixth Amendment 'district' requirement," provided both "community oversight of the United States Attorney" and "a strong check to potential prosecutorial abuse."[131] An acquittal demonstrated to the executive the community's tolerance for certain crimes and classes of offenders.[132] When acquitted conduct is used at sentencing, the jury's function as overseer of the United States Attorney becomes obsolete.[133] Diminishing the jury's power resurrects the Founders' pivotal concern that "'lack of adequate provision for jury trial . . . would fatally weaken the role of the people in the administration of government.'"[134]

See id. at 331 app. (referencing and providing in the appendix jury verdicts from several recent federal district court cases).

[124] United States v. Ibanga, 454 F. Supp. 2d 532, 541 (E.D. Va. 2006) (citing Amar, *supra* note 121, at 1186).

[125] Amar, *supra* note 121, at 1186 (quoting 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 295 (Phillips Bradley ed., Vintage Books 1961) (1831)).

[126] Johnson, *supra* note 2, at 185.

[127] *Id.*

[128] Lear, *supra* note 111, at 1233.

[129] Amar, *supra* note 121, at 1185 (quoting TOCQUEVILLE, *supra* note 125, at 293).

[130] Lear, *supra* note 111, at 1233.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] Amar, *supra* note 121, at 1187 (quoting HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE *FOR* 19 (1981)).

B. Consequences of Abolishing the Use of Acquitted Conduct

Amendments to prohibit the use of acquitted conduct as relevant conduct in calculating the applicable Guidelines offense level were considered by the Commission in 1993 and 1994 and were ultimately rejected.[135] While the proposed amendments did not directly prohibit acquittal-based upward departures,[136] the Commission most likely rejected them for two related reasons. First, abolishing the use of acquitted conduct might lead to abolishing unadjudicated conduct at sentencing.[137] The question whether to "prohibit sentencing judges from enhancing sentences on the basis of acquitted conduct when they can enhance sentences on the basis of the same conduct if it is not charged by the prosecutor,"[138] seemed unanswerable. Second, abolishing the use of acquitted conduct (which might lead to abolishing uncharged conduct) might eventually result in abolishing the use of relevant conduct at sentencing.[139] Such a result would seem undesirable to the Commission because relevant conduct is the "cornerstone" of the Guidelines.[140]

Abolishing acquitted conduct but not uncharged conduct is justifiable because fundamental, normative, and logical differences exist between the two.[141] Acquitted conduct differs from unadjudicated conduct, which refers to "conduct potentially characterized as criminal for which the offender's legal guilt has not been formally adjudicated, either through trial or guilty plea."[142] Because acquitted conduct is different in principle than uncharged conduct, abolishing acquitted conduct legitimizes and preserves the purpose of relevant conduct.

1. The Difference Between Use of Acquitted and Uncharged Conduct

Using acquitted conduct at sentencing gives the prosecutor a second opportunity to prove to the court what the jury rejected, while using uncharged conduct presents the first bite at the apple. In *United States v. Coleman*, the court acknowledged that eliminating acquitted conduct possibly "'creat[es] a temptation for prosecutors to decline to bring charges that they fear could result in acquittal and wait to bring

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[135] *See* Sentencing Guidelines for United States Courts, 57 Fed. Reg. 62,832, 62,832 (proposed Dec. 31, 1992); 58 Fed. Reg. 67,522, 67,541 (proposed Dec. 21, 1993); *see also* Johnson, *supra* note 2, at 155–56, nn.9–12.

[136] Johnson, *supra* note 2, at 191.

[137] *Id.*

[138] *Id.* at 192.

[139] *Id.*

[140] *See* Wilkins & Steer, *supra* note 15, at 495–96.

[141] Johnson, *supra* note 2, at 192–93.

[142] *Id.* at 157–58.

supporting facts to the court's attention at sentencing.'"[143] Nonetheless, the court concluded that calling additional witnesses to the stand during sentencing to provide evidence of an acquitted charge allows "the prosecutor to try the same facts in front of two different fact-finders."[144]

Generally, prosecutors are unlikely to forego formal charging because they are interested primarily in increasing conviction rates and gaining greater leverage to plea bargain.[145] One study of prosecutors' actual behavior indicates that prosecutors are more focused on conviction than on sentencing.[146] While prosecutors theoretically could forego charging crimes and instead use uncharged conduct to increase a sentence, they tend to "reduce sentencing exposure to induce pleas."[147] During plea bargaining, the prosecutor gains leverage through dismissing counts. Undercharging diminishes the prosecutor's bargaining power. Thus, the mechanics of plea bargaining counteract a possible temptation to undercharge. Finally, "to the extent prosecutors focus on Guidelines sentencing, they generally act in concert with defense attorneys to minimize sentencing exposure."[148]

2. The Effect of Abolishing Acquitted Conduct on Relevant Conduct

Continuing to use uncharged conduct, but not acquitted conduct, at sentencing allows a sentence to reflect a defendant's real conduct without ignoring the jury's verdict. "[A]cquittal carries a message about the defendant's legal innocence that mere absence of a conviction does not."[149] If acquitted conduct but not uncharged conduct is abolished, then the use of relevant conduct at sentencing remains relatively unaltered.[150] The sentencing judge is unable to use only one *species* of relevant conduct: acquitted conduct. The broader ban of uncharged conduct, however, threatens the *genus* of relevant conduct.

Abolishing uncharged conduct (a large category of relevant conduct) promotes a pure-conviction system in which the conviction alone determines the sentence.[151] The judge's discretion at sentencing would

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[143] 370 F. Supp. 2d 661, 673 (S.D. Ohio 2005) (quoting Johnson, *supra* note 2, at 200).

[144] *Id.* at 672–73.

[145] Johnson, *supra* note 2, at 200 n.263 (citing Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 535, 546–48 (1992)).

[146] Johnson, *supra* note 2, at 200.

[147] *Id.* at 200 n.263 (citing Nagel & Schulhofer, *supra* note 141).

[148] *Id.* at 200.

[149] *Id.* at 194.

[150] *Id.* at 194–95.

[151] *Id.* at 195.

decrease, while the prosecutor's power to determine the sentence would increase.[152] Uncharged conduct as relevant conduct often aids the judge in assessing a defendant's culpability. Convictions alone cannot determine culpability. For example, persons convicted of conspiracy to launder money may receive different sentences depending on whether they organized the conspiracy or served merely as couriers.[153] Sentencing judges forbidden to use uncharged conduct would often impose sentences based solely on conviction.[154] Thus, the prosecutor's charging decision would directly determine the sentence.[155] In designing the Guidelines, the Commission attempted to avoid this exact result.[156]

V. PROPOSAL

A. Congress Should Abolish the Use of Acquitted Conduct at Sentencing

The Commission should recommend abolishing the use of acquitted conduct at sentencing, and Congress should authorize this change.[157] The Guidelines must conform to "all pertinent provisions of title 18."[158] Thus, the Guidelines must be consistent with 18 U.S.C. § 3661 that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[159] This statute served partly as the basis for the Supreme Court's decision to permit consideration of acquitted conduct at sentencing.[160] This statute also serves as the basis for the appellate courts' continued approval of acquitted conduct after

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[152] *Id.* at 194–95.

[153] *See supra* text accompanying notes 34–39.

[154] Johnson, *supra* note 2, at 195.

[155] *Id.* at 194–95.

[156] *Id.* at 194; *see* Lear, *supra* note 111, at 1204–05.

[157] *Compare* United States v. Watts, 519 U.S. 148, 158 (1997) (Scalia, J., concurring) ("[N]either the Commission nor the courts have authority to decree that information which would otherwise justify enhancement of sentence or upward departure from the Guidelines may not be considered for that purpose (or may be considered only after passing some higher standard of probative worth than the Constitution and laws require) if it pertains to acquitted conduct."), *with id.* at 159 (Breyer, J., concurring) ("Given the role that juries and acquittals play in our system, the Commission could decide to revisit this matter in the future. For this reason, I think it important to specify that, as far as today's decision is concerned, the power to accept or reject such a proposal remains in the Commission's hands."), *and* Johnson, *supra* note 2, at 187 ("The Commission clearly has the power to bar consideration of acquitted conduct under the modified real-offense model as well.").

[158] *See* 28 U.S.C. § 994(b)(1) (2000).

[159] 18 U.S.C. § 3661 (2000). Justice Scalia's concurrence in *Watts* outlines why Congress and not the Commission has the authority to abolish acquitted conduct. *Watts*, 519 U.S. at 158 (Scalia, J., concurring). *But see id.* at 159 (Breyer, J., concurring); Johnson, *supra* note 2, at 186–88.

[160] *See Watts*, 519 U.S. at 151–52.

Booker.[161] The Commission may risk violating this statute if it abolishes acquitted conduct at sentencing without Congressional approval.[162] Thus, the Commission should recommend amending this statute to Congress.[163] After all, the *Booker* Court placed "[t]he ball . . . in Congress' court . . . to devise and install, long term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice."[164]

B. Model Legislation

Congress should amend 18 U.S.C. § 3661 to eliminate the use of acquitted conduct as relevant conduct and its use as a basis for departing upward from the Guidelines range.[165] The following suggested statutory language achieves these two objectives:

> § 3661—Use of Information for Sentencing.
>
> No limitation shall be placed on the information concerning the background, the character, and the conduct of a person convicted of an offense which a court of the United States may receive and consider for purpose of imposing an appropriate sentence, except:
>
> (a) conduct for which a defendant is formally charged and adjudicated not guilty by the finder of fact shall not be considered relevant conduct under the United States Sentencing Guidelines Manual § 1B1.3 (2006);
>
> (b) conduct for which a defendant is formally charged and adjudicated not guilty by the finder of fact shall not constitute grounds for departure under the United States Sentencing Guidelines Manual § 5K2.0 (2006);

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[161] *See supra* text accompanying note 70.

[162] Violating 18 U.S.C. § 3661 is irrelevant, though, if 18 U.S.C. § 3661, as construed, violates the Sixth Amendment. "It makes no difference whether it is a legislature, a Sentencing Commission, or an appellate court that usurps the jury's prerogative." United States v. Rita, 127 S. Ct. 2456, 2479 (2007) (Scalia, J., concurring).

[163] 28 U.S.C. § 994(w)(3) requires the Commission to "submit to Congress at least annually . . . any recommendations for legislation that the Commission concludes is warranted . . . ." 28 U.S.C. § 994(w)(3) (2000). While scholars note that Congress might not pursue such legislation because of the "need to appear tough on crime [and] the press of other legislative matters," Congress may present the legislation as essential to restoring jurors' authority in trials. Johnson, *supra* note 2, at 187 (citing Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079 (1993)).

[164] 543 U.S. 220, 265 (2005).

[165] *See* Johnson, *supra* note 2, at 189–91 (proposing two amendments to the Guidelines to eliminate consideration of acquitted conduct in the sentencing process).

(c) the court shall determine the scope of conduct for which a defendant is formally charged and adjudicated not guilty by the finder of fact under Section 3661 (a) & (b); and

(d) when a dispute arises as to which conduct should be excluded for purposes of sentencing, the defendant bears the burden of persuasion for any conduct to be excluded under Section 3661 (a) & (b).[166]

C. How Federal District Courts Should Treat Acquitted Conduct Until Congress Acts

Sentencing courts may decide case by case that using acquitted conduct contravenes 18 U.S.C. § 3553(a) considerations "to promote respect for the law, and to provide just punishment for the offense."[167] Through this approach, the court in *United States v. Ibanga* avoided using acquitted conduct when it would have increased the maximum possible sentence from five to fifteen years.[168] These factors may be used to avoid acquitted conduct just as they may be used to avoid any other type of conduct that results in unjust punishment. Courts cannot use these factors to automatically ban the use of acquitted conduct in every case. Such a holding would violate 18 U.S.C. § 3661, which bars any limitations on information used at sentencing. No magic number indicates when acquitted conduct becomes the "tail that wags the dog,"[169] but district courts, like the *Ibanga* court, should know it when they see it.[170]

This approach is more consistent with *United States v. Booker*, *United States v. Watts*, and 18 U.S.C. § 3661 than other approaches adopted by district courts since *Booker*. Choosing not to consider acquitted conduct because *Watts* permits, but does not mandate, its consideration at sentencing[171] undermines unanimous circuit-court

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[166] This proposal addresses similar objectives as Professor Barry L. Johnson's proposal, but it uses the vehicle of a statutory amendment through Congress instead of an amendment to the Guidelines through the Commission. *See id.*

[167] 18 U.S.C. § 3553(a)(1)(A) (2000). *See* United States v. Ibanga, 454 F. Supp. 2d 532, 538–43 (2006).

[168] *Id.*

[169] *See supra* text accompanying notes 91–94.

[170] Using different rationales, courts after *Booker* have declined to use acquitted conduct when it disproportionately affects sentence length. United States v. Pimental, 367 F. Supp. 2d 143, 156–57 (D. Mass. 2005) (declining the use of acquitted conduct when it resulted in a sentence anywhere from twenty-seven to thirty-three months and instead imposing a sentence of probation); United States v. Coleman, 370 F. Supp. 2d 661, 665, 670, 681 (S.D. Ohio 2005) (declining the use of acquitted conduct when it resulted in a sentence anywhere from thirty to thirty-seven months and instead imposing a sentence of one year).

[171] United States v. Wendelsdorf, 423 F. Supp. 2d 927, 935 (N.D. Iowa 2006).

opinions allowing the use of acquitted conduct when required by the Guidelines Manual.[172] Applying a reasonable doubt standard at sentencing[173] may seem to provide a viable solution, but its application may directly undermine a jury's verdict. Suppose a jury acquits a defendant due to reasonable doubt, but the court finds the defendant guilty of the acquitted conduct beyond a reasonable doubt. That court's finding effectively reverses the jury's acquittal. At least under current sentencing practices, the court deviates from the jury verdict through factual findings made by a lower evidentiary standard.[174]

All these discussed approaches present the danger (although to different degrees) of decreasing uniformity in sentences among similarly situated defendants. While all courts must take into account 18 U.S.C. § 3553(a),[175] courts will inevitably differ about when the use of acquitted conduct does not promote respect for the law nor provide just punishment for the offense. If *Watts* permits but does not mandate using acquitted conduct, then each court must decide for itself when to permit its use. Requiring the reasonable doubt standard allows the court to directly defy the jury verdict when it disagrees with it. Thus, none of these approaches presents a lasting solution to a continuing problem.

CONCLUSION

Conduct underlying a jury acquittal should not serve as the basis for increasing a sentence. Currently, district courts must justify any refusal to use acquitted conduct at sentencing. District courts may do so on the basis that acquitted conduct contravenes 18 U.S.C. § 3553(a).[176] However, Congress has the authority to, and should, provide a lasting solution by amending 18 U.S.C. § 3661 to prevent the use of acquitted conduct at sentencing.

Farnaz Farkish

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[172] *See supra* text accompanying note 62.

[173] United States v. Baldwin, 389 F. Supp. 2d 1, 2 (D.D.C. 2005); *Pimental*, 367 F. Supp. 2d at 154; *Coleman*, 370 F. Supp. 2d at 670.

[174] United States v. Watts, 519 U.S. 148, 156 (1997).

[175] *Booker*, 543 U.S. at 259.

[176] *See* 18 U.S.C. § 3553(a)(1)(A) (2000). *See, e.g.*, United States v. Ibanga, 454 F. Supp. 2d 532, 538–43 (2006).

GALLOWAY, SPLIT-INTEREST TRUSTS, AND UNDIVIDED PORTIONS: DOES DISALLOWING THE CHARITABLE CONTRIBUTION DEDUCTION OVERSTEP LEGISLATIVE INTENT?

"[I]n charity there is no excess."—Sir Francis Bacon[1]

INTRODUCTION

Private charitable giving has long been "praised as embodying humankind's noblest instincts—generosity, altruism, [and] benevolent initiative."[2] In modern-day America, "[t]he spirit of giving . . . [has become] embedded in American ways as part of a growing self-image of Americans as a generous and altruistic people."[3] America's culture, religions, and society, generally, ingrain within us the desire, perhaps even the felt obligation, to give for the benefit of others. Many fulfill this desire by making private contributions of wealth or property to charitable institutions. Considering this aspect of American culture, it is a logical conclusion that charitable giving, like other societal goods, should be, and is, purposefully encouraged by our current tax structure.

Congress encourages private charitable giving by allowing deductions for charitable contributions made by individuals[4] and estates.[5] With regard to estates, the "deduction has been allowed almost since the inception of a modern federal estate tax[, and Congress's] original underlying policy of encouraging charitable giving remains unchanged."[6] Today, "most studies find that the deduction in the estate tax for charitable contributions generates a significant increase in contributions at death."[7] This deduction's impact "can hardly be overstated. For estates filing returns in 1997 the aggregate total of

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1 FRANCIS BACON, *Of Goodness and Goodness of Nature*, *in* THE ESSAYS OR COUNSELS CIVIL AND MORAL (1625), *reprinted in* ESSAYS, ADVANCEMENT OF LEARNING, NEW ATLANTIS, AND OTHER PIECES 35, 35 (Richard Foster Jones ed., Odyssey Press 1937).

