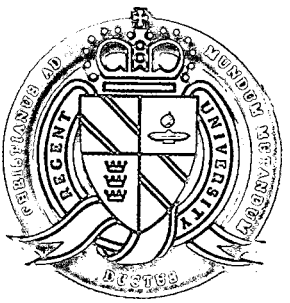
# REGENT UNIVERSITY LAW REVIEW




## ARTICLES



## NOTES



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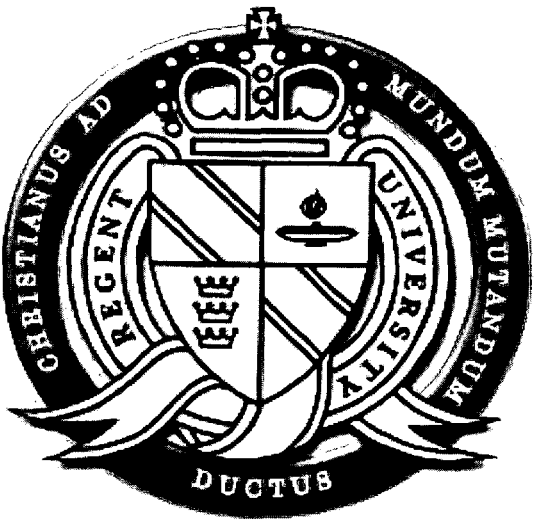


*The seal of the Regent University Law Review symbolizes the Christian heritage of Regent University. The shield represents the shield of faith. The crown at the top of the crest declares the One we represent, our Sovereign King, Jesus Christ. The three crowns represent the Father, Son, and Holy Spirit.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

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## BRINGING A WORLD OF LIGHT TO TECHNOLOGY AND JUDICIAL ETHICS

*David Hricik**

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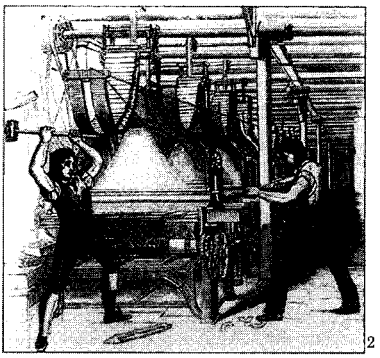
* Professor of Law, Mercer University School of Law, Macon, Georgia. This article was made possible, in part, by a research grant from the law school. I would like to thank my research assistant, Lee Ann Hughes, for her assistance with the article. The title is from the song, "World of Light" from the CD "Swings and Roundabouts" by John Wesley Harding.

## INTRODUCTION: WHY EVEN LUDDITE JUDGES NEED TO KNOW ABOUT TECHNOLOGY

The Luddites thought that by smashing machines in early 19th Century England, they could eliminate the threat that those machines presented to them.[1]

 [2]

Of course, they were wrong. As was the case during the Luddites' time, technology continues to march inexorably onward in today's society.[3] As a result, those within the legal community—judges in particular—have no choice but to begin using technology. Although judges are currently using

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[1] Nelson P. Miller & Derek S. White, *Helping Law Firm Luddites Cross the Digital Divide—Arguments for Mastering Law Practice Technology*, 12 SMU SCI. & TECH. L. REV. 113, 113 (2009) (describing a group of British workers in the early 1800s who destroyed machinery in the hopes of saving jobs, as well as those who generally oppose changes in technology).

[2] Frame-breakers, or Luddites, smashing a loom, HISTORICALBRITAIN.ORG, http://historicalbritain.org/2013/07/18/the-luddites/ (last visited Nov. 14, 2014).

[3] *See* CHRISTOPHER J. DAVEY ET AL., NEW MEDIA AND THE COURTS: THE CURRENT STATUS AND A LOOK AT THE FUTURE 11 (2010), *available at* http://ccpio.org/wp-content/uploads/2012/02/2010-ccpio-report-summary.pdf (noting how social media has the potential to upset the balance between openness and fairness in the judicial system).

technology, they sometimes do so without understanding what they are doing.[4]

Already, today's "new-fangled" contraptions have ensnared judges. Perhaps the most widely known example is Judge Kozinski of the United States Court of Appeals for the Ninth Circuit.[5] While he was sitting by designation in district court and presiding over an obscenity trial, it came to light that he had stored photos on the Internet including a pornographic image and a video depicting a man in the act of bestiality.[6] Judge Kozinski said he thought the information was not publicly available.[7] Although pornographic photos make Judge Kozinski's failure to appreciate technology perhaps the most memorable, he is certainly not alone in failing to appreciate technology.[8] As this Article shows, judges have created embarrassing posts, made awkward statements, set permanent examples of poor judgment, and done worse.[9]

Even if a judge chooses to avoid using "new-fangled" contraptions like e-mail, social media, cloud storage, and other modern inventions, those around him or her are likely using all sorts of new technology. Court staff, law clerks, interns, jurors, and attorneys are using various new tools for surprising and sometimes unintuitive purposes. For example, jurors have been caught posting information about trials on Twitter and Facebook, and they have sometimes formed groups to talk among themselves prior to submission of the case.[10] Of course, jurors are also using various online resources to conduct factual investigation.[11] Additionally, "friendships" between a judge and attorney have caused mistrials, and lawyers are

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4 *See* Trevor Timm, *Technology Will Soon Be Reshaped by People Who Don't Use Email*, THE GUARDIAN (May 3, 2014, 7:30 AM), http://www.theguardian.com/commentisfree/2014/may/03/technology-law-us-supreme-court-internet-nsa.

5 Dan Slater, *Judge Kozinski on Sexually Explicit Material He Posted: "It's Part of Life.,"* WALL ST. J. (June 11, 2008, 2:34 PM), http://blogs.wsj.com/law/2008/06/11/report-judge-alex-kozinski-maintained-porn-on-personal-web-site/.

6 *Id.*

7 *Id.*

8 *See infra* Part VII.B.

9 *See, e.g.*, Slater, *supra* note 5; Matt Volz, *Federal Judge Sent Hundreds of Bigoted Emails*, YAHOO NEWS (Jan. 17, 2014, 8:18 PM), http://news.yahoo.com/federal-judge-sent-hundreds-bigoted-emails-001239518--election.html (discussing a federal judge who sent hundreds of racist e-mails from his federal e-mail account); *infra* Part VII.B.