2 COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS, GIVING IN AMERICA: TOWARD A STRONGER VOLUNTARY SECTOR 53 (1975) [hereinafter GIVING IN AMERICA].

3 *Id.* at 65.

4 *See* I.R.C. §§ 170(a), 2522(a) (2000).

5 *See id.* § 2055(a) (2000); *see also* Burdick v. Comm'r, 979 F.2d 1369, 1372 (9th Cir. 1992) (explaining that Congress's "purpose [in] allowing charitable deductions is to encourage testators to make charitable bequests") (quoting Underwood v. United States, 407 F.2d 608, 610 (6th Cir. 1969)).

6 Edward J. Beckwith, *Estate and Gift Tax Charitable Deductions*, 839 TAX MGMT., 2001, at A-3 (footnote omitted). The charitable contribution deduction has existed in some form in the estate tax context since 1918. *Id.* at A-3 n.3.

7 William G. Gale & Joel Slemrod, *Overview* to RETHINKING ESTATE AND GIFT TAXATION 1, 54 (William G. Gale, James R. Hines, Jr. & Joel Slemrod eds., 2001).

reported *gross* estates was over $162 billion";[8] out of this aggregate, claimed charitable deductions totaled just over $14 billion.[9] When estates make charitable contributions through trusts that give both charitable and non-charitable beneficiaries interests in the same property—commonly termed "split-interest" trusts[10]—a conflict exists between the application of statutory language and legislative intent. The conflict arises over whether a charitable contribution deduction should be allowed and, if so, under which trust structures.

This Note will show why the rulings of the Internal Revenue Service ("IRS"), the United States District Court for the Western District of Pennsylvania, and the United States Court of Appeals for the Third Circuit in *Galloway v. United States*[11] demonstrate the need for revising I.R.C. § 2055(e)(2) and Treasury Regulation § 20.2055-2(e)(2)(i) and why the charitable contribution deduction should be allowed in instances factually similar to *Galloway*.[12]

This Note focuses on circumstances in which the charitable contribution deduction for estates is disallowed under I.R.C. § 2055(e)(2) and Treasury Regulation § 20.2055-2(e). Part I presents an overview of the estate planning advantages available through split-interest trusts and explains the statutory basis for the estate tax charitable contribution deduction and its disallowance in certain split-interest trust situations. Part II explores the legislative intent behind disallowing the deduction as expressed by Congress and as viewed by courts that have applied Section 2055(e)(2) and its corresponding regulations to disallow claimed deductions. Part III analyzes the *Galloway* decisions, which demonstrate that the result of applying the statute and regulation's "plain language" in certain instances overreaches congressional intent by disallowing the charitable contribution deduction in situations in which Congress intended the deduction to be allowed. Part IV examines what

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[8] Richard Schmalbeck, *Avoiding Federal Wealth Transfer Taxes*, *in* RETHINKING ESTATE AND GIFT TAXATION, *supra* note 7, at 113, 115–16.

[9] Barry W. Johnson & Jacob M. Mikow, *Federal Estate Tax Returns, 1995-1997*, STAT. OF INCOME BULL., Summer 1999, at 69, 105.

[10] There is some dispute over whether a "split-interest" trust requires a life interest in a non-charitable beneficiary and a remainder interest in a charitable beneficiary in the same property, or vice versa, or whether a trust giving any interests in property to both charitable and non-charitable beneficiaries should be considered "split-interest." Congress certainly contemplated the former, more limited definition of "split-interest" in its creation of I.R.C. § 2055(e)(2). *See infra* notes 34–36 and accompanying text. The debate over the definition of "split-interest," though relevant, will not be a topic of discussion in this Note. For the purposes of this Note, "split-interest" will generally be taken to mean trusts in which any interests in the same property are given to both charitable and non-charitable beneficiaries, in accordance with the language of I.R.C. § 2055(e)(2).

[11] No. 05-50, slip op. 2006 WL 1233683 (W.D. Pa. May 9, 2006), *aff'd*, 492 F.3d 219 (3d Cir. 2007).

[12] *See* discussion *infra* Parts III-IV.

other courts and the IRS have said concerning when the deduction should or should not be allowed. Part IV also offers a model amendment to revise I.R.C. § 2055(e)(2) so that the statute's application may better reflect congressional intent. Finally, Part V returns to the broader picture of tax policy and to the beneficial aspects of charitable giving, both of which justify and reaffirm the need for legislative clarification in the area of estate tax charitable contribution deductions.

I. THE ESTATE PLANNING BENEFITS OF SPLIT-INTEREST TRUSTS AND THE RESTRICTIVE STATUTORY PROVISIONS GOVERNING THIS AREA OF ESTATE TAX

A. An Overview of the Advantages Available in Estate Planning Through the Use of Split-Interest Trusts

It is neither uncommon nor unexpected for individuals to desire split-interest giving in their estate planning.[13] "A split-interest trust is often the chosen form of testamentary bequest because '[d]ecedents . . . desire to mix private objectives with philanthropy in their testamentary transfers . . . .'"[14] Practitioners may advise clients that testamentary split-interest giving is more advantageous for all parties concerned if done through a trust "instead of making an outright gift to charity when the client seems unwilling to part with an asset entirely, yet wishes to [e]nsure that the item (or cash) ultimately is given to charity."[15]

The availability of a deduction for these charitable contributions gives the added bonus of achieving "some present tax savings coordinated with . . . intended future generosity."[16] Split-interest trusts "are primarily important in estate planning to save income, estate, and gift taxes on wealth passing to non-charitable beneficiaries."[17] The deduction effectually allows charitable contributions to be "subsidized by [the] government, with the size of the subsidy increasing with the donor's tax rate."[18] Thus, if a split-interest trust is structured in line with the applicable restrictions,

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[13] *See* Estate of Hall v. Comm'r, 941 F.2d 1209, 1991 WL 158697, at *5 (6th Cir. Aug. 19, 1991) (unpublished table decision).

[14] *Id.* (alteration in original) (quoting Estate of Boeshore v. Comm'r, 78 T.C. 523, 525 (1982)).

[15] Melinda J. Harrison & Edward D. Tarlow, *How To Use Trusts and Estates To Maximize Deductions for Charitable Contributions*, 13 EST. PLAN. 66, 69 (1986), *available at* 1986 WL 84163.

[16] *Id.*; *see* HAROLD WEINSTOCK & MARTIN A. NEUMANN, PLANNING AN ESTATE: A GUIDEBOOK OF PRINCIPLES AND TECHNIQUES § 14:33 (4th ed. 2002).

[17] DAVID WESTFALL & GEORGE P. MAIR, ESTATE PLANNING LAW AND TAXATION ¶ 19.05 (4th ed. 2003).

[18] Jerald Schiff, *Tax Policy, Charitable Giving, and the Nonprofit Sector: What Do We Really Know?*, *in* PHILANTHROPIC GIVING: STUDIES IN VARIETIES AND GOALS 128, 129

> charitable donations may be paid for in significant measure by the government. This is because of the . . . estate tax deduction which a contribution to charity may produce. In some circumstances, . . . the taxpayer may [even] be able to enhance his or her wealth base, or that of the family, by benefiting from the exemption from taxation which may be provided by such a trust.[19]

It is due to these advantages that the split-interest trust has become an "estate planning mainstay."[20] The latter parts of this Note describe in greater depth how the restrictions set on these trusts by statute and regulation are severe, making it very difficult for a split-interest trust to fall into a category for which the charitable contribution deduction is allowed.[21] It is especially difficult to achieve the desired charitable contribution deduction when preparing a split-interest trust without adept legal counsel. The IRS, acknowledging the severity of these restrictions, has provided several Revenue Procedures detailing various model trust structures which should, but are not guaranteed to, allow for proper claiming of the deduction.[22] These model trusts, however, give little guidance for the dilemma presented by *Galloway* other than to avoid this type of split-interest trust through well-counseled drafting.

B. The Statutory Basis for the Deduction and Its Disallowance

In an effort to encourage and effectively subsidize charitable contributions made by estates, Congress enacted I.R.C. § 2055(a), which provides: "In general . . . the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers . . . to or for the use of any

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(Richard Magat ed., 1989); *see also* Charles T. Clotfelter, *Federal Tax Policy and Charitable Giving*, *in* PHILANTHROPIC GIVING: STUDIES IN VARIETIES AND GOALS, *supra*, at 105, 114.

[19] Jonathan G. Blattmachr & Madeline J. Rivlin, *Some Fundamental and Fine Points of Charitable Giving and Associated Tax Planning*, *in* FINANCIAL PLANNING THOUGHTS 755, 763 (PLI Tax Law and Estate Planning Course Handbook Series No. D0-001N, 1998) *available at* WL 267 PLI/EST 715. The implications of the charitable contribution deduction and the applicable statutory restrictions for split-interest trusts for income and gift taxes are similar to those for estate taxes, thus the analysis provided in this Note, while pertaining specifically to estate taxes, may also apply to some extent to income and gift taxes. *See* I.R.C. §§ 170(f) (2000 & Supp. IV 2004), 2522(c) (2000).

[20] Christopher P. Cline, *Planning for the Charitable Deduction: Charitable Remainder Trusts and Charitable Lead Trusts* (A.L.I.-A.B.A. Course of Study, June 19–24, 2005), *available at* WL SK093 A.L.I.-A.B.A. 1243, 1245.

[21] *See* discussion *infra* Parts II, IV.A.

[22] *See, e.g.*, Rev. Proc. 2003-53, 2003-2 C.B. 230, 2003-54, 2003-2 C.B. 236, 2003-55, 2003-2 C.B. 242, 2003-56, 2003-2 C.B. 249, 2003-57, 2003-2 C.B. 257, 2003-58, 2003-2 C.B. 262, 2003-59, 2003-2 C.B. 268, 2003-60, 2003-2 C.B. 274. These IRS Revenue Procedures contain annotated model declarations of trust for the creation of charitable remainder annuity trusts.

corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . . ."[23]

Subsection 2055(e)(2), which was added to Section 2055 as part of the Tax Reform Act of 1969,[24] disallows Section 2055(a)'s charitable contribution deduction in instances where split-interest trusts are created with only a few specific exceptions:

> (2) Where an interest in property (other than an interest described in section 170(f)(3)(B)) passes or has passed from the decedent to a person, or for a use, described in subsection (a), and an interest (other than an interest which is extinguished upon the decedent's death) in the same property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to a person, or for a use, not described in subsection (a), no deduction shall be allowed under this section for the interest which passes or has passed to the person, or for the use, described in subsection (a) unless—
>
> (A) in the case of a remainder interest, such interest is in a trust which is a charitable remainder annuity trust or a charitable remainder unitrust (described in section 664) or a pooled income fund (described in section 642(c)(5)), or
>
> (B) in the case of any other interest, such interest is in the form of a guaranteed annuity or is a fixed percentage distributed yearly of the fair market value of the property (to be determined yearly).[25]

The provisions of Section 2055(e)(2) essentially state that the deduction is disallowed when interests in the same property pass to both charitable and non-charitable beneficiaries in a form that is not one of the three exceptions specified in Section 2055(e)(2)(A).[26]

This statutory provision is applied in accordance with Treasury Regulation § 20.2055-2(e)(1)(i), which states:

> [W]here an interest in property passes or has passed from the decedent for charitable purposes and an interest (other than an interest which is extinguished upon the decedent's death) in the same property passes or has passed from the decedent for private purposes[,] . . . no deduction is allowed under section 2055 for the value of the interest which passes or has passed for charitable purposes *unless the interest in property is a deductible interest described in subparagraph (2) of this paragraph.*[27]

Section 20.2055-2(e)(2)(i) defines a "deductible interest" as,

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[23] I.R.C. § 2055(a)(2) (2000).

[24] Pub. L. No. 91-172, § 201(d), 83 Stat. 487, 560–61 (codified as amended at I.R.C. § 2055(e)).

[25] I.R.C. § 2055(e)(2) (2000). In *Estate of Gillespie v. Commissioner*, the United States Tax Court upheld I.R.C. § 2055(e) as "constitutional" and not merely "a senseless restriction on testamentary giving." 75 T.C. 374, 376, 380 (1980).

[26] *See* Treas. Reg. § 20.2055-2(e)(1)(i) (2006).

[27] *Id.* (emphasis added).

> a charitable [interest in property which] is an *undivided portion, not in trust, of the decedent's entire interest in property.* An undivided portion of a decedent's entire interest in property must consist of a fraction or percentage of each and every substantial interest or right owned by the decedent in such property and must extend over the entire term of the decedent's interest in such property and in other property into which such property is converted.[28]

Application of the "plain language" of I.R.C. § 2055(e)(2) and its corresponding regulations results in a charitable deduction being allowed for transfers "immediately payable" to charitable beneficiaries under a will or "held in trust entirely for charitable purposes."[29] When transfers are held in the same trust for both charitable and non-charitable purposes, however, "they will not be separated for tax purposes, even though the interests may be clearly separable."[30] Therefore, even if an undivided portion of the grantor's interest in trust property is passed to charitable beneficiaries "in trust"—so long as that interest is considered to be "in the same property" as the interest passed to non-charitable beneficiaries "in the same trust," which does not take one of the three excepted forms—no deduction will be permitted.[31]

Thus, charitable contribution deductions are essentially only permitted for split-interest trusts which take one of the three forms specified in Section 2055(e)(2)(A), a charitable remainder annuity trust, a charitable remainder unitrust, or a pooled income fund.[32] Those responsible for forming and administering these trusts, however, must be especially careful to adhere to the strict requirements of these trust forms, since, "[e]ven what may appear to be an insignificant departure from [these] requirements may result in the disallowance of an entire charitable deduction."[33] This strict "plain language" interpretation of Section 2055(e)(2) and its corresponding regulations applied by courts today, may not, in every situation, result in the outcomes Congress had in mind when this subsection was enacted.

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[28] *Id.* § 20.2055-2(e)(2)(i) (2006) (emphasis added).

[29] Beckwith, *supra* note 6, at A-17; *see infra* notes 67–73 and accompanying text; *see also* Rev. Rul. 77-97, 1977-1 C.B. 285–86 (noting that if the decedent had established two separate trusts, one for the interest passing to charitable beneficiaries and one for the interest passing to non-charitable beneficiaries, instead of one split-interest trust, a deduction would have been allowed for the undivided portion of the decedent's interest passing to the charitable beneficiaries).

[30] Beckwith, *supra* note 6, at A-17.

[31] *See id.*

[32] I.R.C. § 2055(e)(2)(A) (2000); BRUCE R. HOPKINS, THE TAX LAW OF CHARITABLE GIVING 338 (3d ed. 2005).

[33] Beckwith, *supra* note 6, at A-17; *see* Paul N. Frimmer, *Charitable Dispositions* 219, 241 (PLI Tax Law and Estate Planning Course Handbook Series No. D4-5197, 1987), *available at* WL 176 PLI/EST 219.

II. THE LEGISLATIVE INTENT BEHIND I.R.C. § 2055(E)(2)'S CHARITABLE CONTRIBUTION DEDUCTION DISALLOWANCE PROVISIONS

The House of Representatives Ways and Means Committee laid out in its report on the Tax Reform Act of 1969 the general reasons for the changes in the estate tax charitable contribution deduction and for the inclusion of I.R.C. § 2055(e)(2):

> The rules of [the pre-1969 Internal Revenue Code] for determining the amount of a charitable contribution deduction in the case of gifts of remainder interests in trust do not necessarily have any relation to the value of the benefit which the charity receives. This is because the trust assets may be invested in a manner so as to maximize the income interest with the result that there is little relation between the interest assumptions used in calculating present values and the amount received by the charity. For example, the trust corpus can be invested in high-income, high-risk assets. This enhances the value of the income interest but decreases the value of the charity's remainder interest.
>
> . . . .
>
> [The] committee does not believe that a taxpayer should be allowed to obtain a charitable contribution deduction for a gift of a remainder interest in trust to a charity which is substantially in excess of the amount the charity may ultimately receive.[34]

This is the reasoning behind the "in the same property" requirement of Section 2055(e)(2); some forms of split-interest trusts divide the same trust property into "two bundles of rights, one of which can be administered . . . to increase the value of the other, thus milking the charitable beneficiary['s interest] for the benefit of the non-charitable beneficiary."[35] A deduction is disallowed in these situations because any deduction granted would likely reflect an amount greater than the present value of the amount charitable beneficiaries will eventually receive.

The 1969 House Report goes on to imply that the provision specifically disallows the deduction in three cases: first, when charities receive vested remainder interests in trust property; second, when charitable beneficiaries receive a contingent remainder interest which is not likely to vest; and finally, when invasion of a charitable remainder is

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[34] H.R. REP. NO. 91-413, pt. 1, at 58 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1645, 1704; *see* BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 130.5.1, at 130-17 (2d ed. 1993) ("The restrictions, which also apply for purposes of the income and gift tax charitable deductions, are designed to prevent manipulations in the exercise of powers over investments and discretionary distributions, thereby ensuring that the amount deducted is commensurate with the benefit that will actually be received by the charity.") (footnote omitted); HOPKINS, *supra* note 32, at 342 ("The purpose of [Section 2055(e)(2)] is to preclude a claimed charitable contribution deduction in an amount greater than the value of the interest contributed.").

[35] BITTKER & LOKKEN, *supra* note 34, at 130-19.

permitted "for the benefit of a non-charitable intervening interest which is incapable of reasonably certain actuarial valuation."[36]

The House supported denying a deduction to any split-interest trust not structured as either "an *annuity trust* (under which the income beneficiary is to receive a stated dollar amount annually) or a *unitrust* (under which the income beneficiary is to receive an annual payment based on a fixed percentage of the trust's assets)."[37] The "annuity format" is a logical choice to curb potential abuse because

> irrespective of whether the charity has the annuity or remainder interest[,] the trustee would have no incentive to manipulate trust investments . . . . In all events[,] either income or, to the extent necessary, principal would be used to pay the annuity and sound business judgment would dictate that the trustee invest the property in the most profitable manner possible since neither interest could benefit from a different investment policy. . . . [T]he annuity format provides the greatest assurance that the amount allowed as a charitable deduction would actually go to the charity . . . .[38]

The Senate Finance Committee, while agreeing with the House Ways and Means Committee's reasons for amendment, found the House's version of Section 2055(e)(2) to be "unduly restrictive" and responded by adding pooled income funds to the list of trust structures for which a deduction is allowable.[39] A *pooled income fund* is defined as an arrangement "under which a person transfers property to a public charity which then places the property in an investment pool and pays the donor . . . the income attributable to the property for life."[40]

The Federal Courts of Appeals have conveyed their understanding of the legislative intent behind I.R.C. § 2055(e)(2), pointing out that "abuses in the administration of split-interest trusts proliferated under pre-1969 law."[41] The Tenth Circuit, citing an earlier opinion of the Eighth Circuit, stated:

> Section 2055(e)(2) was enacted . . . to eliminate [this] abuse of the charitable deduction through the split interest bequest. Congress was concerned with situations in which a noncharitable beneficiary retained a substantial interest in the estate, and benefited from a

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[36] H.R. REP. NO. 91-413, pt. 1, at 58, *reprinted in* 1969 U.S.C.C.A.N. 1645, 1705. The Report indicates that disallowing the deduction is due to the Ways and Means Committee's fear that the deduction would be abused if it was allowed in these instances. *See id.*

[37] S. REP. NO. 91-552, at 87 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2027, 2116 (emphasis added).

[38] BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 82.1.2 at 82-5 (3d ed. 2003).

[39] S. REP. NO. 91-552, at 87, *reprinted in* 1969 U.S.C.C.A.N. 2027, 2117.

[40] *Id.* at 85, *reprinted in* 1969 U.S.C.C.A.N. 2027, 2114 (emphasis added).

[41] Estate of Hall v. Comm'r, 941 F.2d 1209, 1991 WL 158697, at *6 (6th Cir. 1991) (unpublished table decision).

> charitable deduction for a remainder or other interest that was significantly disproportionate to the actual value ultimately received by the charity.[42]

Additionally, the Ninth Circuit acknowledged that the 1969 Section 2055(e) amendment, specifically subsection (e)(2), was designed to impose "more demanding requirements . . . to assure that [an] estate could not get the benefit of the deduction if the will did not provide a sufficiently certain interest for the charitable remainderman."[43]

The factual scenario Congress viewed as being prone to this abuse is typified, for example, in *Burdick v. Commissioner*.[44] Burdick's will created a trust which provided an income interest to an individual for life, with the remaining corpus to be divided evenly between an individual and a charity.[45] In a situation such as this, the non-charitable beneficiary with the life interest could have the trust property invested in stocks that would yield higher income in the short-term and result in a depleted trust corpus to be eventually distributed between the non-charitable and the charitable remainder beneficiaries. In a similar case, *Estate of Johnson v. United States*, a trust was created under a will to serve three purposes, to support the decedent's three sisters for life, to maintain family graves, and to contribute to specified charities.[46]

It is clear that, in scenarios similar to those in *Burdick* and *Johnson*, the potential exists for the abuse Congress aimed to curb by enacting Section 2055(e)(2). These cases have the capacity for creating little correlation between the amount for which a charitable contribution deduction might be claimed and the amount which a charitable beneficiary holding a future interest in the corpus of a trust might eventually receive. Disallowing the deduction in these instances is merited and is effected under the current language of Section 2055(e)(2), regardless of the additional "undivided portion, not in trust" language of Treasury Regulation § 20.2055-2(e)(2)(i). However, I.R.C. § 2055(e)(2), in coordination with its corresponding regulations, also disallows the deduction when undivided portions of the grantor's entire interest in trust property are passed to charitable beneficiaries. In scenarios involving undivided portions, the potential for abuse identified by

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42 Flanagan v. United States, 810 F.2d 930, 935 (10th Cir. 1987) (citing First Nat'l Bank of Fayetteville v. United States, 727 F.2d 741, 747–48 (8th Cir. 1984)).

43 Wells Fargo Bank v. United States, 1 F.3d 830, 832 (9th Cir. 1993).

44 979 F.2d 1369 (9th Cir. 1992).

45 *Id.* at 1370.

46 941 F.2d 1318, 1318 (5th Cir. 1991). A different type of situation, also with the potential for abuse, arose in *Estate of Burgess v. Commissioner*, in which a trust was created to provide a life interest with power to invade the corpus for the decedent's mother and, after payment of other specific bequests, the remainder of the corpus was to pass to two charities. 622 F.2d 700, 702–03 (4th Cir. 1980). The Burgess Estate was disallowed a charitable deduction under § 2055(e)(2). *Id.*

Congress and illustrated in the above cases does not exist; the charitable and non-charitable interests are non-competing. This is the scenario in *Galloway*.[47] In these instances, the application of the statute and its corresponding regulations oversteps legislative intent.

III. THE *GALLOWAY* DILEMMA: WHEN UNDIVIDED PORTIONS ARE GIVEN TO CHARITABLE BENEFICIARIES IN SPLIT-INTEREST TRUSTS, DOES DISALLOWING A DEDUCTION OVERSTEP CONGRESSIONAL INTENT?

In *Galloway v. United States*,[48] the successor trustee of the James D. Galloway Revocable Living Trust brought suit to recover estate taxes assessed by the IRS after the James D. Galloway Estate's claimed charitable contribution deduction was disallowed.[49] The Galloway Trust, written and revised by James D. Galloway, provided for the trust corpus to pass, essentially in fee, 25% each to four beneficiaries, including two charitable entities,[50] and two individuals.[51] Each beneficiary received 50% of its total interest in a distribution made in early 2006; the remaining corpus of the trust is to be distributed on January 1, 2016, at which point the Galloway Trust will terminate.[52]

Thus far, the Galloway Trust is straightforward. The charitable and non-charitable beneficiaries' interests are seemingly separable, although they are in one body of stock that constitutes the trust corpus. Each beneficiary receives the income and principal from its own percentage share of the trust. It was under this reasoning that the Galloway Estate claimed a charitable contribution deduction for the present value, as calculated by the Pennsylvania Department of Revenue, of the 50% of the trust designated, in both present and future interest (an undivided portion), to the charitable beneficiaries.[53]

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[47] *See infra* Part III.

[48] No. 05-50, slip op. 2006 WL 1233683 (W.D. Pa. May 9, 2006), *aff'd*, 492 F.3d 219 (3d Cir. 2007).

[49] *Id.* at *1.

[50] Plaintiff's Motion for Summary Judgment at 2–3, Galloway v. United States, slip op. 2006 WL 1233683 (W.D. Pa. May 9, 2006) (No. 05-50), [hereinafter Galloway Motion]. The two charitable entities were the James D. Galloway Scholarship Fund of the Federated Church of East Springfield, Pennsylvania, and the WLD Ranch of the Federated Church of East Springfield, Pennsylvania. *Id.* As a side note, my sister and I have fond memories of attending the WLD Ranch summer camp as children. Begun in 1963 by the Federated Church of East Springfield, Pennsylvania, upon a charitable donation made in memory of Wayne L. Davis, the "WLD Ranch is committed to providing the very best in Christian camping." Welcome to WLD Ranch, http://www.wldranch.com (last visited Oct. 8, 2007).

[51] *Galloway*, 2006 WL 1233683 at *1. The two individuals were James D. Galloway's son and granddaughter. *Id.*

[52] *Id.*

[53] Galloway Motion, *supra* note 50, at 3–4.

The Galloway Trust declarations also provide that, in the event a non-charitable beneficiary of the trust "is not living at the time of final distribution, his or her share will be distributed [evenly among] the remaining beneficiaries[;]" thus, if both individual beneficiaries are deceased at the time of the 2016 distribution, 100% of the remaining trust corpus will be distributed to the charitable beneficiaries.[54] While perhaps no charitable deduction may be allowed for any amount that might be distributed to the charities from the interests of the non-charitable beneficiaries, Galloway maintained that a deduction was allowed for the 50% undivided portion of the trust designated to pass entirely to the charitable beneficiaries.[55]

As Galloway argued, "the [50%] charitable and non-charitable interests are not competing in any way that could give rise to any abuse of the estate charitable tax deduction."[56] Despite the validity of this argument, the IRS, both initially and on appeal, denied the charitable contribution deduction, "determining that the trust constituted a 'split interest trust' in that it divided the same property between charitable and non-charitable entities" and did not take one of the three excepted forms listed in I.R.C. § 2055(e)(2)(A).[57] The IRS disallowed the deduction based on the "plain language" of I.R.C. § 2055(e)(2), requiring the Galloway Estate to pay an additional $160,394.13 in estate taxes.[58]

Galloway also argued that, were the charitable donation not made "in trust," it would constitute the donation of an "undivided portion . . . of the decedent's entire interest," and would, thus, qualify for the charitable contribution deduction as a "deductible interest" under Treasury Regulation § 20.2055-2(e)(2)(i).[59] The donation in *Galloway*, however, was made in trust. Presumably, this is why the district court and the Third Circuit in *Galloway* both affirmed the holding of the IRS without discussing whether the provisions of Section 20.2055-2(e)(2)(i) regarding split-interest trusts are in line with the legislative intent behind I.R.C. § 2055(e)(2).[60]

The issue presented is well-summarized by Galloway: "[S]hould the IRS be permitted to elevate form so far over substance that the charitable intent and effect of the Trust are ignored, to the detriment of both the individual beneficiaries *and* the charitable organizations

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54 *Galloway*, 2006 WL 1233683 at *1.

55 Galloway Motion, *supra* note 50, at 4.

56 *Id.* at 6.

57 *Galloway*, 2006 WL 1233683 at *1.

58 *Id.*

59 Galloway Motion, *supra* note 50, at 5 (quoting Treas. Reg. § 20.2055-2(e) (2006)).

60 *Galloway*, 2006 WL 1233683 at *6, *aff'd*, 492 F.3d at 225 n.6.

designated by the Trust[?]"[61] Should the fact that the charitable contribution of an undivided portion was made through a split-interest trust instrument, which does not qualify as a charitable remainder annuity trust, a charitable remainder unitrust, or a pooled income fund, result in its exclusion from the undivided portion exception of Treasury Regulation § 20.2055-2(e) and merit the denial of a deduction under I.R.C. § 2055(e)(2)?

> [T]he record of the United States Senate makes it clear that the intent behind § 2055(e) was to prevent abuse in "split interest" or "remainder" trusts, where the *corpus* was comprised of a single, undivided, interest in which an individual beneficiary had, for instance, a life-estate interest, with the remainder of the *corpus* conveyed to the charitable beneficiary upon his or her death, the fear being that the private beneficiary, especially if also Trustee, might choose investments designed to maximize income by pursuing riskier investments, decreasing the amount ultimately realized by the charitable beneficiary . . . .[62]

The Galloway Trust was "for all intents and purposes, and in practical effect, two separate Trusts,"[63] one giving 50% to the charitable beneficiaries in fee simple and another giving 50% to the non-charitable beneficiaries in fee simple on executory limitation with an executory interest (not a valid remainder, either vested or contingent) held by the charitable beneficiaries in the 50% interest of the non-charitable beneficiaries. "Had Galloway initially split his assets down the middle and established two (2) separate but identical trusts, in two (2) separate but identical (except for the beneficiaries) documents," the IRS would have seen no reason to disallow the deduction for the charitable contribution of a 50% undivided portion of Galloway's assets;[64] however, the IRS, the district court, and the Third Circuit concluded that, having been established through a single trust document, the Galloway Trust constituted only "one trust," for which the deduction was disallowed.[65]

IV. SHOULD THE "PLAIN LANGUAGE" OF I.R.C. § 2055(E)(2) AND TREASURY REGULATION § 20.2055-2(E)(2)(I) BE STRICTLY APPLIED WHEN THE OUTCOME OVERSTEPS LEGISLATIVE INTENT?

The language of Section 2055(e)(2) and its corresponding regulations has been applied by the *Galloway* courts to disallow the

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[61] Plaintiff's Brief in Support of Motion for Summary Judgment at 5, Galloway v. United States, slip op. 2006 WL 1233683 (W.D. Pa. May 9, 2006) (No. 05-50) [hereinafter Galloway Brief].

[62] *Id.* at 8 (citing S. REP. NO. 91-552 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2027, 2116).

[63] *Id.* at 5.

[64] *Id.*

[65] *Galloway*, 2006 WL 1233683 at *6, *aff'd*, 492 F.3d at 224.

charitable contribution deduction in a factual scenario which is not, at least regarding the 50% of the trust designated solely to the charitable beneficiaries, prone to the abuse Congress designed Section 2055(e)(2) to prevent. These decisions perpetuate the rule that disallows the deduction to any estate which involves a trust, including both charitable and non-charitable beneficiaries, not drafted and administered[66] in one of the three excepted forms, regardless of the nature of the interests involved. Continued application of Section 2055(e)(2)'s plain language in factual scenarios similar to *Galloway*, involving undivided portions given to charitable beneficiaries in trust, will produce results inconsistent with the statute's intent and will effectively, through disallowing the deduction, deplete trust resources bound for charitable beneficiaries.

A. Galloway *Compared: When Should the Deduction Be Allowed for Charitable Contributions Made in Trust?*

An examination of how other courts have interpreted and applied I.R.C. § 2055(e)(2) will help in analyzing *Galloway* and the statutory and regulatory language in question. Thus, this section details how other courts apply the estate tax charitable contribution deduction in factual scenarios relevant to *Galloway*.

First, it should be noted that a deduction is allowed for an outright distribution to a charitable beneficiary made by an estate in trust. In *Estate of Simpson v. Commissioner*, Simpson's will established a trust, 1% of which was to be distributed to each of five charities upon Simpson's death.[67] After fulfilling a series of other interests, the remaining trust corpus was to be distributed in equal shares among the charitable beneficiaries.[68] The petitioner, the respondent, and the court in *Simpson* all agreed that outright distributions of 1% of the trust to each of five specified charities upon Simpson's death qualified for a charitable deduction under Section 2055, even though the trust did not take one of the statute's specified three forms and the donation was made in trust.[69] The court prohibited the Simpson Estate from taking a deduction for the charitable remainder interest established under the trust, because the court viewed the remainder interest as separable from that distributed to the charities outright.[70]

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66 *See, e.g.*, Estate of Atkinson v. Comm'r, 309 F.3d 1290, 1292 (11th Cir. 2002) (holding that a charitable remainder annuity trust in which the annuity payments to the non-charitable beneficiary were never paid does not qualify as a charitable remainder annuity trust under I.R.C. § 2055(e)(2)(A) and is disallowed any charitable deduction).

67 67 T.C.M. (CCH) 3062, 3063 (1994).

68 *Id.*

69 *Id.* at 3064.

70 *Id.*

A trust involving a partial income interest for life in the decedent's sister and a remainder interest in a charitable beneficiary was at issue in *Flanagan v. United States*.[71] Following a will contest and settlement, the charitable interest "passed directly" to the charitable beneficiary.[72] The Tenth Circuit held in *Flanagan* that, even though the will contest resulted in the trust's funds being divided between charitable and non-charitable beneficiaries, there was "no split interest transfer to which [Section] 2055(e)(2) [was] applicable;" the charitable contribution deduction was allowed for the funds that passed directly to the charitable beneficiary upon the settlement of the will contest.[73]

The Tenth Circuit explained in *Flanagan* that, "[w]hile the Supreme Court 'has long recognized the primary authority of the IRS and its predecessors in construing the Internal Revenue Code,' this authority must still be reviewed *with regard to congressional intent*."[74] Agreeing with an earlier decision of the Seventh Circuit, the Tenth Circuit—regarding the legislative intent behind the estate tax charitable contribution—stated that

> congressional intent to prefer charitable gifts to estate taxes was "a case of absolute priority . . . . [While] loopholes should not be permitted to diminish estate tax payments by ostensibly charitable bequests which may never become effective," *we cannot blindly resolve all doubts in favor of the IRS if we are to respect legislative intent to encourage gifts to charity*.[75]

This is an important point to consider in any analysis of the charitable contribution deduction's disallowance, especially in an instance involving an undivided portion passing to a charitable beneficiary as was the case in *Galloway*.