10 Jacqueline Connor, *Jurors and the Internet: Jury Trials and Millenials* [sic], CAALA ADVOCATE MAGAZINE, (Sept. 2011), *available at* http://www.adrservices.org/pdf/Jurors%20and%20the%20Internet.pdf; *see also* Dimas-Martinez v. State, 385 S.W.3d 238, 248–49 (Ark. 2011) (recognizing the impact social media by juror can have on a case).

11 NPR Staff, *For Modern Jurors, Being on a Case Means Being Offline*, NPR (June 24, 2013, 4:09pm), http://www.npr.org/blogs/alltechconsidered/2013/06/24/195172476/JURORS-AND-SOCIAL-MEDIA (reporting that jurors regularly look up legal terms on the Internet and share about trial details on social media).

using social media while picking juries in the courtroom to research jurors in ways that could concern the judiciary.[12]

Of course, judges are also subject to ethical restrictions.[13] These restrictions may vary depending upon whether the judge is a state or federal judge and, if he is a state judge, what state rules apply to him. Generally, however, a Luddite judge who is unaware of what other participants in the judicial system are doing may be acting at his or her own peril. This unawareness is at least problematic because of common provisions of judicial ethical codes such as the following rules from the ABA Model Code of Judicial Conduct upon which many state codes are based:

- "A judge shall act *at all times* in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety";[14]
- "A judge shall not abuse the prestige of judicial office to advance the personal or economic interest of the judge or others, or allow others to do so";[15]
- "A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge";[16] and
- "A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing."[17]

This Article discusses various issues that judges must be aware of in the Digital Age—even if they personally choose not to use "new-fangled" technology. Judges must keep abreast of conduct that implicates applicable ethical rules.

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[12] Ed Silverstein, *Social Media Can Cause Problems for Lawyers When it Comes to Ethics, Professional Responsibility*, INSIDECOUNSEL.COM (Apr. 29, 2014), http://www.insidecounsel.com/2014/04/29/social-media-can-cause-problems-for-lawyers-when-i; Jenna Gant, *Lawyers' Use of Social Media for Jury Selection OK'd by ABA*, COURTNEWSOHIO.GOV (Oct. 1, 2014) http://www.courtnewsohio.gov/happening/2014/ABASocialMedia_100114.asp#.VDDB8PldWSp.

[13] *See, e.g.*, *infra* notes 14–17 and accompanying text.

[14] MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (2007), (emphasis added) (footnotes omitted).

[15] *Id.* R. 1.3 (footnote omitted).

[16] *Id.* R. 2.4(C).

[17] *Id.* R. 2.10(A) (footnotes omitted).

## I. ETHICAL ISSUES ARISING FROM FACEBOOK AND SOCIAL NETWORKING SITES

### *A. Why a Judge May Not Be Able to Have Friends . . . on Facebook, at Least*

As of January 2014, 74% of people who use the Internet also use social networking sites.[18] Even among Internet users aged 50 to 64, 65% were active on social media sites in 2013.[19] Although statistics for the judiciary's use of social media are less reliable, a 2012 Conference of Court Public Information Officers' survey showed that 46.1% of the responding judges used social media with 86.3% of those that were doing so using Facebook and another 32.8% using LinkedIn.[20] Those judges were also aware of the potential ethical issues their activities implicated: 45.4% "disagreed or strongly disagreed" with the statement that " '[j]udges can use social media . . . in their professional lives without compromising . . . ethics.'"[21]

These issues are getting bar counsels' attention. In a recent Georgia Bar Journal column, Paula Frederick—general counsel for the State Bar of Georgia—stated that "[e]ven maintaining a social media presence that is strictly personal with no hint of one's status as judge is not foolproof."[22] To illustrate her point, she gave the hypothetical example of a judge who had simply disclosed in a Facebook post that a dog had bitten him when he was a child—information which turned out to have extraordinary value to a plaintiff's lawyer who dropped the jury demand and instead went with a bench trial before that judge for a dog-bite case.[23] Some of the formal authorities have addressed if and to what extent a judge may participate in social media like Facebook. For instance, the American Bar Association (ABA) and several states allow judges to use social media,[24] but they have

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[18] Pew Research Internet Project, *Social Networking Fact Sheet*, http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/ (last visited Nov. 14, 2014).

[19] *Id.*

[20] DAVEY ET AL., *supra* note 3, at 5, 65.

[21] John G. Browning, *Why Can't We Be Friends? Judges' Use of Social* Media, 68 U. MIAMI L. REV. 487, 488 (2014).

[22] Paula Frederick, *To Friend or Not to Friend*, 19 GA. BUS. J. 44, 44 (2014).

[23] *Id.*

[24] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 462 (2013). Examples of states that allow judges to use social media are: California, Connecticut, Florida, Kentucky, Massachusetts, Michigan, New York, Ohio, Oklahoma, South Carolina, and Tennessee. *See* California Judges Ass'n Judicial Ethics Comm., Op. No. 66 (2010), *available at* http://www.caljudges.org/files/pdf/Opinion%2066FinalShort.pdf; Connecticut Comm. on Judicial Ethics, Informal Op. 2013-06 (2013), *available at* http://www.jud.ct.gov/committees/ethics/sum/2013-06.htm; Florida Supreme Court Judicial Ethics Advisory Comm., Op. 2009-20 (2009), *available at* http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html; Kentucky Ethics Comm. of the Kentucky Judiciary, Formal Op. JE-119 (2010), *available at* http:// courts.ky.gov/

taken various positions on the extent of this privilege. Tennessee simply suggests that judges be constantly aware of ethical issues,[25] but other authorities are more specific. Some of these authorities allow judges to "friend" any lawyer on social media regardless of whether the judge knows that the lawyer will likely appear before him.[26] Although this approach appears lenient, the privilege of social media does not come without warning.[27] Additionally, some states may require a judge to consider disclosing a particular friendship or recusing himself from the case.[28] For example, authority from California advises judges to consider all the circumstances, but it focuses on the four following factors:

- the nature of the particular page, such as whether it discloses personal information or instead is a page for an organization like an alumni group;