In *Oetting v. United States*, Mrs. Dunmeyer's inter vivos trust and pour-over will provided $100 a month to each of three relatives for life, with the remainder of the trust corpus to be divided equally between four charitable beneficiaries and one non-charitable beneficiary.[76] By court decree, upon the death of Mrs. Dunmeyer, the trust funds were

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[71] 810 F.2d at 931.

[72] *Id.* at 933.

[73] *Id.* at 935.

[74] *Id.* at 934 (emphasis added) (quoting Bob Jones Univ. v. United States, 461 U.S. 574, 596 (1983)). "In enacting the charitable deduction provisions in I.R.C. § 2055 and its predecessors, Congress sought to encourage gifts to charity." *Id.* (citing Comm'r v. Estate of Sternberger, 348 U.S. 187, 190 n.3 (1955)).

[75] *Id.* at 935 (alteration in original) (emphasis added) (quoting Norris v. Comm'r, 134 F.2d 796, 802 (7th Cir. 1943)).

[76] 712 F.2d 358, 359 (8th Cir. 1983). Thus far, the fact pattern in *Oetting* resembles the typical trust structure prone to the abuse of overvaluing deductions that Congress tried to discourage by enacting I.R.C. § 2055(e)(2). *See supra* notes 44–46 and accompanying text.

divided into three annuities purchased for the three relatives, outright distributions made to the four charitable remainder beneficiaries, and a trust established for the individual remainder beneficiary.[77] The court in *Oetting* cited the 1969 Senate Report, detailing the purpose of Section 2055(e)(2)—to prevent abuse.[78] The Eighth Circuit held that *Oetting* "present[ed] none of the abuses which [Section] 2055(e)[(2)] was designed to prevent" and allowed the deduction claimed for "those amounts that were actually received by the four charities."[79] Although *Oetting* involves an outright distribution, and not an undivided portion in trust, the Eighth Circuit's reasoning in *Oetting* reaffirms the principle argued in *Galloway* that, when applying Section 2055(e)(2) to a situation when the charitable and non-charitable interests in a split-interest trust are structured in a way that they are non-competing and in no way prone to deduction valuation abuse, the allowance of a deduction is appropriate.

More recently, *Estate of Jackson v. United States* involved a revocable inter vivos trust which was to pay Jackson income and principal during her life.[80] Upon Jackson's death, the trust was to pay outright distributions of $150,000 to each of her four nephews and nieces; these four non-charitable beneficiaries were also each to receive a one-fourth income interest in the trust for life.[81] The remainder interest in the trust assets was to be distributed upon the death of the last non-charitable beneficiary to a named charitable beneficiary.[82] Following Jackson's death, however, the beneficiaries agreed to terminate the trust and the charitable beneficiary received an outright distribution of the estimated present value of its remainder interest.[83] The district court looked to the intent of Section 2055(e) to allow a deduction in this instance.[84] According to the court in *Jackson*:

> To determine whether § 2055(e) applies to a terminated charitable split-interest, courts routinely emphasize the distinct goal

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77 *Oetting*, 712 F.2d at 360.

78 *Id.* at 360–61 (citing S. REP. NO. 91-552, at 87 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2027, 2116); *see supra* notes 34–40 and accompanying text.

79 712 F.2d at 363. In *Estate of Strock v. United States*, 655 F. Supp. 1334, 1335 (W.D. Pa. 1987), decided by the same district court as *Galloway*, a trust was created under Strock's will that provided life income interests to non-charitable beneficiaries and a remainder interest in the corpus of the trust to charitable beneficiaries. Upon a will contest, the trust assets were distributed directly to all beneficiaries. *Id.* Under this scenario, the court determined that the Strock Estate was entitled to the charitable contribution deduction for the amount that was paid outright to its charitable beneficiaries. *Id.* at 1341.

80 408 F. Supp. 2d 209, 210 (N.D. W. Va. 2005).

81 *Id.*

82 *Id.*

83 *Id.* at 211.

84 *Id.* at 211–13.

> of the statute, i.e., to ensure that an estate's charitable deduction corresponds to the value received by the charity. Accordingly, when analyzing this issue, courts have generally focused on four factors: (1) whether property is directly transferred to the charitable beneficiary; (2) whether a non[-]charitable beneficiary maintains an interest in that property; (3) whether the deduction is sought for the actual benefit received by the charitable entity; and (4) whether the estate is "concerned solely with gaining a charitable deduction by skirting the split-interest rules" of § 2055(e).[85]

This test minimizes the focus on Section 2055(e)(2)'s strict trust structure requirements and seeks to determine when the deduction should be granted based on the intent underlying this statute.

Estate of Jackson, like its predecessor cases, made an outright distribution of trust funds to a charitable beneficiary and was deemed to have properly claimed a charitable contribution deduction. The only major distinction between the four cases described above and *Galloway* is that the 50% charitable interest in *Galloway* is to be held in trust for a period of years before it is fully distributed. All of the income and principal of the 50% charitable interest, however, will be distributed to the charitable beneficiaries, and there are no interfering interests to prevent this from occurring. The design of the Galloway Trust, regarding the 50% charitable "undivided portion," does not create a scenario susceptible to the deduction valuation abuse Congress sought to curb in the creation of Section 2055(e)(2). In accordance with the logic of the cases presented in this Note, the Galloway Trust should be allowed a charitable deduction in the amount of the present value of 50% of the trust.

Additionally, Galloway argued that the Galloway Trust was economically and operationally equivalent to two separate trusts, one for the 50% share for the charitable beneficiaries and one for the 50% share for the non-charitable beneficiaries in which the charitable beneficiaries hold a future interest.[86] Both *Galloway* courts disagreed with this argument, finding that no deduction is allowed where a split-interest trust created to be a single trust does not meet the specific requirements of one of the trust structures listed in Section 2055(e)(2)(A).[87]

The Third Circuit recognized the "unfortunate result" that this conclusion causes in the *Galloway* case, but upheld the outcome, stating:

> Section 2055(e) was passed to protect against abuses that resulted most frequently from non-charitable beneficiaries exploiting their life interest in an estate and leaving a charitable beneficiary with a

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[85] *Id.* at 212 (citation omitted) (quoting Burdick v. Comm'r, 979 F.2d 1369, 1372 (9th Cir. 1992)).

[86] Galloway Brief, *supra* note 61, at 5.

[87] *Galloway*, 2006 WL 1233683, at *6, *aff'd*, 492 F.3d at 223–25.

> shadow of what was bequeathed to it. *In [Galloway], there is little chance that the same sort of abuse would take place. Each beneficiary of the Trust, charitable and non-charitable, shares equally in the risk of loss and the benefit of good investing as each beneficiary receives an equal share in the property.* However, the fact that the abuses Congress sought to protect against are not present here does not give us license to circumvent the clear language presented in the statute. In the future, should testators seek to bequeath their estates to both charitable and non-charitable beneficiaries, they must use the tools provided in §§ 2055(e)(2)(A) and (e)(2)(B).[88]

This is in line with the holding of the United States Tax Court in *Estate of Edgar v. Commissioner*, in which the court asserted:

> Although this specific [trust structure] may not have been regarded as abusive by Congress when it enacted [Section 2055(e)], . . . permitting economic factors to be considered would directly contradict Congress' intent to establish specific rules in this area. . . . [Charitable interests in split-interest trusts] must in all events conform to the statutory requirements.[89]

Significantly, though, *Edgar* is distinguishable from *Galloway* in that the Edgar Trust contained a charitable remainder interest,[90] not an undivided portion.

In *Zabel v. United States*—the case most closely analogous to *Galloway*—the court disallowed a charitable contribution deduction claimed for a trust which had been created under a will.[91] The trust's charitable and non-charitable beneficiaries were to equally share the income from the trust for 21 years, at which point the entire remaining corpus of the trust would be distributed to the charitable beneficiaries. Zabel argued that the charitable beneficiaries had "practically, although not legally, received half the trust."[92] The plaintiff claimed the charitable contribution deduction for the present value of this 50% income and remainder interest and not for any value attributable to the remainder interest the charitable beneficiaries held in the non-charitable beneficiaries' 50% income for life share.[93] Zabel argued that under the trusts in both *Galloway* and *Zabel*, "no harm can befall the charities, though the trust[s do] not employ one of the three devices specified in

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88 *Galloway*, 492 F.3d at 224 (emphasis added).

89 74 T.C. 983, 987–88 (1980). The district court in *Galloway* based its decision in part on the holding in *Edgar*. *Galloway*, 2006 WL 1233683, at *4. Neither the district court in *Galloway* nor the court in *Edgar* took into account the implications of Treasury Regulation § 20.2055-2(e)(2)(i) where an undivided portion is transferred to charity. The Third Circuit in *Galloway* also summarily dismissed Section 20.2055-2(e)(2)(i), considering it "inapplicable" to the case. 492 F.3d at 225 n.6.

90 *Edgar*, 74 T.C. at 985.

91 995 F. Supp. 1036, 1038 (D. Neb. 1998).

92 *Id.*

93 *Id.*

section 2055(e)(2)(A)."[94] There is only potential for the 50% interests of the charities to increase, not decrease, as a result of the charities' interests in the non-charitable beneficiaries' 50% shares.

The court in *Zabel* based its decision on *Oetting*, which it cited as defining Section 2055(e)(2) for the Eighth Circuit as disallowing a deduction for any split-interest bequest made in trust unless the remainder interest is in one of the statute's three excepted forms.[95] The IRS came to the same conclusion under a similar factual scenario in Revenue Ruling 77–97, noting that "if the decedent had established two separate trusts, one for charitable purposes and one for private purposes, instead of one trust for both purposes [with an undivided portion conveyed to the charitable beneficiaries], the charitable deduction would have been allowable."[96] The IRS has stated that this is also the result when the undivided portion passing to charitable beneficiaries consists of a specified number of shares of stock held in the same trust as a specified number of shares of stock designated to a non-charitable beneficiary.[97] This scenario was found to meet both the "in the same property" and "in trust" requirements of I.R.C. § 2055(e)(2) and Treasury Regulation § 20.2055-2(e)(2)(i), respectively.[98] It seems, then, that the courts and the IRS draw their distinction as to when the deduction should be allowed in the instance of an undivided portion passing to charitable beneficiaries in trust by a simple count of the number of documents involved, *one trust document or two*.[99]

Interestingly, though, the IRS did not follow its prior holdings when applying Section 2055(e)(2) in Revenue Ruling 83-20, in which a trust

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[94] *See id.* at 1047.

[95] *Id.* at 1046; Oetting v. United States, 712 F.2d 358, 361 (8th Cir. 1983).

[96] Rev. Rul. 77-97, 1977-1 C.B. 285. Additionally, in a factually comparable Private Letter Ruling, the IRS stated:

> It might be argued that, for purposes of section 20.2055-2(e)(2)(i) of the regulations, Charity *X* has at least an undivided fifteen percent interest in the subject trust because of its twenty percent income interest followed by a fifteen percent remainder interest. . . . But section 20.2055-2(e)(2)(i) applies only to undivided interests *not in trust*.

I.R.S. Priv. Ltr. Rul. 93-26-003 (March 23, 1993) (emphasis added); *see also* Estate of Brock v. Comm'r, 71 T.C. 901, 906 & n.9 (1979); I.R.S. Priv. Ltr. Rul. 2002-23-013 (March 11, 2002) (holding that, where a contribution of an undivided portion was made "not in trust," the deductible interest exception in Section 20.2055-2(e)(2)(i) applied and the deduction was allowed).

[97] I.R.S. Tech. Adv. Mem. 77-35-002 (May 23, 1977).

[98] *Id.*

[99] Even where two separate trust documents are drafted, however, if the two trusts combined give both charitable and non-charitable beneficiaries interests "in the same property," the two trusts may be deemed to constitute one total trust, and the deduction may still be disallowed. *See* I.R.S. Tech. Adv. Mem. 76-10-199590A (October 19, 1976).

was established similar to that in *Galloway* and in *Zabel*.[100] In this instance, a trust was created entirely for charitable purposes, but the surviving spouse of the decedent "petitioned the probate court for an allowance for support that [was] payable during the period of administration of [the decedent's] estate," creating an income interest in a percentage of the trust for the surviving spouse.[101] The IRS held that the "portion of the residuary estate certain to be received by charity (or not subject to diversion for a noncharitable purpose) is property in which no noncharitable interest exists and is therefore deductible and not a split interest."[102] Since the interests in this trust were "capable of being measured and severed," the charitable contribution deduction was allowed.[103]

The IRS seems to be uncertain regarding when to allow a deduction to estates making charitable donations in split-interest trusts. When donors give undivided portions in trust, the IRS and the courts have, in most instances, overreached congressional intent and disallowed the deduction. Thus, there is an apparent need for clarification, whether by the courts or by Congress, of the "plain language" of I.R.C. § 2055(e)(2) and Treasury Regulation § 20.2055-2(e)(2)(i). Ultimately, congressional amendment of Section 2055(e)(2) may allow this Section to better reflect legislative intent and better resolve this issue.

B. Revision of I.R.C. § 2055(e)(2) and Treasury Regulation § 20.2055-2(e)(2)(i) Is Needed to Prevent Improper Disallowances of the Charitable Contribution Deduction for Undivided Portions Given in Trust

When should the deduction be allowed or disallowed? As evidenced by the foregoing cases, this is not an easy question to answer, even for the IRS.[104] In light of this, it is not surprising that some courts look to legislative intent to divine the meaning of I.R.C. § 2055(e)(2). Discerning and applying legislative intent, however, is a gray area of law itself and should be approached with caution.

1. Applicable Canons of Statutory Construction

The Supreme Court of the United States has addressed the value of legislative intent in various cases that offer guidance for analyzing Section 2055(e)(2). The Supreme Court begins with the presumption that "'[the] legislature says in a statute what it means and means in a statute

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[100] Rev. Rul. 83-20, 1983-1 C.B. 231.

[101] *Id.* at 231–32.

[102] *Id.* at 232.

[103] *Id.*

[104] *See supra* Part IV.A.

what it says there.'"[105] While recognizing "the potential for harsh results in some cases" under an existing statutory scheme, the Supreme Court maintains that it is "not free to rewrite [a] statute that Congress has enacted. '[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'"[106] Legislative intent, though, can be a useful analytical tool, especially in the interpretation of ambiguous statutory language. Upon an "extraordinary showing" of contrary congressional intention, a court's limitation on the "plain meaning" of statutory language can be justified.[107] "'In surveying legislative history [the Supreme Court has] repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on [a] bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'"[108]

The district court in *Zabel* described the rules that courts have applied regarding the construction of Section 2055(e)(2):

> (a) In interpreting tax statutes, the literal meaning of the words employed is most important, and such statutes are not to be extended by implication beyond the clear import of the language used. Thus, the Court's first duty is to read the statute in its ordinary and natural sense.
>
> (b) Where the meaning of the words used in the statute is doubtful, however, it is proper to resort to legislative history as an aid to construction, although such legislative history cannot be used to expand or contract the scope of the statute itself.
>
> (c) Where a tax statute involves the allowance of a deduction or an exemption, it must be strictly construed.[109]

The court in *Zabel* was also of the opinion that

> Congress has the right to pick among various competing alternatives when specifying how a taxpayer must structure trusts to qualify for a tax exemption. The fact that the decedent may have

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[105] Dodd v. United States, 545 U.S. 353, 357 (2005) (alteration in original) (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992)).

[106] *Id.* at 359 (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000)).

[107] Garcia v. United States, 469 U.S. 70, 75 (citing Tenn. Valley Auth. v. Hill, 437 U.S. 153, 187 n.33 (1978)); *see* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("Absent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive."). *But see* Zedner v. United States, 126 S. Ct. 1976, 1991 (2006) (Scalia, J., concurring) ("[T]he use of legislative history is illegitimate and ill advised in the interpretation of any statute[,] especially a statute that is clear on its face . . . .").

[108] *Garcia*, 469 U.S. at 76 (quoting Zuber v. Allen, 396 U.S. 168, 186 (1969)).

[109] Zabel v. United States, 995 F. Supp. 1036, 1045 (D. Neb. 1998) (quoting Estate of Cassidy v. Comm'r, No. 26713-83, 49 T.C.M. (CCH) 580, 583 (1985)).