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commissionscommittees/JEC/JEC_Opinions/JE_119.pdf; Massachusetts Comm. on Judicial Ethics, Op. 2011-6 (2011), *available at* http://www.mass.gov/courts/case-legal-res/ethics-opinions/judicial-ethics-opinions/cje-opin-2011-6.html; New York Advisory Comm. on Judicial Ethics, Op. 08-176 (2009), *available at* http://www.courts.state.ny.us/ip/judicialethics/opinions/08-176.htm; Supreme Court of Ohio Bd. of Comm'rs on Grievances & Discipline, Op.2010-7 (2010), *available at* http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2010/Op_10-007.doc; Oklahoma Judicial Ethics Advisory Panel, Op. 2011-3 (2011), *available at* http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=464147; South Carolina Advisory Comm. on Standards of Judicial Conduct, Op. 17-2009 (2009), *available at* http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009; Tennessee Judicial Ethics Comm., Advisory Op. 12-01 (2012), *available at* http://www.tncourts.gov/sites/default/files/docs/advisory_opinion_12-01.pdf; Lorie Savin, *Friend Requests and Beyond: Judicial Ethics in the Social Networking Sphere*, MICH. BUS. J., Aug. 2014, at 18, 18–19, *available at* http://www.michbar.org/journal/pdf/pdf4article1959.pdf (discussing judicial ethics relating to social networking in an article endorsed by the Michigan Committee on Judicial Ethics).

[25] Tennessee Judicial Ethics Comm., Advisory Op. 12-01.

[26] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 462; California Judges Ass'n Judicial Ethics Comm., Op. No. 66; Kentucky Ethics Comm. of the Kentucky Judiciary, Formal Op. JE-119; New York Advisory Comm. on Judicial Ethics, Op. 08-176; Supreme Court of Ohio Bd. of Comm'rs on Grievances & Discipline, Op. No. 2010-7; South Carolina Advisory Comm. on Standards of Judicial Conduct, Op. 17-2009; Savin, *supra* note 24, at 18–19 (discussing judicial ethics relating to social networking in an article endorsed by the Michigan Committee on Judicial Ethics).

[27] *See* Kentucky Ethics Comm. of the Kentucky Judiciary, Formal Op. JE-119 (warning that using social networks is "fraught with peril"); Supreme Court Ohio Bd. of Comm'rs on Grievances & Discipline, Op. No. 2010-7 (suggesting that the judge be constantly vigilant); South Carolina Advisory Comm. on Standards of Judicial Conduct, Op. 17-2009 (warning judges who use Facebook not to discuss their position); Savin, *supra* note 24, at 18–19 (warning judges, in an article endorsed and reviewed by the Michigan Committee on Judicial Ethics, to be cautious in their use of social networking).

[28] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 462 (requiring judges to carefully evaluate whether disclosure or recusal is necessary); California Judges Ass'n Judicial Ethics Comm., Op. 66 (imposing various limitations); New York Advisory Comm. on Judicial Ethics, Op. 08-176 (explaining how a judge may need to disclose a relationship and recuse himself if that relationship is a "close social relationship").

- the number of friends the judge has, with a lower number suggesting that each friend is somehow more special;
- the judge's method of accepting friend requests such as whether he or she accepts some or all friend requests or whether there is a pattern such as exclusively including plaintiffs' lawyers or all lawyers from a certain firm; and
- the regularity of a particular attorney's appearances before the judge.[29]

A different approach is evident in other states that allow judges to friend any lawyer on social media as long as the judge does not know that the lawyer will appear before him.[30] For instance, Massachusetts requires a judge to recuse himself if he faces a friended lawyer.[31] Other restrictions on social media may also apply in these states.[32] For example, even if a Florida judge includes a disclaimer on a social network page that explains how friend on social media does not mean friend in the traditional sense, the disclaimer will not be enough to cure any "impermissible impression that the judge's attorney 'friends' are in a special position to influence the judge."[33] However, a Florida judge may belong to a non-legal organization's Facebook page even if lawyers who appear before him participate in that organization.[34] Further, Florida allows a judicial candidate to friend lawyers who, if the person is elected, will appear before him.[35]

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[29] California Judges Ass'n Judicial Ethics Comm., Op. 66.

[30] *See* Connecticut Comm. on Judicial Ethics, Informal Op. 2013-06 (2013), *available at* http://www.jud.ct.gov/committees/ethics/sum/2013-06.htm; Florida Supreme Court Judicial Ethics Advisory Comm., Op. 2012-12 (2012), *available at* http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2012/2012-12.html; Florida Supreme Court Judicial Ethics Advisory Comm., Op. 2010-06 (2010), *available at* http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-06.html; Massachusetts Comm. on Judicial Ethics, Op. 2011-6 (2011), *available at* http://www.mass.gov/courts/case-legal-res/ethics-opinions/judicial-ethics-opinions/cje-opin-2011-6.html; Oklahoma Judicial Ethics Advisory Panel, Op. 2011-3 (2011), *available at* http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=464147.

[31] Massachusetts Comm. on Judicial Ethics, Op. 2011-6.

[32] *See* Florida Supreme Court Judicial Ethics Advisory Comm., Op. 2010-06; *see also* Connecticut Comm. on Judicial Ethics, Informal Op. 2013-06 (imposing twelve limitations on using social media); Oklahoma Judicial Ethics Advisory Panel, Op. 2011-3 (warning that judges' use of social media is "fraught with peril").

[33] Florida Supreme Court Judicial Ethics Advisory Comm., Op. 2010-06.

[34] *Id.*

[35] Florida Supreme Court Judicial Ethics Advisory Comm., Op. 2010-05 (2010), *available at* http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-05.html. For restrictions on campaigns, see Florida Supreme Court Judicial

Despite these various positions, some common warnings and admonitions are evident among the various rules and opinions. One of these admonitions appears in New York's requirement that every comment, post, and photograph maintain the dignity of the bench.[36] Other examples of these common warnings and admonitions are clearly evident in the following opinions of the Connecticut Committee on Judicial Ethics that require judges using social media to:

- Use communication that does not "erode confidence in the independence of judicial decision-making";[37]
- Refrain from posting "any material that could be construed as advancing the interests of the judge or others," such as "liking" a commercial or advocacy website;[38]
- Avoid relationships with people or organizations that may give the impression that these people or organizations are able to influence the judge;[39]
- Keep from friending social workers or "any other persons who regularly appear in court in an adversarial role";[40]
- Ensure their comments do not discuss any pending or impending court issues;[41]
- Refrain from viewing parties' or witnesses' social networking pages;[42]
- Avoid giving legal advice to others;[43]
- Stay away from political activities on social networking sites such as public endorsements or oppositions to a candidate for public office, liking a political organization's Facebook page or linking to political organization websites, and commenting on

Ethics Advisory Comm., Op. 2010-28 (2010), *available at* http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-28.html.