> chosen a different method, *which is as good as the method chosen by Congress*, does not mean that the decedent's choice trumps the Congressional choice of another method. Congress, not the taxpayer, defines the boundaries of tax exemptions.[110]

Regarding the authority of treasury regulations, the Supreme Court has provided: "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question of whether Congress has directly spoken to the precise question at issue."[111] If Congress has spoken unambiguously, then the agency must give effect to that statutory language. "If, however, the court determines Congress has not directly [and unambiguously] addressed the precise question at issue," such as with the present issue of undivided portions given to charitable beneficiaries through split-interest trusts, then "the question for the court is whether the agency's answer is based on a permissible construction of the statute."[112] Deference should be shown to administrative interpretations of statutory schemes;[113] however,

> The judiciary is the *final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.* If a court employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.[114]

2. Revision of the Split-Interest Trust Charitable Contribution Deduction Provisions with Respect to Undivided Portions

Applying the "plain language" of I.R.C. § 2055(e)(2) and Treasury Regulation § 20.2055-2(e) in factual scenarios that contain undivided portions given to charitable beneficiaries by estates in split-interest trusts, such as in *Galloway*, produces results that are contrary to or extend beyond legislative intent. This disallows the charitable contribution deduction in instances which are not prone to deduction valuation abuse. The charitable interests in these trusts are "capable of being measured and severed"[115] and merit allowance of a deduction.

The effect of Treasury Regulation § 20.2055-2(e)(1)(i) is to deny a deduction to split-interest bequests unless the interest designated to charity is a "deductible interest,"[116] the definition of which includes

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[110] *Id.* at 1047 (emphasis added).

[111] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

[112] *Id.* at 843.

[113] *Id.* at 844.

[114] *Id.* at 843 n.9 (emphasis added) (citations omitted).

[115] Rev. Rul. 83-20, 1983-1 C.B. 231.

[116] Treas. Reg. § 20.2055-2(e)(1)(i) (2006).

"undivided portion[s]."[117] Section 20.2055(2)(e)(2)(i) operates to deny this "undivided portion" exception to transfers made "in trust."[118] The Treasury Regulations effectively leave I.R.C. § 2055(e)(2) to be the controlling rule in the situation of an undivided portion given in a split-interest trust, refraining from giving any guidance for how courts should deal with these instances, other than to apply the severe trust structure restrictions included in Section 2055(e)(2) (essentially what could be called the "One trust document or two?" rule). This results in disallowing the deduction in situations not susceptible to the abuse which Congress enacted Section 2055(e)(2) to deter. Thus, courts should allow the deduction—recognizing that failure to do so defeats legislative intent.

Because the congressional intent underlying Section 2055(e)(2) is authoritative when the relevant statutory and regulatory provisions operate to contradict this intent, the *Galloway* and *Zabel* courts erred in disallowing the deductions for the undivided portions passing to charitable beneficiaries in trust. Section 2055(e)(2) is ambiguous with respect to undivided portions given to charitable beneficiaries in split-interest bequests. The statutory provision fails to make any mention of an undivided portion exception, which is a concept that the applicable treasury regulations create and apply only to charitable contributions made in non-trust contexts.[119] Accordingly, the *Galloway* and *Zabel* courts should have concluded the following: (1) these trusts contained separable and undivided charitable interests, not in competition with the non-charitable interests in the same trust, and (2) the "not in trust" requirement of Treasury Regulation § 20.2055-2(e)(2)(i) is contrary to and an inappropriate expansion of the congressional intent behind I.R.C. § 2055(e)(2) and should no longer be followed. Together, these conclusions would have resulted in allowance of the charitable contribution deduction in these cases. Additionally, a ruling of this nature would have set a clear precedent for future decisions.[120]

If, however, the plain language of Section 2055(e)(2) is unambiguous, as both *Galloway* courts decided,[121] and if the relevant

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[117] *Id.* § 20.2055-2(e)(2)(i) (2006).

[118] *Id.*

[119] *See id.* § 20.2055-2(e)(1)(i), (2)(i) (2006).

[120] The Third Circuit in *Galloway* based its decision on *Zabel* and held accordingly, affirming the district court's decision. Galloway v. United States, 492 F.3d 219, 224–25 (3d Cir. 2007). This was the first time the Third Circuit ruled on a case involving an undivided portion given to charitable beneficiaries in a split-interest trust. Had *Galloway* been appealed to the Supreme Court of the United States, there would exist the potential for these two proposed conclusions to be found, allowing a deduction for the 50% charitable interest in the trust.

[121] *Galloway*, 2006 WL 1233683, at *5, *aff'd*, 492 F.3d at 223–24; *see* Estate of Johnson v. United States, 941 F.2d 1318, 1321 (1991) ("[T]he pertinent statutory language [of Section 2055(e)(2) is] unambiguous."). The Third Circuit stated in *Galloway*:

treasury regulations are assumed to be "a permissible construction of the statute,"[122] then the *Galloway* courts made the only decision they could under the existing language. As the district court in *Galloway* noted, "it is the role of Congress" and not the courts "to clarify or amend the plain language of [Section] 2055(e) to prevent" such harsh results.[123] Statutory or regulatory revision is a possible solution to the *Galloway* dilemma. This could be carried out in two ways. First, the Treasury Department could remove the "not in trust" requirement from Treasury Regulation § 20.2055-2(e)(2)(i). This would create a clear exception to the disallowance provisions for all undivided portions passed to charitable beneficiaries in split-interest bequests.

The IRS, though, likely contends that Treasury Regulation § 20.2055-2(e) is not only a permissible construction, but that it is the intended construction of I.R.C. § 2055(e)(2).[124] Therefore, the second and likely the necessary solution to resolve the *Galloway* dilemma is for Congress to amend I.R.C. § 2055(e)(2) to include similar provisions as found in the following model legislation:

> (2) Where an interest in property (other than an interest described in Section 170(f)(3)(B)) passes or has passed from the decedent to a person, or for a use, described in subsection (a), and an interest (other than an interest which is extinguished upon the decedent's death) in the same property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to a person, or for a use, not described in subsection (a), no deduction shall be allowed under this section for the interest which passes or has passed to the person, or for the use, described in subsection (a) unless—
>
> (A) in the case of a remainder interest, such interest is in a trust which is a charitable remainder annuity trust or a

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> Therefore, where, as here, the language of the statute is clear and unambiguous, we will not create an ambiguity through the use of legislative history. The language of § 2055(e) does not refer only to trusts creating a remainder interest. It also refers to "any other interest." We will not use legislative history that focuses on a particular type of trust to narrow the broad language Congress chose to use when enacting the statute.

Galloway, 492 F.3d at 224 (citation omitted).

[122] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

[123] *Galloway*, 2006 WL 1233683, at *6.

[124] The IRS stated, with regard to the charitable contribution deduction provisions for individual taxation, *see* I.R.C. § 170(a) (2000), (f) (2000 & Supp. IV 2004), that the disallowance provisions "extend[] beyond situations in which there is actual or probable manipulation of the non-charitable interest to the detriment of the charitable interest." Rev. Rul. 2003-28, 2003-1 C.B. 594; *see also* Rev. Rul. 88-37, 1988-1 C.B. 97.

charitable remainder unitrust (described in section 664) or a pooled income fund (described in section 642(c)(5)),

(B) the interest that passes or has passed to a person, or for a use, described in subsection (a), is an undivided portion of the decedent's entire interest in property, or

(C) in the case of any other interest, such interest is in the form of a guaranteed annuity or is a fixed percentage distributed yearly of the fair market value of the property (to be determined yearly).[125]

V. THE BROADER PICTURE OF TAX POLICY AND PRIVATE CHARITABLE GIVING

A. American Tax Policy Encourages Private Charitable Giving

When a charitable contribution deduction is denied in an instance where Congress's intended to allow a deduction, Congress' goal of encouraging and effectively subsidizing private charitable giving is subverted. This is especially true when the tax owed as a result of the deduction's disallowance is paid out of the trust corpus, severely depleting any interest in the trust which charities might eventually receive. This is the case in *Galloway*. When charitable contribution deductions are disallowed in instances lacking the potential for deduction valuation abuse, the American private nonprofit sector, on the whole, receives less private charitable funding. Congress and the IRS, as a policy, sought to avoid this result through the creation of the deduction, which was designed to encourage private giving.

> [T]here is little question that an important institutional area of American life—the private nonprofit sector—could not exist without [private giving]. Private support is a fundamental underpinning for hundreds of thousands of . . . organizations; it is the ingredient that keeps private nonprofit organizations alive and private, keeps them from withering away or becoming mere adjuncts of government.[126]

The Seventh and Tenth Circuits have stated accurately that "congressional intent to prefer charitable gifts to estate taxes [is] 'a case

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[125] This model amended legislation is based on both I.R.C. § 2055(e)(2) and Treasury Regulation § 20.2055-2(e)(2)(i). The italicized portion is the proposed amendment to I.R.C. § 2055(e)(2); the unitalicized text is taken directly from the current text of that statute. *See* I.R.C. § 2055(e)(2) (2000). The term "undivided portion" will also need to be included in the definition section of these statutory provisions as: *A fraction or percentage of each and every substantial interest or right owned by a decedent in such property extending over the entire term of the decedent's interest in such property and in other property into which such property is converted.* This proposed definition is based on the definition of "undivided portion" provided in Treasury Regulation § 20.2055-2(e)(2)(i).

[126] GIVING IN AMERICA, *supra* note 2, at 53.

of absolute priority'"[127] The principal that private charitable giving is to be encouraged should overarch all tax policy regarding charitable contribution deductions. This policy is supported in I.R.C. § 2055(a)'s allowance of the deduction in the area of estate taxes, as well as in I.R.C. § 2055(e)(2)'s disallowance of the deduction in instances of deduction valuation abuse. The abuse is discouraged through disallowing the deduction with an overall goal of increasing the chances that the full amount of contributions for which deductions are allowed will eventually reach the charitable beneficiaries for which the contributions are intended.

However, disallowing the deduction in instances not prone to deduction valuation abuse, as demonstrated in *Galloway*, operates in reverse of Congress's main intent to encourage private charitable giving. Deduction disallowance in these scenarios typically increases estate taxes substantially and deprives both charitable and non-charitable beneficiaries of a percentage of the trust property designated to them. Because of these "draconian" results[128] which are inconsistent with the American tax policy in favor of private charitable giving, the proposed amendment[129] is an appropriate and necessary addition to existing tax law.

B. A Biblical Basis for Private Charitable Giving

Private charitable giving, in addition to being encouraged by American tax policy and firmly rooted in American ideals, has been long-established in Judeo-Christian religious doctrine. Deuteronomy 15:7–11 states:

> If there is a poor man among [you] . . . . Give generously to him and do so without a grudging heart; then because of this the LORD your God will bless you in all your work and in everything you put your hand to. There will always be poor people in the land. Therefore I command you to be openhanded toward your brothers and toward the poor and needy in your land.[130]

A reality of American society is that wealth is not evenly distributed. There is a moral imperative to aid those in need, both within the United States and internationally, and allowing a charitable contribution

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[127] Flanagan v. United States, 810 F.2d 930, 935 (10th Cir. 1987) (quoting Norris v. Comm'r, 134 F.2d 796, 801 (7th Cir. 1943)).

[128] W. LESLIE PEAT & STEPHANIE J. WILLBANKS, FEDERAL ESTATE AND GIFT TAXATION: AN ANALYSIS AND CRITIQUE 215 (2d ed. 1995).

[129] *See infra* notes 124–25 and accompanying text.

[130] *Deuteronomy* 15:7, 10–11 (NIV); *see also Psalms* 112:5 (NIV) ("Good will come to him who is generous . . . ."); *Proverbs* 22:9 (NIV) ("A generous man will himself be blessed . . . .").

deduction is an added bonus on top of the fulfillment of this calling to "[g]ive generously" to others.[131]

People should fulfill this calling even without a deduction for private charitable giving. Paul wrote in Romans 12:6–8: "If a man's gift is . . . contributing to the needs of others, let him give generously . . . ."[132] Biblical principles of fairness,[133] though, imply that if a deduction is allowed for the purposes of encouraging and increasing private charitable giving, then this deduction should be allowed for all who deserve it. These Biblical principles are violated when courts disallow a merited deduction because of legislative or regulatory technicalities.

CONCLUSION

When individuals make charitable contributions through split-interest trusts, they risk the disallowance of any potential charitable contribution deduction for estate tax purposes. Even where the interest given to the charitable beneficiary represents an undivided portion of the decedent's interest in trust property—as was the case in *Galloway*—under the prevailing statutory interpretation of I.R.C. § 2055(e)(2) and Treasury Regulation § 20.2055-2(e), the deduction will be disallowed. This draconian application of Section 2055(e)(2) oversteps the legislative intent behind the enactment of that section. Until a better solution to this conflict between statutory language and intent is reached, whether through case precedent or legislative amendment, the "moral" of *Galloway* remains that "the drafter who is unsure of the technical [deduction disallowance] rules would be well-advised to seek" legal counsel before trying to make any contribution to charitable beneficiaries out of his or her estate.[134]

Valerie H. Kuntz

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[131] *Deuteronomy* 15:10 (NIV).

[132] *Romans* 12:6–8 (NIV).

[133] *See Deuteronomy* 1:16; *Proverbs* 31:9; *Isaiah* 30:18.

[134] *See* PEAT & WILLBANKS, *supra* note 128, at 217.

PROPHETIC SPEECH AND THE INTERNAL REVENUE CODE: ANALYZING I.R.C. § 501(C)(3) IN LIGHT OF THE RELIGIOUS FREEDOM RESTORATION ACT

And [the Pharisees] sent their disciples to [Jesus] . . . saying, "Teacher, we know that You are truthful . . . . Is it lawful to give a poll-tax to Caesar, or not?" But Jesus perceived their malice, and said, "Why are you testing Me, you hypocrites? Show Me the coin used for the poll-tax." And they brought Him a denarius. And He said to them, "Whose likeness and inscription is this?" They said to Him, "Caesar's." Then [Jesus] said to them, "Then render to Caesar the things that are Caesar's; and to God the things that are God's."[1]

I. INTRODUCTION

A. All Saints Episcopal Church

> Jesus continues: "Mr. President [Bush], your doctrine of preemptive war is a failed doctrine. Forcibly changing the regime of an enemy that posed no imminent threat has led to disaster."
>
> . . . .
>
> Jesus turns to President Bush again with deep sadness. "Is what I hear really true? Do you really mean that you want to end a decade-old ban on developing nuclear battlefield weapons, as well as endorsing the creation of a nuclear 'bunker-blaster' bomb? Are you really going to resume nuclear testing? That is sheer insanity."
>
> . . . .
>
> Everything I know about Jesus would have him uttering those words.
>
> . . . .
>
> When you go to the polls on November 2nd—vote all your values. Jesus places on your heart this question: Who is to be trusted as the world's chief peacemaker?[2]

On October 31, 2004, the very eve of the 2004 national elections, the Rev. Dr. George F. Regas, a Rector Emeritus of the Episcopal Church, delivered a guest sermon, containing the four paragraphs quoted above, before All Saints Episcopal Church, a liberal Episcopalian church in Pasadena, California.[3] Regas went on to hold President Bush and his tax cuts responsible for enlarging the gap between the rich and the poor in the United States.[4] "All of that would break Jesus' heart," he stated.[5]

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1 *Matthew* 22:16–21 (NASB).

2 Rev. Dr. George F. Regas, If Jesus Debated Senator Kerry and President Bush, at 2–3 (Oct. 31, 2004), http://www.allsaints-pas.org/sermons/(10-31-04)%20If%20Jesus%20Debated.pdf.

3 *Id.* at 1.

4 *Id.* at 3.

Regas also bemoaned the quiescence of Christian churches in regard to current social and political issues, stating that "[p]rophetic Christianity has lost its voice."[6] In response to Regas's sermon, the Internal Revenue Service ("IRS") began an investigation of the eighty-year-old parish and delivered a summons demanding the surrender of all materials containing political references, including newsletters and sermons, produced during the 2004 election year.[7] The rector of the parish, Rev. J. Edwin Bacon, Jr., was also informed that he must testify in person before IRS investigators to answer for All Saints Church's activities during the 2004 election year.[8] The IRS acted pursuant to I.R.C. § 501(c)(3), a provision of the Internal Revenue Code, which forbids all tax-exempt religious institutions, like All Saints Church, from engaging in any partisan campaign activity.[9] During an interview conducted in the midst of the controversy, Rev. Bacon justified the events at All Saints Episcopal Church by stating that the Episcopal faith "calls [the Church] to speak to the issues of war and poverty, bigotry, torture, and all forms of terrorism . . . ."[10] After the news of the IRS investigation went public, Dr. Regas sent a letter to the editor of the Los Angeles Times, stating that "[a]n IRS audit [would] not diminish the prophetic ministry of All Saints Church."[11]

B. The Church at Pierce Creek

The IRS investigated All Saints Episcopal Church in light of the seminal ruling of the United States Court of Appeals for the District of Columbia Circuit in *Branch Ministries v. Rossotti*.[12] The ruling directly addressed the validity and scope of Section 501(c)(3)'s prohibition against partisan campaign activity by tax-exempt religious institutions.[13] According to the facts in *Branch Ministries*, the IRS revoked the tax-exempt status of the Church at Pierce Creek, a conservative non-denominational Christian church, for that church's alleged partisan political intervention in the 1992 Presidential election.[14]

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5 *Id.*

6 *Id.*

7 *See* Louis Sahagun, *Church Votes to Fight Federal Probe; Pasadena's All Saints Episcopal Parish Board Challenges a Request to Turn Over Documents in a Case Over a 2004 Antiwar Sermon*, L.A. TIMES, Sept. 22, 2006, at B1.