[36] New York Advisory Comm'n on Judicial Ethics, Op. 08-176 (2009), *available at* http://www.courts.state.ny.us/ip/judicialethics/opinions/08-176.htm.

[37] Connecticut Comm. on Judicial Ethics, Informal Op. 2013-06 (2013), *available at* http://www.jud.ct.gov/Committees/ethics/sum/2013-06.htm.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

proposed legislation or controversial political topics;[44] and

- Remain "aware of the contents of his/her social networking profile page, be familiar with the site's policies and privacy controls, and stay abreast of new features and changes."[45]

In contrast to the various authorities' approaches, an author recently argued that all of these authorities take an unrealistic view of the word "friend" in the context of social media, and he called for them to take a more "digitally enlightened" view.[46] As the minority members of the Florida Supreme Court Judicial Ethics Advisory Committee noted, "the term 'friend' on these pages does not convey the same meaning that it did in the pre-internet age."[47] Which approach will "win" this view of what exactly "friend" means remains to be seen, but caution is obviously the operative word.

### *B. Policies to Consider Beyond Friending*

Whether a judge decides to friend lawyers or not, judges need to ensure that court personnel understand that their posts about a judge's schedule, pending matters, or court business generally can reflect poorly on the court. Additionally, these posts may provide an unfair advantage to a litigant or counsel. For example, knowing that a judge is taking a vacation may prove to be valuable information in some instances such as mediation. If parties are mediating while a summary judgment motion is pending, one party's knowledge that the judge will not be ruling on the motion any time soon could affect settlement positions. Thus, judges should carefully consider what they do on the Internet and social media.

## II. ETHICAL ISSUES ARISING FROM PERSON-TO-PERSON COMMUNICATIONS

### *A. Confidentiality of E-mail*

Most lawyers use e-mail without encrypting the text or attachments. This seems to comply with the standard of care—at least with respect to routine communications—even though e-mail can be intercepted and misdirected.[48] Nonetheless, some communications among lawyers and

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[44] *Id.*

[45] *Id.*

[46] Browning, *supra* note 21, at 490, 532–33.

[47] Florida Supreme Court Judicial Ethics Advisory Comm., Op. 2009-20 (2009), *available at* http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html.

[48] *See* Kristin J. Hazelwood, *Technology and Client Communications: Preparing Law Students and New Lawyers to Make Choices That Comply with the Ethical Duties of Confidentiality, Competence, and Communication*, 83 MISS. L.J. 245, 259, 261 (2014). For a

clients present a greater risk of harm than others. Thus, they may require encryption.

The same is no doubt true of communications among court staff. Security over e-mail can take various forms, but court staff can use it in its simplest form. They can agree to use "security" features in Microsoft Word to require a password to open attachments, and the password would be the same for every document (*e.g.*, a sports' team's name, the county in which the court sits, the judge's middle name, and so on). While the attachment won't be encrypted, only someone with expert skills will be able to easily open it.

When e-mail is encrypted, only the most determined user could possibly open it. The technology to encrypt the content of an e-mail and its attachment is built into most e-mail software. While the particular details vary, there is often an option to simply encrypt all e-mails or a particular e-mail and its attachment. A Google search of "encryption" along with the software's name, its version number, and the operating system will likely result in a simple set of instructions for encryption.

Judges should consider whether to permit transmission of all or only some judicial documents. If a judge decides to permit this transmission, he should then decide whether encryption or at least password protection should be required. Having a uniform policy among courthouse personnel is critical because the protection is largely illusory if all but one person does not use encryption.

### *B. The Permanency of Text Messages*

Text messages have become evidence in many high- and low-profile cases, but the most recent case was the "bridge scandal" involving Governor Christie of New Jersey.[49] People text much more informally than they would write. While texts feel ephemeral, the content of a text message can, in fact, persist for a long time. Various high-profile cases involving alleged abuse or discrimination make that point clear.[50]

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recent argument to the contrary, see Rebecca Bolin, *Risky Mail: Concerns in Confidential Attorney-Client Email*, 81 U. CIN. L. REV. 601, 652–54 (2012) (stating that common sense tells attorneys that some information requires special effort to protect in an e-mail).

[49] Heather Haddon, *Subpoena Hunts for Bridge Scandal Text Messages Between Christie, Aide*, WALL ST. J. (Aug. 27, 2014, 12:20 PM), http://blogs.wsj.com/metropolis/2014/08/27/bridge-scandal-text-messages-between-christie-aide-subpoenaed/.

[50] *See, e.g.*, Lizette Alvarez, *Defense in Trayvon Martin Case Raises Questions About the Victim's Character*, N.Y. TIMES, May 24, 2013, at A15 (examining old text messages that raised character questions about Trayvon Martin); Gregory S. McNeal, *Adrian Peterson's Indefensible Abuse of a 4-Year-Old Likely Violates Texas Law*, FORBES (Sept. 16, 2014, 5:11 PM), http://www.forbes.com/sites/gregorymcneal/2014/09/16/adrian-petersons-indefensible-abuse-of-a-4-year-old-likely-violates-texas-law/ (discussing various incriminatory picture text messages that allegedly show Adrian Peterson's abuse of his son).

Unfortunately, court personnel may not be aware of these facts. As a result, embarrassing texts, inappropriate texts, and other awkward communications may become public. Warning court personnel to use texts with the view toward disclosure or inadvertent disclosure may be the best policy.

### *C. The Hidden Dangers of Metadata*

In order to grasp the dangers of metadata, it is important to understand what metadata is. "Metadata is 'data about data.'"[51] Software often creates metadata and stores it unseen—unless the user knows where to look—in a single file; when that file is transmitted as an e-mail attachment, the metadata often goes with it.[52] However, this often does not matter. Some metadata included in a Word document, for example, consists of information like how many words are in the document or when the document was prepared.[53] In many instances, that information will have very little significance to anyone.

But some metadata may not be so benign. The worst culprit is the "track changes" feature that, when enabled, records who, when, and what changes were made to a document; it also tracks multiple "undo's," which allows the recipient to repeatedly "undo" changes to a document and see the edits made over time.[54] Imagine a draft settlement agreement that originally proposed offering $100,000 to settle the case, but was revised to reflect a $50,000 initial offer. The recipient may be able to "undo" the changes or "track" them to see that the original offer was intended to be much higher. This can obviously have real-world impact.

The Model Rules require lawyers to use reasonable care in the storage and transmission of confidential information.[55] Thus, a lawyer who knows a document contains embedded information generally has a duty to remove it before transmission where that information could be misused. Although this seems relatively clear, the Model Rules go further than simply requiring the obvious. The comment emphasizes, for example, that lawyers "act competently" to guard against disclosure of confidences.[56] While a few years ago, it may have been that the existence of track changes and other potentially malevolent metadata was not widely known, and could not have been found without reasonable care, the same is probably not true today, at least in relatively sophisticated

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[51] David Hricik & Chase Edward Scott, *Metadata: The Ghosts Haunting e-Documents*, 13 GA. B.J. 16, 16 (2008).

[52] *Id.*

[53] *Id.* at 17–18.

[54] *Id.* at 16–18.

[55] MODEL RULES OF PROF'L CONDUCT R. 1.6(C), cmts. 18 & 19 (2014).

[56] *See id.* R. 1.6 cmt. 18.

practice areas. Reasonable care in today's highly technological practice probably does not depend on what special programs an attorney may use to access confidential information.[57] Rather, reasonable care likely means knowing whether the recipient can use the same software in which the document was prepared to view client confidences that were unintentionally included with the file.[58]

Is it ethical for a lawyer who receives a file to check to see if the sender erred and included metadata that might be useful? There is no specific rule that says that a lawyer cannot take advantage of the incompetence of opposing counsel, and zealous representation obviously requires that lawyers regularly do so. Bar associations, however, are still determining whether looking in the opposing client's confidences in transmitted files is "conduct involving dishonesty, fraud, deceit, or misrepresentation."[59] State bar associations that have dealt with metadata are split on how to do so.[60]

Some states—like Alabama, Arizona, Florida, and New York—take the position that it is unethical to purposefully search for metadata.[61] One opinion emphasized that it was not the carelessness of the transmitting lawyer that lead to the misuse, but instead, "it is a deliberate act by the receiving lawyer . . . that would lead to the disclosure of client confidences and secrets" in the metadata.[62]

But other bar associations disagree. The ABA, Colorado Bar Association, and Oregon State Bar find nothing unethical with

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[57] *See* Oregon State Bar, Formal Op. 2011-187 (2011), *available at* https://www.osbar.org/_docs/ethics/2011-187.pdf (recognizing that it might be unethical for a lawyer to use specialized software to search for hidden information).

[58] *See id.* ("With respect to metadata in documents, reasonable care includes taking steps to prevent the inadvertent disclosure of metadata, to limit the nature and scope of the metadata revealed, and to control to whom the document is sent. What constitutes reasonable care will change as technology evolves."); Minnesota Court Rules, Op. 22 cmt. (2010), *available at* https://www.revisor.mn.gov/court_rules/rule.php?type=pr&subtype=lawy&id=22 (stating "a lawyer must take reasonable steps to prevent the disclosure of confidential metadata").

[59] MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2007).

[60] *Compare infra* notes 61–62 and accompanying text (reasoning that purposefully searching for metadata is unethical), *with infra* notes 63–64 and accompanying text (reasoning that searching for metadata is ethical).

[61] *See* Alabama State Bar Office of Gen. Counsel, Formal Op. RO-2007-02 (2007), *available at* https://www.alabar.org/resources/office-of-general-counsel/formal-opinions/2007-02/; State Bar of Arizona Ethics, Op. 07-03 (2007), *available at* http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=695; Professional Ethics of the Florida Bar, Op. 06-2 (2006), *available at* https://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+06-2?opendocument; New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 749 (2001), *available at* https://www.nysba.org/CustomTemplates/Content.aspx?id=5463.

[62] New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 749.

deliberately digging for metadata gold.[63] The District of Columbia Bar drew the line in a different place; viewing metadata is only dishonest if, before viewing it, the recipient *actually knew* that opposing counsel had inadvertently sent the document with the hidden information.[64]

Only eighteen states currently have an opinion on metadata.[65] Yet, it is only a matter of time until the other thirty-two states adopt formal ethics opinions that will govern what lawyers must do.

For the judiciary, this means that courts must be particularly careful to avoid transmitting information to litigants or transmitting public documents without ensuring that any metadata has been removed.[66] Lawyers may be mining away. In this regard, at least in federal court and under the Pacer system, files are in PDF format that generally does not contain metadata of any import.[67]

### *D. Third-Party Storage of Court Data: Storms in the Cloud?*

Court personnel may be using vendors such as Dropbox, Google, and others to store documents so that they can be easily accessed at the courthouse, at home, or through a mobile device. Putting documents "on the cloud" has become common.[68] While extraordinarily convenient, storing data on third-party sites also creates risks.[69] The vendor's

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[63] *See* ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-442 (2006); Colorado Ethics Handbook, Op. 119 (2011), *available at* http://www.cobar.org/repository/Ethics/FormalEthicsOpion/FormalEthicsOpinion_119_2011.pdf; Oregon State Bar, Formal Op. 2011-187 (2011), *available at* https://www.osbar.org/_docs/ethics/2011-187.pdf.

[64] D.C. Bar, Ethics Op. 341 (2007), *available at* http://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion341.cfm.

[65] *See* American Bar Association, *Metadata Ethics Opinions Around the U.S.*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/metadatachart.html (last visited Nov. 14, 2014) (noting that only eighteen states have ethics opinions regarding metadata).