8 *See id.*

9 I.R.C. § 501(c)(3) (2000).

10 Sahagun, *supra* note 7.

11 George Regas, *The Won't-Be-Bullied Pulpit; A Pasadena Cleric Cited by the IRS Refuses to Surrender 'The Very Soul of our Ministry,'* L.A. TIMES, Nov. 9, 2005, at B13.

12 211 F.3d 137 (D.C. Cir. 2000).

13 *Id.* at 141–44.

14 *Id.* at 140.

The Church at Pierce Creek had published several open letters in newspapers asserting that various policy positions taken by then-presidential candidate William Clinton violated biblical precepts.[15] On October 30, 1992, four days before the presidential election, the Church at Pierce Creek printed full-page letters in *USA Today* and the *Washington Times*.[16] The letters bore the headline "Christians Beware" and pointed out that then-Governor Clinton had "extreme views regarding abortion and homosexuality."[17] The Church cited many biblical passages to support its positions on these issues.[18] Each of the letters stated that it was sponsored by the Church and its pastor, and each letter requested "tax deductible donations."[19] Allegedly as a result of the open letters, the Church at Pierce Creek "received hundreds of contributions."[20] In response to the letters, the IRS revoked the Church's tax-exempt status in 1995.[21] The D.C. Circuit upheld the revocation of the Church's tax-exempt status, holding that the Church at Pierce Creek violated the prohibition in Section 501(c)(3) against electioneering and intervention in a partisan political campaign.[22] This case represented the first time that the campaign activity prohibition in Section 501(c)(3) was used by the IRS and a federal court to revoke the tax-exempt status of a church.[23] Barry Lynn, Executive Director of Americans United for Separation of Church and State, was prompted by the ruling to declare that the decision of the D.C. Circuit was a "staggering defeat for Pat

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[15] *Id.*

[16] *Id.*

[17] Mathew D. Staver, *Church's Loss of Tax Exempt Status Letter Turns Out to Be a Victory for Churches*, LIBERTY COUNSEL (2000), http://www.lc.org/Resources/ChurchLossOfTaxExempt.html. The relevant text of the letters reads as follows:

> "Christians Beware: Do not put the economy ahead of the Ten Commandments. Did you know that Gov. Bill Clinton—supports abortion on demand—supports the homosexual lifestyle and wants homosexuals to have special rights—promotes giving condoms to teenagers in public schools? Bill Clinton is promoting policies that are in rebellion to God's laws . . . . HOW, THEN, CAN WE VOTE FOR BILL CLINTON?"

Ann M. Murphy, *Campaign Signs and the Collection Plate—Never the Twain Shall Meet?*, 1 PITT. TAX REV. 35, 67 (2003) (quoting Lisa A. Runquist, *Basic Tax Aspects for Religious Organizations* (2001), http://www.runquist.com/ARTICLE_ReligTax.htm#N_29).

[18] *Federal Appeals Court Rules Against New York State Church in IRS Case—But Offers Blueprint for Churches to Engage in Political Speech*, American Center for Law & Justice, May 12, 2000, http://www.aclj.org/news/Read.aspx?ID=103.

[19] *See* Staver, *supra* note 17.

[20] *Id.*

[21] *Id.*

[22] *See* Branch Ministries v. Rossotti, 211 F.3d 137, 139 (D.C. Cir. 2000).

[23] *See* Staver, *supra* note 17. "The revocation of Branch Ministries' tax-exempt status in 1995 was the first time in history that the IRS has revoked a bona-fide church's tax-exempt status." Murphy, *supra* note 17, at 67.

Robertson, Jerry Falwell and others who want to convert America's churches into a partisan political machine."[24]

C. Purpose

The purpose of this Note is to determine whether the prohibition against partisan campaign activity found in I.R.C. § 501(c)(3) is a valid law under the protective, free-exercise standards set by the Religious Freedom Restoration Act ("RFRA") and to determine whether the IRS properly applies the prohibition. In evaluating the validity of the prohibition contained within Section 501(c)(3), Part II of this Note examines the text of the statute, as well as its legislative history and current interpretation by the IRS. Part III examines the concept of "prophetic speech," the underlying religious activity at issue in both *Branch Ministries* and the situation of All Saints Church. Finally, Part IV argues that Section 501(c)(3)'s prohibition of various types of prophetic speech practiced by religious institutions violates the standards established by RFRA and should be abandoned.

II. THE CURRENT LAW

A. The Legislative History of I.R.C. § 501(c)(3)

Before describing the actual content of Section 501(c)(3), it is important to understand the legislative history (or lack thereof) of this particular provision. Section 501(c)(3) contains prohibitions on partisan political intervention (electioneering) and lobbying by tax-exempt organizations.[25] These prohibitions arose as Senate floor amendments that bypassed congressional hearings.[26] Senator David Reed introduced the lobbying prohibition, which Congress passed in 1934, and Texas Senator Lyndon Johnson introduced the partisan campaign-intervention prohibition passed two decades later in 1954.[27] Because the electioneering prohibition was raised as a floor amendment and was not subject to debate, "the legislative record is essentially silent" as to this provision of Section 501(c)(3).[28] Some have speculated from the historical context surrounding Lyndon Johnson's political and campaign activities during this period that the bill containing the electioneering prohibition was introduced as Johnson's bid to squelch the political influence of nonprofit organizations that opposed him in his own electoral

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[24] Staver, *supra* note 17.

[25] *See* I.R.C. § 501(c)(3) (2000).

[26] Chris Kemmitt, *RFRA, Churches and the IRS: Reconsidering the Legal Boundaries of Church Activity in the Political Sphere*, 43 HARV. J. ON LEGIS. 145, 152 (2006).

[27] *Id.*

[28] *Id.*

campaign.[29] Some scholars that have examined the subject, however, have found that the ban on partisan political intervention by nonprofit organizations was a mere coincidence and not the manifestation of any political objective.[30]

B. I.R.C. § 501(c)(3) and Its Prohibitions

Moving to the actual text of and the substantive law surrounding the political campaign prohibition found in Section 501(c)(3), churches and other religious institutions are considered nonprofit organizations because they are created "exclusively for [a] religious" purpose and "no part of the[ir] net earnings . . . inure[] to the benefit of any private shareholder or individual . . . ."[31] Further, under I.R.C. § 170, contributors to churches and other religious institutions that qualify under Section 501(c)(3) are entitled to deduct their charitable contributions.[32] In order to maintain their tax-exempt status, however, churches and other religious institutions must not conduct any "substantial part of the[ir] activities . . . [in] carrying on propaganda, or otherwise attempting, to influence legislation" and must "not participate in, or intervene in . . . , any political campaign on behalf of (or in opposition to) any candidate for public office."[33]

C. I.R.C. § 508(c)(1)(A) and the Status of Churches

Despite the inclusion of churches and religious institutions among the wide range of organizations that may qualify for tax-exempt status

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[29] *See* Patrick L. O'Daniel, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*, 42 B.C. L. REV. 733 (2001) (providing an extensive redaction of the historical and political events surrounding Lyndon Johnson's electoral campaign and his support of the 1954 amendment); *see, e.g.*, MATTHEW D. STAVER, FAITH AND FREEDOM: A COMPLETE HANDBOOK FOR DEFENDING YOUR RELIGIOUS RIGHTS 374 (2d ed. 1998).

[30] Kemmitt, *supra* note 26, at 153.

[31] I.R.C. § 501(c)(3) (2000).

[32] *Id.* § 170(a)(1), (c)(2)(D).

[33] *Id.* § 501(c)(3). The full text reads as follows:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

Id.

under Section 501(c)(3), churches and religious institutions are not treated identically to other charitable organizations in the Internal Revenue Code. According to I.R.C. § 508(c)(1)(A), a church or religious organization is automatically considered to be tax exempt without having to apply in advance for the IRS to determine their exempt status, a consideration unique among the range of other nonprofit organizations.[34] Churches may merely present themselves to parishioners and contributors as tax-exempt, and these parishioners and contributors can lawfully deduct any charitable contributions under I.R.C. § 170 on the assumption that their church qualifies under Section 501(c)(3). Donations to churches that have not been subject to a formal ruling or advance determination by the IRS are deductible. If a contributor in this situation is audited, however, that contributor must prove that the church met the requirements of Section 501(c)(3).[35] Before the events of 1992, the Church at Pierce Creek, although not formally applying for tax-exempt status with the IRS, had asked for and received an IRS letter stating that it was in compliance with IRS guidelines on Section 501(c)(3).[36] The IRS revoked this letter ruling due to the Church's supposed campaign activities.[37] The Church at Pierce Creek then sued to be reinstated as tax deductible, resulting in the D.C. Circuit's decision in *Branch Ministries v. Rossotti*.[38]

D. The IRS's Interpretation and Application of the Current Law

The IRS has interpreted Section 501(c)(3) strictly to forbid all intervention in partisan political campaigns by churches and other

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[34] I.R.C. § 508(a)(1), (c)(1)(A) (2000). The relevant provisions read as follows:

(a) New organizations must notify Secretary that they are applying for recognition of section 501(c)(3) status

Except as provided in subsection (c), an organization organized after October 9, 1969, shall not be treated as an organization described in section 501(c)(3)—

(1) unless it has given notice to the Secretary in such manner as the Secretary may by regulations prescribe, that it is applying for recognition of such status . . . .

. . . .

(c) Exceptions

(1) Mandatory exceptions

Subsections (a) and (b) shall not apply to—

(A) churches, their integrated auxiliaries, and conventions or associations of churches . . . .

Id.

[35] Branch Ministries v. Rossotti, 211 F.3d 137, 139 (D.C. Cir. 2000).

[36] Staver, *supra* note 17.

[37] *Id.*

[38] *Branch Ministries*, 211 F.3d at 140.

religious institutions.[39] In keeping with the text of the relevant statute, the IRS warns against any overt endorsement of or opposition to political candidates and against any tacit endorsement communicated through partisan political appearances at church services or religious gatherings.[40] The IRS has recognized a difference between issue advocacy and candidate advocacy or electioneering.[41] Indeed, while churches may comment on issues, they may not comment on specific candidates.[42] A church may also attempt to influence legislation, so long as these attempts are less than a "substantial part" of the church's activities.[43] The law, therefore, allows a church to take positions on issues and engage in issue-oriented political activity. Further, according to the IRS, churches may undertake to educate voters by publishing and distributing voter guides and other political education materials.[44] These voter guides and educational materials may be distributed during an election campaign season and may provide information on how the candidates view different issues.[45] These materials, however, must be distributed with the sole purpose of educating voters and must not be used in any "attempt to *favor* or *oppose*" any candidate for publicly elected office.[46] Finally, because the distinction between issue advocacy,

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[39] IRS, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS: BENEFITS AND RESPONSIBILITIES UNDER THE FEDERAL TAX LAW 7 (IRS Publ'n 1828, Sept. 2006) [hereinafter TAX GUIDE], *available at* http://www.irs.gov/pub/irs-pdf/p1828.pdf. The TAX GUIDE specifically provides that:

> Under the Internal Revenue Code, all [S]ection 501(c)(3) organizations, including churches and religious organizations, are absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office. Contributions to political campaign funds or public statements of position (verbal or written) made by or on behalf of the organization in favor of or in opposition to any candidate for public office clearly violate the prohibition against political campaign activity. Violation of this prohibition may result in denial or revocation of tax-exempt status and the imposition of certain excise tax.

Id.

[40] IRS, *Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations* (Feb. 2006), http://www.irs.gov/newsroom/article/0,,id=154712,00.html.

[41] *Id.*

[42] *Id.*

[43] TAX GUIDE, *supra* note 39, at 5; *see* IRS, *Lobbying Activity*, http://www.irs.gov/charities/article/0,,id=163392,00.html (last visited Oct. 30, 2007).

[44] TAX GUIDE, *supra* note 39, at 10.

[45] *Id.* But, "[t]he IRS . . . has been far from clear or comprehensive in its guidance on what constitutes a permissible voter guide." Erik J. Ablin, *The Price of Not Rendering to Caesar: Restrictions on Church Participation in Political Campaigns*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541, 552 (1999).

[46] TAX GUIDE, *supra* note 39, at 10 (emphasis added).

legislative activities, and electioneering is "easily blurred," the IRS "requires that its agents make a subjective evaluation of the church's religious speech to discern issue commentary from veiled candidate commentary."[47]

The IRS reports that in the years following the 2004 elections it has "responded to increased complaints about political intervention by 501(c)(3) organizations and dramatic increases in the amount of money financing campaigns during election cycles . . . ."[48] As a result of the 2004 election cycle, the IRS undertook full examinations of forty-seven churches to evaluate their compliance with Section 501(c)(3) and was able to close its investigation on all but seven of these churches.[49] Thirty-seven churches were found to have substantially violated the campaign intervention prohibition in Section 501(c)(3), and three churches were found to have violated the statute to an extent not substantial enough to warrant sanctions.[50] The IRS promulgated new organizational guidelines, increasing the scope and efficiency of its investigations of alleged violations of Section 501(c)(3).[51] The prohibition on partisan campaign intervention remains an active part of the enforcement regime of the IRS, and in the future, enforcing the campaign intervention prohibition will become of increasing importance.

III. PROPHETIC SPEECH

Given the above explanation of the current law derived from Section 501(c)(3) and its interpretation by the IRS, it is evident that both the Church at Pierce Creek and All Saints Episcopal Church have violated Section 501(c)(3) as interpreted by the IRS. Both churches, whether overtly, as in the case of the Church at Pierce Creek, or more subtly, as in the case of All Saints Church, expressed opposition to a political candidate in the midst of a political campaign. The facts of the controversies surrounding All Saints Church and the Church at Pierce Creek and the claims of their religious leaders, however, make clear that these churches' actions involved much more than pure politics. Indeed, the Church at Pierce Creek used the authority of biblical passages as a warning to other Christians. Further, Dr. Regas claimed that the real

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47 *See* Kemmitt, *supra* note 26, at 179 (footnote omitted).

48 Letter from Lois G. Lerner, Director, Exempt Organizations Division, IRS, to Colleagues, Members of the Press and Taxpayers, at 3 (Nov. 7, 2006), http://www.irs.gov/pub/irs-tege/fy07_implementing_guidelines.pdf.

49 IRS, Final Report: Project 302: Political Activities Compliance Initiative, at 1, 9, http://www.irs.gov/pub/irs-tege/final_paci_report.pdf (last visited Oct. 13, 2007).

50 IRS, 2004 Political Activity Compliance Initiative (PACI) Summary of Results (Feb. 16, 2006), http://www.irs.gov/pub/irs-tege/one_page_statistics.pdf.

51 *See* IRS, FY 2007 Exempt Organizations (EO) Implementation Guidelines (Nov. 2006), http://www.irs.gov/pub/irs-tege/fy07_implementing_guidelines.pdf.

issue in controversy in his case was All Saints Church's exercise of its "prophetic ministry."[52] These comments highlight that the actions of All Saints Church and the Church at Pierce Creek must be evaluated within the context of a stream of Christian tradition that places significant emphasis on prophetic speech and the prophetic ministry.

A. The Theological Basis for Prophetic Speech

According to *The HarperCollins Bible Dictionary*, a "prophet" is "a person who serves as a channel of communication between the human and divine worlds."[53] In the Judeo-Christian tradition, the prophet was an individual appointed by God to deliver His word to mankind.[54] In the Protestant Christian community,[55] there have emerged two competing views on the current status of the gift of prophecy in the life of the Church: the cessationist view and the non-cessationist or charismatic view.[56] According to the cessationist view, all genuine prophetic activity ceased at the end of the Apostolic Age of the first century and, therefore, the prophetic ministry is no longer a continuing part of the religious life of the Christian church.[57] Conversely, according to the non-cessationist

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[52] Regas, *supra* note 11.

[53] THE HARPERCOLLINS BIBLE DICTIONARY 884 (Paul J. Achtemeier et al. eds., rev. ed. 1996).

[54] WAYNE A. GRUDEM, THE GIFT OF PROPHECY IN THE NEW TESTAMENT AND TODAY 17–18 (1988).