[66] For further information regarding the treatment of metadata, including a step-by-step tutorial on how to remove it from documents, see Hricik & Scott, *supra* note 51, at 16–20, 22, 24.

[67] *See* Garry R. Appel, *The Practical Paperless Office*, COLO. LAW., Jan. 2008, at 55, 57 ("Federal courts nationwide have moved to electronic filing of pleadings, and PDF is the only format the courts will accept."); Blake A. Klinkner, *Metadata: What Is It? How Can It Get Me into Trouble? What Can I Do About It?*, WYO. LAW., Apr. 2014, at 18, 20 (explaining how PDF copies of files contain less metadata than original files of documents).

[68] *See* Quentin Hardy, *The Era of Cloud Computing*, N.Y. TIMES, June 12, 2014, at F1 ("You already work in the cloud, too, if you use a smartphone, tablet or web browser. And you're using the cloud if you're tapping online services like Dropbox or Apple's iCloud or watching 'House of Cards' on Netflix.").

[69] *See* Brian X. Chen, *Apple Says It Will Add New iCloud Security Measures After Celebrity Hack*, N.Y. TIMES, Sep. 5, 2014, at B2.

obligations of confidentiality may not be as vigorous as the judiciary's,[70] and the documents may become public if security is breached. Thus, courts should ensure that court personnel use only third-party vendors with excellent protective measures if such use is permitted at all.

## III. DATA HELD OR ACCESSIBLE BY DEPARTING COURT PERSONNEL

If court personnel are permitted to store important information on the cloud or on personal devices, the court should ensure that former employees can no longer access that information when they depart. At the same time, the court should also make sure that it maintains access to the information. This may require having employees disclose their username and password for any sites and promptly changing this information when a former employee departs.

## IV. LAWYERS' USE OF THE INTERNET TO RESEARCH JURORS

Judges have encouraged lawyers to research potential jurors for conflicts; for example, the Supreme Court of Missouri noted that because "advances in technology allow[] greater access to information," it could place a "greater burden" on parties to raise improper jury issues to the court.[71] In another recent case, a New Jersey Superior Court held that a trial judge "acted unreasonably" by preventing plaintiff's counsel from using his laptop to research jurors during voir dire.[72]

Consistent with these findings, a few bar associations have issued opinions that essentially give lawyers the green light to use social media content to research jurors and potential jurors with a few limitations.[73]

A recent opinion from the New York City Bar is the most comprehensive of these opinions.[74] The opinion first concluded that a lawyer could not *communicate with* a juror or potential juror, and it reasoned that an improper communication occurred if, as a result of the research, the juror would receive a communication such as a friend

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[70] *Compare Dropbox Privacy Policy*, DROPBOX (Mar. 24, 2014), https://www.dropbox.com/terms#privacy, *with* MODEL RULES OF PROF'L CONDUCT R. 1.6(C), cmts. 18 & 19 (2014).

[71] Johnson v. McCullough, 306 S.W.3d 551, 558–59 (Mo. 2010).

[72] Carino v. Muenzen, No. A-5491-08T1, 2010 WL 3448071, at *24, *26–27 (N.J. Super. Ct. App. Div. Aug. 30, 2010).

[73] *E.g.*, ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-466 (2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_466_final_04_23_14.authcheckdam.pdf; Ass'n. of the Bar of the City of New York Comm. on Prof'l. Ethics Formal Op. No. 2010-2, *available at* http://www.nycbar.org/ethics/ethics-opinions-local/2010-opinions/786-obtaining-evidence-from-social-networking-websites.

[74] *See infra* notes 75–80 and accompanying text.

request on Facebook.[75] The opinion emphasized that any indication to the juror that the lawyer had accessed their information would be improper.[76] Second, it emphasized that a lawyer cannot use deception to obtain access.[77] Finally, the opinion concluded that the same restrictions applied to agents (such as undercover investigators) hired by the lawyer to conduct this research.[78] Significantly, the opinion emphasized that lawyers probably had a duty, within the scope of the opinion, to research the jurors.[79]

Despite the ostensible duty to research the background of jurors and the convenience of using social media sites to do so, "even jurors who understand that many of their social networking posts and pages are public may be discouraged from jury service by the knowledge that attorneys and judges can and will conduct active research on them or learn of their online—albeit public—social lives."[80] Further, lawyers should be admonished to report juror misconduct they discover. In one interesting case, a court granted a new trial, based on juror misconduct, as to three of four defendants, but not to the fourth because his lawyers had reason to know of the misconduct through their Internet searches but had done nothing.[81] Clearly, lawyers' use of social media to research jurors and potential jurors may be beneficial to litigants, but it may also be awkward for the judge and jury.

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[75] Ass'n of the Bar of the City of New York Comm. on Prof'l. Ethics, Formal Op. 2012-2 (2012), *available at* http://www.nycbar.org/ethics/ethics-opinions-local/2012opinions/1479-formal-opinion-2012-02.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id. See also* Ass'n. of the Bar of the City of N.Y. Comm. on Prof. and Judicial Ethics Formal Op. No. 2010-2, *available at* http://www.nycbar.org/ethics/ethics-opinions-local/2010-opinions/786-obtaining-evidence-from-social-networking-websites; N.Y. St. Bar Ass'n Formal Op. 843, *available at* http://www.nysba.org/CustomTemplates/Content.aspx?id=5162; N.Y. County Lawyers' Ass'n. Formal Op. 743, *available at* https://www.nycla.org/siteFiles/Publications/Publications1450_0.pdf (stating only proper to use Twitter, Facebook, and other sites to research potential and actual jurors); San Diego Cnty. Bar Legal Ethics Op. 2011-2, *available at* https://www.sdcba.org/index.cfm?pg=LEC2011-2 (stating a lawyer cannot friend represented party); Sharon R. Klein, et al., *Ethical Issues that Arise From Social Media Use in Courtrooms*, N.J. LAWYER, http://www.pepperlaw.com/pdfs/Klein_Stio_Zurich_NJL_10_2013.pdf (last visited Nov. 14, 2014).

[80] Ass'n. of the Bar of the City of New York Comm. on Prof'l Ethics Formal Op. 2012-2.

[81] United States v. Daugerdas, 867 F. Supp. 2d 445, 458, 460–61, 466, 484–85 (S.D.N.Y. 2012).

## V. JURORS' USE OF SOCIAL MEDIA AND THE INTERNET

Another issue that judges should be aware of is jurors' use of the Internet to research and discuss their cases. Interestingly, there is a blog devoted to misbehaving jurors![82] Every week, its author (a judge) seems to have another example of intentional or inadvertent misconduct.[83] Some recent examples include a mistrial where a juror researched potential sentences in rape a case[84] and a discharge of an entire jury pool due to one juror searching for the defendant's name on Google.[85]

### *A. Jurors' Use of the Internet to Research Facts and Law*

Jurors are human, and juries have long had access to newspapers, television, and their neighbors. Additionally, jurors are, no doubt, sometimes frustrated by the lack of "relevant" evidence at trial. This often leads jurors to conduct their own Internet research as was the case in *State v. Abdi* where the Supreme Court of Vermont overturned a child sexual assault conviction after learning that a juror performed his own research on the cultural significance of the alleged crime in Somali Bantu culture.[86] The *New York Law Journal* also reported a number of cases where jurors harmed the system by researching facts, law, or general issues.[87] For example, a Washington Court of Appeals overturned a $4.3 million dollar employment discrimination verdict when the court learned the jury had researched the employer's annual earnings.[88]

The U.S. legal system is not alone, as reports from across the globe show jurors using the Internet to conduct research.[89] Several countries

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[82] *See* JURORS BEHAVING BADLY, http://jurorsbehavingbadly.blogspot.com (last visited Nov. 14, 2014).

[83] *Id.*

[84] Stephen M. Halsey, *Juror Researching Penalty Causes Mistrial of Rape Case*, JURORS BEHAVING BADLY (Jan. 23, 2014, 7:14 PM), http://jurorsbehavingbadly.blogspot.com/2014/01/juror-researching-penalty-causes.html (citing Ken Armstrong, *Case of the Curious Juror: When the Web Invades the Courtroom*, SEATTLE TIMES (Jan. 18, 2014, 8:25 PM), http://seattletimes.com/html/localnews/2022703634_jurorsinternetxml.html).

[85] Stephen M. Halsey, *Entire Jury Pool Discharged After Juror Google-searches Defendant*, JURORS BEHAVING BADLY (Jan. 31, 2014, 11:45 AM), http://jurorsbehavingbadly.blogspot.com/2014/01/entire-jury-pool-discharged-after-juror.html.

[86] State v. Abdi, 2012 VT 4, ¶ 1, 191 Vt. 162, 45 A.3d 29.

[87] Daniel A. Ross, *Juror Abuse of the Internet*, N.Y.L.J. (Sept. 8, 2009), *available at* http://www.stroock.com/SiteFiles/Pub828.pdf.

[88] Sheffield v. Goodyear Tire & Rubber Co., 151 Wash. App. 1052 (2009) (unpublished opinion).

[89] *See, e.g.*, PAUL LAMBERT, COURTING PUBLICITY: TWITTER AND TELEVISION CAMERAS IN COURT 27–28 (2011); Anna Vidot, *Internet Research by Jurors Could Lead More Defendants to Choose Judge-Only Trials*, ABC NEWS (July 31, 2014 12:38 PM), http://www.abc.net.au/worldtoday/content/2014/s4057822.htm.

have adopted various electronic countermeasures.[90] Clearly, jurors' use of the Internet to research issues in their case is a significant problem about which judges must be aware.

### *B. Jurors' Use of the Internet to Discuss Pending Cases*

Although jurors are told not to discuss a case until it is submitted to them,[91] improper pre-submission communication occurs.[92] The Internet makes this improper communication easier.[93] As one court recently noted, "the widespread availability of the Internet and the extensive use of social networking sites, such as Twitter and Facebook, [has] exponentially increased the risk of prejudicial communication amongst jurors and opportunities to exercise persuasion and influence upon jurors."[94]

The Third Circuit recently addressed this issue in *United States v. Fumo*: "Not unlike a juror who speaks with friends or family members about a trial before the verdict is returned, a juror who comments about a case on the internet or social media may engender responses that include extraneous information about the case, or attempts to exercise persuasion and influence."[95] In this case, on the eve of the second day of deliberations, a juror posted on Facebook that he was "'not sure about tomorrow.'"[96] A friend of the juror then posted, "why?" to which the juror responded, "think of the last five months dear."[97]

A recent article cataloged the rising number of controversies arising from jury misconduct.[98] Among other things, the authors note that a guilty verdict in a murder case in Arkansas was overturned because a juror had tweeted during the trial.[99] Other examples of jurors using social media include Al Roker's tweet about reporting for grand jury duty and posting

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[90] *See* LAMBERT *supra* note 89, at 27–28; *see also* Thaddeus Hoffmeister, *Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age*, 83 U. COLO. L. REV. 409, 413 (2012); Jason Deans, *Facebook Juror Jailed for Eight Months*, THE GUARDIAN (June 16, 2011, 6:07 PM), http://www.theguardian.com/uk/2011/jun/16/facebook-juror-jailed-for-eight-months.

[91] *See, e.g.*, United States v. Gianakos, 404 F.3d 1065, 1073–74 (8th Cir. 2005).

[92] *See* United States v. Juror No. One, 866 F. Supp. 2d 442, 444–45, 448–49, 451, 453 (E.D. Pa. 2011) (holding that a dismissed juror improperly communicated with other jurors about her opinion on the trial before the case was submitted for deliberation).

[93] *Id.*

[94] *Id.*

[95] United States v. Fumo, 655 F.3d 288, 305 (3d Cir. 2011).

[96] *Id.* at 298.

[97] *Id.* at 298 n.3.

[98] Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 DUKE L. & TECH. REV. 3, 7, 9 (2012), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1228&context=dltr.