[55] This Note will deal almost entirely with the theological and religious context of Protestant Christianity due to the fact that the Author is a Protestant and is most familiar with this religious context. This emphasis on the Protestant context seems particularly appropriate considering that the two churches discussed in this Note are Protestant as well.

[56] There is a distinction between the terms "non-cessationist" and "charismatic." This distinction is beyond the scope of this Note. These two terms, however, are placed together because both views hold that the gift of prophecy is a valid and continuing ministry in the Church. The Church at Pierce Creek would more closely resemble the charismatic view, while All Saints Episcopal Church would be more aptly placed in the non-cessationist camp. In a sermon delivered before the congregation of All Saints Church in October of 2006, Rev. J. Edwin Bacon, Jr., outlined All Saints Church's theology on prophecy and stated that all Christians have a prophetic duty to speak out against social and political injustice. Rev. J. Edwin Bacon, Jr., All God's Children Called to be Prophets, at 1 (Oct. 1, 2006), http://www.allsaints-pas.org/sermons/JEB%2010-1-06%20All%20God's%20Children%20Called%20To%20Be%20Prophets.pdf. Bacon then declared that modern prophets, such as Rev. Martin Luther King, Jr. and Archbishop Desmond Tutu, were inspired by God with the same "prophetic spirit" that inspired Jesus Christ and the Old Testament prophets. *Id.* at 2–3.

There are a large number of differences within the broader non-cessationist or charismatic view regarding the character and authority of the continuing prophetic ministry. For a discussion of the various different views concerning the nature of the continuing prophetic ministry, see ARE MIRACULOUS GIFTS FOR TODAY?: FOUR VIEWS (Wayne Grudem et al. eds., 1996).

[57] *See* GRUDEM, *supra* note 54, at 13.

or charismatic view, the prophetic ministry, a gift of God, is a continuing practice that is fundamental to the life of Christian churches and communities.[58] It is with the non-cessationist or charismatic view that this Note is chiefly concerned, and it is this view that is at the heart of the legal controversies involving both All Saints Episcopal Church and the Church at Pierce Creek.

Indeed, the Christian scriptures are replete with references to prophecy, and one of the passages of scripture that most directly speaks to the role and purpose of the ministry of prophecy in the life of the Church is the Apostle Paul's exposition on the subject in 1 *Corinthians* 14.[59] In these passages, Paul exhorts the believers at the Corinthian church to "[p]ursue love, yet desire earnestly spiritual *gifts*, but especially that you may prophesy."[60] Paul puts special emphasis on the fact that "one who prophesies speaks to men for edification and exhortation and consolation."[61] Not only does Paul contend that prophetic speech is useful for building up individuals but that "prophecy *is for a sign*, not to unbelievers, but to those who believe."[62] Paul goes on to state, "Now I wish that you all spoke in tongues, but *even* more that you would prophesy . . . ."[63] Thus, churches that hold a non-cessationist or charismatic view of prophecy interpret these Scripture passages as reflecting the Biblical verity that the ministry of prophecy is integral to the life and practice of Christian communities.

B. The Old Testament Prophets

Several biblical precedents for the prophetic ministry will serve to elucidate an important characteristic of Christian prophetic speech—that, within the Judeo-Christian tradition, prophetic speech can be thoroughly religious and still be composed, partially or entirely, of political subject matter. In the biblical narrative of the Old Testament prophets Nathan and Elijah and their respective prophetic ministries to the nation of Israel and its surrounding kingdoms, there is exemplary material of prophetic speech that was religious in character and yet had current political implications. The book of 2 *Samuel* records several incidents in which Nathan specifically endorsed the kingship of David, saying that the Lord was with David.[64] After David had murdered his ally Uriah and had committed adultery with Uriah's wife, however,

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58 *Id.*

59 *See* 1 *Corinthians* 14:1–25.

60 1 *Corinthians* 14:1 (NASB).

61 1 *Corinthians* 14:3 (NASB).

62 1 *Corinthians* 14:22 (NASB) (emphasis added).

63 1 *Corinthians* 14:5 (NASB).

64 *See, e.g.*, 2 *Samuel* 7:3.

Nathan appeared before David and rebuked him, recounting David's sins and their impact on Israel, the Davidic line, and on David himself.[65] Again, in 1 *Kings*, God appeared to the prophet Elijah and directed him to go to Damascus and anoint Hazael as king over the Arameans in Syria and Jehu as king over Israel.[66] In the stories of both of these prophets, a profound religious duty arising from a command from God led to intervention of the prophets in the political events of their respective times—intervention that took the form of either endorsement of or opposition to specific political leaders.

C. The Prophetic Ministry of Jesus

A more prominent precedent, within a Christian context, for the intersection of religion and politics in prophetic speech is the prophetic ministry of Jesus Christ, as recorded in the Christian gospels. In orthodox Christian theology, Jesus served in the role of prophet.[67] The prophetic ministry of Jesus within the context of first-century Judea was both profoundly religious and profoundly political in nature. Indeed, Jesus publicly confronted both the Sadducees, the faction that dominated Jewish religious life in first century Judea,[68] on religious issues[69] and the Pharisees, the faction that dominated Jewish political life in first century Judea,[70] on matters of politics.[71] Indeed, Jesus' prophecies were extremely political in subject matter and often made clear reference to the destruction of the current religious and political authority that was embodied by the Jewish Second Temple.[72] Thus, the

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[65] 2 *Samuel* 12:1–15.

[66] 1 *Kings* 19:15–16.

[67] *Luke* 24:19.

[68] James F. Driscoll, *Saducees*, 13 THE CATHOLIC ENCYCLOPEDIA 323a (Robert Appleton Co. 1912), *available at* http://www.newadvent.org/cathen/13323a.htm. The Saducees dominated Jewish religious life in the first century in the sense that they were "the dominant priestly party during the Greek and Roman period." *Id.* Considering their relatively strong influence with the Roman government and the politically important families in first-century Judea, the Saducees cannot be considered a purely religious group. THE HARPERCOLLINS BIBLE DICTIONARY, *supra* note 53, at 957–58.

[69] *See Matthew* 22:22–34.

[70] *See* James F. Driscoll, *Pharisees*, 11 THE CATHOLIC ENCYCLOPEDIA 789b (Robert Appleton Co. 1911), *available at* http://www.newadvent.org/cathen/11789b.htm. The Pharisees were dominant politically in the sense that they enjoyed the popular support of the Jewish people during the first century and were at the forefront of the Jewish-nationalist movement that defined the political climate of first-century Judea. THE HARPERCOLLINS BIBLE DICTIONARY, *supra* note 53, at 841–42. But, the Pharisees were also part of a reformist religious movement with its own interpretation of Jewish law. *Id.*

[71] *Matthew* 22:16–22.

[72] *Matthew* 24:1–28. Although Jesus' words in *Luke* regarding "rendering to Caesar" indicate that first-century Jews did have at least a vague concept of the difference between religion and politics, the religious and political lives of first century Jews were virtually

primary prophetic material in the New Testament defies a rigid distinction between the religious and political spheres.[73]

D. The Prophetic Writings

What is more, a common feature of the Judeo-Christian prophetic tradition is the centrality of written prophecy in the life of the religious community. Indeed, Hebrew texts, such as *Isaiah*, *Jeremiah*, and *Daniel*, and Greek texts, such as *Revelation*, are parts of the canon for all orthodox Christian believers. These books are not only central to the life of the religious community, but they are also profusely political in their character. For example, the book of *Daniel* records several prophecies that are thoroughly religious yet directly address immediate or future political events. The prophecies of the four beasts[74] and of the statue[75] found in *Daniel* deal almost exclusively with the political fortunes of the Gentile kingdoms in the Near East beginning with Daniel's immediate time period. Written prophecy is as valid and as prominent as oral prophecy in Christian tradition. Thus, while secular readers may perceive the published letters from the Church at Pierce Creek as crass political advertisements, these letters can be interpreted as a continuation of the prophetic speech tradition of charismatic Christian churches.

E. Analysis of Prophetic Speech

The above exposition of the non-cessationist or charismatic view of the Christian religious practice of prophetic speech serves to disclose several important points relevant to an analysis of the controversies surrounding All Saints Church and the Church at Pierce Creek and of the partisan campaign intervention prohibitions in Section 501(c)(3). First, prophetic speech and the exercise of the prophetic gift are a fundamental aspect of the religious life and practice of non-cessationist or charismatic churches. All Saints Episcopal Church and the Church at Pierce Creek were thus both engaging in behavior fundamental to their religious communities. Second, no real distinction necessarily exists between the oral and written forms of prophetic speech in the Christian

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indistinguishable. For example, the chief judicial and legislative body for the Jewish people in first century Judea was the Great Sanhedrin. THE HARPERCOLLINS BIBLE DICTIONARY, *supra* note 53, at 971–72. The Sanhedrin claimed authority over all aspects of Jewish life, including political and religious aspects, and convened in the Hall of Hewn Stone in the complex of the Second Temple. *Id.*

[73] It is therefore not surprising that the Christian tradition of prophetic speech, with its antecedents found within the New Testament and within the context of first-century Jewish experience, also defies distinctions between politics and religion.

[74] *See Daniel* 7.

[75] *See Daniel* 2.

tradition. Although the oral form of prophetic speech is far more commonly exercised in modern times, the various biblical examples present evidence that written words, such as those employed by the Church at Pierce Creek, can also play an important role in prophetic speech. Last, prophetic speech in Christian tradition has oftentimes been thoroughly religious while still being political in its subject matter, and no ready distinctions between the political and the religious spheres exist in this context. Hence, the political nature of the speech of the two churches at issue does not disqualify this speech from being genuinely prophetic.

IV. RELIGIOUS FREEDOM RESTORATION ACT AND ANALYSIS

A. Religious Freedom Restoration Act[76]

Having identified and defined the religious activity at issue in the cases of All Saints Episcopal Church and the Church at Pierce Creek, it is necessary to examine whether the prohibition of this activity by Section 501(c)(3) is valid under the Constitution and laws of the United States. The First Amendment to the United States Constitution begins with the admonition that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[77] This portion of the First Amendment contains the twin clauses that define the relationship between the Church and the State in the United States: the Establishment Clause and the Free Exercise Clause. In 1990, the Supreme Court introduced a new analytical method for deciding Free Exercise Clause cases in *Employment Division v. Smith*.[78] This new method "marked a significant turning point in the Supreme Court's Free Exercise Clause jurisprudence."[79] Indeed, *Smith* rejected applying strict scrutiny in Free Exercise Clause cases to laws that are "neutral" toward religion and "generally applicable" and, thereby, disallowed judicially

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[76] 42 U.S.C. § 2000bb-1 (2000).

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

Id.

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

[78] 494 U.S. 872 (1990).

[79] Kemmitt, *supra* note 26, at 163.

created religious exemptions from such laws.[80] RFRA was enacted by Congress in 1993 in order to restore the pre-*Smith* analysis of the Free Exercise Clause that was propagated by the Supreme Court,[81] first in *Sherbert v. Verner*[82] and again in *Wisconsin v. Yoder*.[83] According to RFRA and the *Sherbert* test, the government may "substantially burden" an individual's free exercise of religion only if it demonstrates that the burden on the individual's free-exercise right furthers a "compelling governmental interest" and is the "least restrictive means of furthering that compelling governmental interest."[84] Despite Congress's efforts to apply RFRA comprehensively, the Supreme Court ruled RFRA unconstitutional as applied to state governments because of the limitations of the Fourteenth Amendment.[85] Today RFRA remains inapplicable to the states, but it still applies to the federal government.[86] Thus, to determine whether Section 501(c)(3), federal legislation, is valid under RFRA, one must evaluate this provision according to RFRA's three prongs: substantial burden, compelling state interest, and least-restrictive means.[87]

B. Substantial Burden

Given the preceding analysis of the religious context of prophetic speech, one is prompted to the conclusion that Section 501(c)(3)'s blanket prohibitions on partisan campaign intervention by churches is a substantial burden on the free exercise of the religion of many of these institutions. Section 501(c)(3) violates the first prong of the RFRA analysis. Indeed, the Supreme Court has held that "'the power to tax the exercise of a privilege is the power to control or suppress its

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[80] 494 U.S. at 878–80.

[81] *See* 42 U.S.C. § 2000bb(b)(1) (2000).

[82] 374 U.S. 398, 406–09 (1963).

[83] 406 U.S. 205, 215, 220–29 (1972).

[84] 42 U.S.C. § 2000bb-1(a)–(b) (2000); *Sherbert*, 374 U.S. at 406–09.

[85] City of Boerne v. Flores, 521 U.S. 507, 536 (1997). The decision in *City of Boerne* only addressed whether RFRA was binding on states under Section 5 of the Fourteenth Amendment. *Id.*

[86] The Supreme Court has held that, "RFRA requires the [Federal] Government to demonstrate that the compelling interest test is satisfied . . . ." Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430 (2006). *Gonzales* held that the federal government did not meet the demands of strict scrutiny, created by RFRA, when it applied provisions of the Controlled Substances Act to members of a religious organization. *Id.* at 436–37, 439. Although not explicitly stated by the Court, RFRA may be applicable to the federal government based on powers granted to Congress by Article I, particularly the Necessary and Proper Clause in Section 8 of Article I, of the United States Constitution. *See* Kemmitt, *supra* note 26, at 163 n.149.

[87] *See* 42 U.S.C. § 2000bb-1(a)–(b) (2000).

enjoyment.'"[88] Again, "the power to tax involves the power to destroy . . . ."[89] Thus, "the government may not deny a benefit to a person because he exercises a constitutional right."[90] By denying tax exemptions to churches because they engage in prophetic speech, the partisan campaign-intervention prohibition in Section 501(c)(3) punishes churches adhering to the continuing validity of the prophetic ministry for the free exercise of their religion. Prophetic speech is a well-developed religious practice that is held by many Christian churches to be completely religious in character, although the prophetic subject matter may be political and may support or oppose certain political candidates.[91] To punish churches for speaking prophetically, and perhaps thereby endorsing or opposing certain candidates or parties, is to limit churches' ability to convey a religiously compelled message.

Certainly, the current law also imposes an implicit ideological dichotomy, separating the words and actions of churches into two competing spheres: the purely political and the purely religious.[92] As has been demonstrated in the foregoing analysis of Christian prophetic speech, this dichotomy is false when applied to this type of speech. What is more, the dichotomy acts as an implicit endorsement of certain types of theological presuppositions that should be left to churches. Indeed, the prohibition on campaign intervention and electioneering acts as a prohibition penalizing churches for holding, and acting upon, a specific religious belief: that of the continuing relevance of the prophetic ministry and prophetic speech to the religious life of the Christian Church. Essentially, Section 501(c)(3) forces All Saints Church, the Church at Pierce Creek, and other Christian churches to make the unenviable choice between practicing their prophetic ministry and maintaining their tax-exempt status. This is a substantial burden on a legitimate religious practice.

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[88] Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 386 (1990) (quoting Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943)).

[89] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819). The phrase reads in full:

> That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.

Id.

[90] Regan v. Taxation with Representation, 461 U.S. 540, 545 (1983).

[91] *See supra* Part III.

[92] *See* Kemmitt, *supra* note 26, at 162.

C. Compelling Governmental Interest

Considering the substantial burden that Section 501(c)(3) places on the legitimate religious practice of prophetic speech in Christian churches, it is necessary to determine if there is a compelling state interest in imposing this burden. Three popular arguments have been put forward to justify the current system based upon the prohibitions enumerated in Section 501(c)(3).

The first argument is primarily normative. According to this argument, which is often made by Christians and other people of faith, churches and other religious institutions should not be fora for political activism and political campaigning because this defiles the purpose of religious institutions. Indeed, most Christians and other people of faith believe that churches and other houses of worship should not engage in partisan political activities.[93] Some have even argued that "[i]n addressing the moral dimensions of policy issues, churches are fulfilling their unique prophetic role. In endorsing a particular candidate, party, or political platform, however, they jeopardize that distinctive prophetic voice."[94] Churches and other religious institutions could, therefore, devolve into nothing more than political machines.[95] The first normative argument, however, cannot provide a compelling governmental interest because, in the modern American system of separation of State and Church, the State has no interest in preserving the sacred character of religious institutions. What is more, even if the campaign intervention prohibition is removed, the text of Section 501(c)(3) would still demand that churches and religious institutions have an "exclusively . . .

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[93] The Interfaith Alliance Foundation, Religious Leaders Say: Oppose the Jones "Churches in Politics" Bill, H.R. 2357, http://www.interfaithalliance.org/site/pp.asp?c=8dJIIWMCE&b=397383 (last visited Oct. 29, 2007) [hereinafter Religious Leaders Say].

> In a recent Gallup/Interfaith Alliance Foundation poll, a full 77% of clergy were opposed to their fellow clergy endorsing political candidates. Another poll conducted by The Pew Research Center for the People and the Press and The Pew Forum on Religion and Public Life, found that 70% of Americans feel that houses of worship should not come out in favor of one candidate over another during political elections.

Id. *See* Murphy, *supra* note 17, at 81.

[94] Deirdre Dessingue, *Prohibition in Search of a Rationale: What the Tax Code Prohibits; Why; To What End?*, 42 B.C. L. REV. 903, 925 (2001).

[95] Religious Leaders Say, *supra* note 93.

> This . . . would open a dramatic loophole in the nation's campaign finance laws. Donations to houses of worship are tax deductible because the government assumes that their work is contributing to the common good of society, not a political party or a partisan campaign. As such, contributions to churches are tax deductible and donations to political candidates and parties are not. Therefore, these bills would create a significant new loophole in our nation's campaign finance laws with serious ethical and legal implications.

Id.

religious" purpose.[96] Churches and religious institutions would not be allowed to abandon their exclusively religious purpose when engaging in matters that could be considered political. Therefore, this argument cannot constitute a compelling state interest.

The next two arguments for the current law focus on the legal and policy ramifications of altering the current law. Indeed, when the case of *Branch Ministries, Inc. v. Rossotti* was in the United States District Court for the District of Columbia, the court stated that, "[t]he government has a compelling interest in maintaining the integrity of the tax system and in not subsidizing partisan political activity, and Section 501(c)(3) is the least restrictive means of accomplishing that purpose."[97] The IRS cites this passage in the district court's opinion in *Branch Ministries* as reflecting its own justification for the partisan campaign-intervention prohibition in Section 501(c)(3).[98] Thus, the second argument is that the Section 501(c)(3) prohibitions are "required . . . to maintain a tax system that can be easily administered without allowing myriad exceptions for different religious groups."[99] In accordance with the second argument, one could assert that the government has a compelling governmental interest in maintaining uniform rules for taxation. Canceling the prohibition on campaign activity in Section 501(c)(3), however, would not create any additional exceptions to the tax code. All churches and religious institutions would be allowed to engage in additional behavior, but the IRS would not accrue "[any] new administrative duties."[100] Contrary to the assertions of the proponents of this argument, removing the partisan campaign intervention prohibition as applied to churches would likely make the administration of the tax code by the IRS easier because the IRS would no longer have to undertake the complicated investigation and enforcement tasks associated with applying this prohibition to churches. Moreover, the IRS undertakes extensive education campaigns targeted toward churches during each election cycle in order to facilitate their compliance with Section 501(c)(3).[101] Removing the prohibition as applied to churches would relieve the IRS of the burden of implementing these massive

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[96] I.R.C. § 501(c)(3) (2000).

[97] Branch Ministries, Inc. v. Rossotti, 40 F. Supp. 2d 15, 25–26 (D.D.C. 1999) (citation omitted).

[98] IRS, *Charities, Churches and Politics*, http://www.irs.gov/newsroom/article/0,,id=161131,00.html (last visited Nov. 3, 2007).

[99] Kemmitt, *supra* note 26, at 174 (citing Hernandez v. Comm'r, 490 U.S. 680, 699–700 (1989)).

[100] *Id.* at 175.

[101] IRS, *Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations* (Feb. 2006), http://www.irs.gov/newsroom/article/0,,id=154712,00.html.

educational campaigns. Thus, the second argument also fails to provide a compelling governmental interest.

Although the first two arguments are rather easily dismissed as failing to provide a compelling state interest for Section 501(c)(3), the third argument is not so readily dismissed. According to the third argument forwarded by the IRS and the United States District Court for the District of Columbia in *Branch Ministries*, the compelling governmental interest invoked in Section 501(c)(3) is rooted in the Establishment Clause of the First Amendment. In *Everson v. Board of Education*, the Supreme Court determined that the Establishment Clause means that "[n]either a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another."[102] The Court has never disavowed this statement. As the Court made clear in *Lemon v. Kurtzman*, any government action must have a legitimate secular purpose, must not have the primary effect of either advancing or inhibiting religion, and must not result in an "'excessive government entanglement with religion.'"[103] Thus, the third argument is that allowing churches and religious institutions the right to unfettered political activity, including unrestricted lobbying and unrestricted electioneering, would advance religion, and thereby establish religion, by affording religious institutions a financial advantage over secular organizations in the political sphere.[104]

While altering the tax code to remove the partisan campaign prohibition as applied to religious institutions may, in some sense, provide religious institutions with advantages over non-religious organizations in the political sphere, when viewed in the light of other Supreme Court precedents, however, the governmental interest in preventing this becomes far less compelling. In *Marsh v. Chambers*, the Court upheld the chaplaincy practice of the Nebraska legislature although the direct funding of legislative chaplains was a clear and unambiguous case of the State advancing religion according to the *Lemon* test.[105] In his opinion for the Court, Chief Justice Warren Burger ignored the specifics of the three-part *Lemon* test, which had been the standard for cases involving the Establishment Clause, and, in its place,

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[102] 330 U.S. 1, 15 (1947).

[103] 403 U.S. 602, 612–13 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

[104] Murphy, *supra* note 17, at 78. *See also id.* (quoting Rep. John Lewis as stating that altering the law in Section 501(c)(3) "'threatens the very integrity and independence of our churches and other[] houses of worship. Any time the wall of separation between church and State is breached, religious liberty is threatened.'" (148 CONG. REC. H6912, 6912–17 (2002) (statement of Rep. Lewis))).

[105] Marsh v. Chambers, 463 U.S. 783, 792–95 (1983).

substituted an analysis based on historical custom.[106] The Court stated that, "[t]o invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country."[107] According to Section 508(a), churches and religious institutions are automatically presumed to be tax exempt.[108] This indicates that Congress recognizes a historical precedent in the United States affirming that churches and religious institutions should be exempt from taxation by the State. Indeed, before 1954, religious institutions were free to engage in partisan political intervention without fear of losing their exemption from taxation.[109]

Moreover, the automatic exemption in the tax code echoes the historical recognition that the State should strive as much as possible to leave churches and religious institutions alone lest the free exercise of religion be violated. Indeed, the separation of Church and State is premised, first and foremost, on the notion that the State should be restrained from intervening in religious exercise by a "wall of separation."[110] Thus, there is a long-held historical custom of tax exemption for churches and religious institutions in recognition of the principle of separation of Church and State. This exemption has existed irrespective of campaign activity by churches.[111] Eliminating the campaign intervention prohibition would thus be a reinstatement of the historical status quo. Removing statutory prohibitions, which have no historical legislative justification[112] and very little cognizable legal justification, to return to the historical status quo is not an Establishment Clause violation that would constitute a compelling state interest.

Again, the above analysis, based on the decision in *Marsh v. Chambers*, is supported by the Supreme Court's opinion in *Walz v. Tax Commission*, the Court's seminal case on the issue of tax exemption for religious institutions.[113] In *Walz*, the Court addressed the

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[106] *Id.* at 786–90.

[107] *Id.* at 792.

[108] I.R.C. § 508(a) (2000).

[109] *See* Vaughn E. James, *Reaping Where They Have Not Sowed: Have American Churches Failed to Satisfy the Requirements for the Religious Tax Exemption?*, 43 CATH. LAW. 29, 44–48 (2004).

[110] Letter from Thomas Jefferson to Messrs. Nehemiah Dodge and Others, a Committee of the Danbury Baptist Association (Jan. 1, 1802), *in* THOMAS JEFFERSON: WRITINGS 510, 510 (Merrill D. Peterson, ed., 1984).

[111] *See* James, *supra* note 109, at 48–69.

[112] *See supra* notes 25–30 and accompanying text.

[113] 397 U.S. 664 (1970).

constitutionality of New York's general provision of tax exemption for churches and religious institutions.[114] In finding tax exemption for churches and religious organizations to be constitutional, the Court found "[i]t . . . significant that Congress, from its earliest days, has viewed the Religion Clauses of the Constitution as authorizing statutory real estate tax exemption to religious bodies."[115] This statement emphasizes the historical importance of the tax exemption for religious institutions and does not make a distinction between the unconditional tax exemption, which was the norm prior to the 1954 addition, and the post-1954 conditional exemption. The unconditional tax exemptions that existed prior to 1954 have been recognized by the Supreme Court as being supported by powerful historical precedents.[116]

Further, the Court in *Walz* directly addressed the current concerns of those who argue that an unconditional tax exemption for religious organizations is equivalent to an establishment of religion.[117] The Court clearly stated that "[n]othing in this national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of all forms of religious belief."[118] Indeed, certain early proponents of the Constitution and its separation of Church and State thought it essential that religious institutions be free from taxation by the government to maintain the efficacy of both of the Religion Clauses.[119] According to Chief Justice Burger, even unconditioned tax

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[114] *Id.* at 666–67.

[115] *Id.* at 677. "The existence from the beginning of the Nation's life of a practice, such as tax exemptions for religious organizations, is not conclusive of its constitutionality. But such practice is a fact of considerable import in the interpretation of abstract constitutional language." *Id.* at 681 (Brennan, J., concurring).

[116] *Id.* ("The more longstanding and widely accepted a practice, the greater its impact upon constitutional interpretation. History is particularly compelling in the present case because of the undeviating acceptance given religious tax exemptions from our earliest days as a Nation. Rarely if ever has this Court considered the constitutionality of a practice for which the historical support is so overwhelming.").

[117] "*Walz* unequivocally establishes the constitutionality, propriety, and desirability of exempting religious organizations from taxation." Ablin, *supra* note 45, at 564.

[118] *Walz*, 397 U.S. at 678.

[119] *See generally* ISAAC BACKUS, AN APPEAL TO THE PUBLIC FOR RELIGIOUS LIBERTY, AGAINST THE OPPRESSIONS OF THE PRESENT DAY (Boston, John Boyle 1773). In September of 1775, Rev. Isaac Backus, a strong supporter of the separation of Church and State, delivered a sermon in which he stated:

> Yet, as we are persuaded that an entire freedom from being taxed by civil rulers to religious worship, is not a mere favor, from any man or men in the world, but a right and property granted us by God, who commands us to stand fast in it, we have not only the same reason to refuse an acknowledgment of such a taxing power here, as America has the above-said power, but also,

exemption for churches was a function of "religious tolerance" that prevents the government from engaging in excessive interference in the religious sphere and promotes religious plurality.[120] Chief Justice Burger's argument leads to the conclusion that tax exemptions for religious institutions, in fact, prevent the type of excessive entanglement that the Court found incompatible with the Establishment Clause in *Lemon v. Kurtzman*.[121]

Thus, avoiding an establishment of religion does not constitute a compelling governmental interest in favor of Section 501(c)(3) because removing the prohibition as applied to religious institutions would only restore the historical status quo regarding the tax relationship between religious institutions and the federal government. This status quo was based on a historical custom and was similar to the custom held constitutional in *Marsh v. Chambers*,[122] which the Supreme Court has stated does not violate the Establishment Clause of the First Amendment.[123] Indeed, this historical custom was meant to safeguard the separation of Church and State and to avoid the constitutional problem of excessive entanglement that the Supreme Court has concluded, in *Lemon*, threatens this separation. Therefore, with that in mind, Section 501(c)(3) violates the standards set by RFRA because it is a substantial burden on the prophetic speech of churches, such as All Saints Episcopal Church and the Church at Pierce Creek, and because the government lacks a compelling state interest that justifies this burden.

V. CONCLUSION

Currently, under Section 501(c)(3), any partisan campaign intervention undertaken by a church, such as the Church at Pierce Creek, will result in the revocation of the tax-exempt status of that

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according to our present light, we should wrong our consciences in allowing that power to men, which we believe belongs only to God.

Isaac Backus, *A History of New England (1774–75), reprinted in* 5 THE FOUNDERS' CONSTITUTION, 65, 65 (Philip B. Kurland & Ralph Lerner eds., Liberty Fund 1987).

120 *Walz*, 397 U.S. at 678.

121 Indeed, "one can argue that taxation of churches violates the Free Exercise Clause of the First Amendment because it allows the government to become excessively entangled with the financial affairs of churches, and thus burdens the practice of religion." Ablin, *supra* note 45, at 564.

122 463 U.S. 783, 792–95 (1983). Sponsoring legislative prayer, as in *Marsh v. Chambers*, is similar to exempting churches and other houses of worship from taxes in that both are customs that confer a particular benefit on religion. Both practices have long historical roots extending back to certain legislative actions by the founding generation. Further, both customs single out religion, including clergy and religious bodies, for benefits based on their religious exercise.

123 *See supra* notes 25–30 and accompanying text.

church or religious institution. The Supreme Court has yet to rule on the constitutionality of the prohibition on participation in political campaigns by churches. Thus, Section 501(c)(3) remains in question. Churches such as All Saints Episcopal Church[124] and the Church at Pierce Creek, however, are bound by religious duty and conviction to speak prophetically, even if this means that their prophetic speech resounds into the political sphere. Indeed, it is apparent that, at certain times, churches are compelled to become involved in political campaigns, in recognition of their prophetic ministry.

Thus far, attempts to reformulate the partisan campaigning prohibition to overcome the prohibition's violation of RFRA have failed to recognize that distinctions between political and religious content are not always applicable when dealing with Christian prophetic speech.[125] Recent popular proposals, such as the Crane-Rangel Amendment, have suggested that churches and religious organizations would be allowed to dedicate a certain percentage of their income to partisan political activity.[126] These proposals, however, require the government to determine which church activities are political and which are religious and how much of this partisan political activity is appropriate and should be tolerated. Plans that suggest a "substantial part" test—similar to Section 501(c)(3)'s lobbying-prohibition test—should be used to determine the extent to which churches may engage in partisan political intervention. This test would also entail a judicial or governmental determination of the character of church activities, such as Christian prophetic speech.[127] Certain scholars have even suggested that the tax code should allow churches and other religious institutions to engage in partisan political intervention, without any fear of having their tax-exempt status revoked, but any church funds expended in partisan

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[124] On September 10, 2007, the IRS sent a closing letter to All Saints Episcopal Church that "simultaneously closed the dormant examination—without challenge to the Church's tax-exempt status and without the audit ever actually taking place—and concluded without explanation that [Regas's sermon] constituted intervention in the 2004 Presidential election." Press Release, All Saints Church, All Saints Church, Pasadena Demands Correction and Apology From the IRS (Sept. 23, 2007), http://www.allsaints-pas.org/site/DocServer/IRS_Press_Release_Sept_23__2007.pdf. The investigation of All Saints Church may be concluded, but it remains a vivid example of the detrimental effects of the electioneering prohibition in Section 501(c)(3) on religious communities and on the relationship between these communities and the government. Indeed, All Saints Church was forced to undergo an intense, two-year examination by the IRS that consumed significant amounts of All Saints Church's time and resources. In the end, although it did not revoke All Saints Church's tax-exempt status, the IRS declared the legitimate, religiously motivated practice of prophetic speech by Regas and All Saints Church to be a violation of the Internal Revenue Code. *See supra* text accompanying notes 2–11.

[125] *See* Ablin, *supra* note 45, at 551–53; *see also* Kemmitt, *supra* note 26, at 153–62.

[126] *See* Ablin, *supra* note 45, at 585–86; *see also* Kemmitt, *supra* note 26, at 177–78.

[127] Ablin, *supra* note 45, at 584.

political activity would be taxed by the government.[128] This last plan would necessitate a delineation and classification of all of a church's activities as either political or religious. It is therefore likely that this plan would require even more invasive church investigations than those conducted under the present enforcement regime, as well as judicial or governmental determination of the nature of all of a church's activities. Indeed, all of the proposed changes to Section 501(c)(3) proffered recently have required either an implicit or an explicit judicial or governmental determination of what is religious and what is political. Hence, these proposed changes would also run afoul of the standards imposed by RFRA.

With the increasing prominence of so-called "faith-and-values voters," on both the left and the right,[129] the influence of churches and other religious institutions will almost certainly come under increasing scrutiny both by nongovernmental organizations and by the IRS. As the prominence of churches in politics increases, the IRS and the United States government will likely be forced to deal with the troubling consequences of the current law. The current law and the proposed changes to the current law violate the free-exercise right of churches and other religious institutions as guaranteed in RFRA and also create excessive entanglement of the State in the Church's affairs. History bears out that an unconditional tax exemption for churches and other religious institutions not only avoids the problems associated with the current law, but also promotes religious freedom and religious pluralism. Therefore, courts should abandon and Congress should repeal the current prohibition in Section 501(c)(3) against partisan political intervention by churches and other religious institutions to protect religious institutions from violations of their right to free exercise as safeguarded by Congress in the Religious Freedom Restoration Act.

Zachary Cummings

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[128] Kemmitt, *supra* note 26, at 176–77.

[129] Ron Chepesiuk, *Faith Based Groups Left and Right Appeal to Different 'Moral Values,'* THE NEW STANDARD, Dec. 7, 2004, http://newstandardnews.net/content/?action=show_item&itemid=1284.