[99] *Id.* at 2–3 (citing Dimas-Martinez v. State, 2011 Ark. 515, at 11–18, 385 S.W.3d 238, 246–49 (Ark. Dec. 8, 2011)).

photographs, and a potential juror tweeting "'Guilty! He's guilty! I can tell'" during jury selection.[100] Sometimes, however, courts find blogging and other communication proper as long as the juror does not discuss the case or his opinion on the case.[101]

### *C. Courts Fight Back: Model Instructions and Beyond*

Courts have responded in various ways to jurors' Internet research and discussion of their cases. While holding a juror in contempt or declaring a mistrial protects the rights of the litigants, it does not result in efficient litigation. Thus, judges are expanding their use of jury instructions that warn against use of social media, or the Internet, to discuss a case or conduct research.[102] In addition, if the judge has jurors disclose their twitter "handles," the judge can monitor the jurors' tweets during trial.[103]

A collection of "model" jury instructions concerning the use of the Internet by jurors to conduct research follows in Appendix A.

## VI. JUDICIAL USE OF THE INTERNET TO CONDUCT FACTUAL RESEARCH

The Internet puts the world at our fingertips; Google Maps and other sites provide pictures of almost every corner of the earth, distances between points can be plotted on Mapquest, and a certain day's weather can be determined with precision on numerous sites. There is a wealth of information available. Even as to the particular litigants, the Internet might provide access to their personal webpage, their social media page, or various "facts" about them posted hither and yon on the Internet.

In our adversary system, however, judicial research into facts creates some delicate issues. On one hand, consideration of historic facts pertinent to the dispute without adversary presentation can create ethical and due

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[100] *See* Brian Grow, *As Jurors Go Online, U.S. Trials Go Off Track*, REUTERS (Dec. 8, 2010, 3:23 PM), http://www.reuters.com/article/2010/12/08/us-internet-jurors-idUSTRE6B74Z820101208; Corky Siemaszko, *Al Roker Gets Ripped for Snapping Court Pix & Tweeting During Jury Duty*, NY DAILY NEWS (May 28, 2009, 9:00 PM), http://www.nydailynews.com/entertainment/tv-movies/al-roker-ripped-snapping-court-pix-tweeting-jury-duty-article-1.374749.

[101] *See* State v. Goehring, No. OT-06-023, 2007-Ohio-58862007 Ohio App. LEXIS 5169, at ¶ 35 (Ohio Ct. App. Nov. 2, 2007).

[102] *See* Amy J. St. Eve, Charles P. Burns, & Michael A. Zuckerman, *More from the #Jury Box: The Latest on Juries and Social Media*, 12 DUKE L. & TECH. REV. 64, 86–87 (2014), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1247&context=dltr.

[103] *See generally* Hayes Hunt & Brian Kint, *Trial and Social Media: Researching Potential Jurors*, (Feb. 3, 2014), http://www.fromthesidebar.com/2014/02/03/trial-and-social-media-researching-potential-jurors-3/ (explaining how defense attorneys should continue conducting Internet and social media research into jurors and immediately disclosing any misconduct to the tribunal).

process concerns. On the other, while a judge "must not independently investigate facts in a case and must consider only the evidence presented,"[104] a judge may take judicial notice as allowed by law.[105] As recently amended in Georgia, judicial notice is governed by statute, which provides:

> (a) This Code section governs only judicial notice of adjudicative facts.
>
> (b) A judicially noticed fact shall be a fact which is not subject to reasonable dispute in that it is either:
>
> (1) Generally known within the territorial jurisdiction of the court; or
>
> (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
>
> (c) A court may take judicial notice, whether or not requested by a party.
>
> (d) A court shall take judicial notice if requested by a party and provided with the necessary information.
>
> (e) A party shall be entitled, upon timely request, to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, such request may be made after judicial notice has been taken.
>
> (f) Judicial notice may be taken at any stage of the proceeding.
>
> (g)
>
> (1) In a civil proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed.
>
> (2) In a criminal proceeding, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.[106]

At the outset of this analysis, the fact that a judge uses the Internet, rather than some other means of research, does not seem pertinent to whether and to what extent research is permissible. While the Internet certainly makes it easier to find facts, it does not alter the question presented. Thus, a judge should not investigate facts independently, whether on the Internet or not, except to the extent that the fact can be judicially noticed.[107]

In analyzing the breadth of the "exception" to the prohibition against independent factual research, one commentator observed:

> By including the reference to judicial notice, however, the Model Code opens a loophole. If the ethics rules are meant to incorporate the totality of federal and state evidence rules' approach to what judges can "know" on their own, the research prohibition is a narrow one. Judges may *not* independently investigate adjudicative facts—the facts that

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[104] GEORGIA CODE OF JUDICIAL ETHICS CANON 3 (Commentary 2011).

[105] *See, e.g.*, FED. R. EVID. 201.

[106] GA. CODE ANN. § 24-2-201 (Lexis through 2014 Reg. Sess.).

[107] ABA MODEL CODE OF JUDICIAL CONDUCT Canon 2.9(C) (2007).

> are at issue in the particular case—unless they are generally known or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." But they *may* independently ascertain and use information that meets the requirements for judicial notice, and they may investigate "legislative facts"—those that inform the court's judgment when deciding questions of law or policy—to their hearts' content, bound by no rules about sources, reliability, or notice to the parties.[108]

Courts have used the Internet to take judicial notice of facts, but they have not always done so without dissent.[109] This is rare: for example, the only Georgia case that seems to have used the Internet to take judicial notice involved arbitration rules posted on organization webpages.[110] Courts are split on whether and to what extent judicial notice may be taken about information that originated from the Internet.[111] Even if judicial notice is appropriate, some courts have held that judicial factual investigation on the Internet implicates Due Process concerns[112] and issues concerning the competency of the judge to be a witness.[113]

## VII. MISCELLANEOUS ISSUES

### *A. Blogging*

Washington has permitted judicial officers to blog, but it has warned that they should be careful that their blogs are not used to question their impartiality.[114] Additionally, Washington has suggested that the judicial officers include a disclaimer stating that the opinions are theirs and not

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[108] Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 REV. LITIG. 131, 136 (2008) (footnote omitted).

[109] *See, e.g.*, Gent v. CUNA Mut. Ins. Soc'y, 611 F.3d 79, 84 n.5 (1st Cir. 2010) (taking judicial notice of information that came from the Center for Disease Control and Prevention's website); Oken v. Williams, 23 So.3d 140, 148 n.2 (Fla. Dist. Ct. App. 2009) (defending the majority's use of Internet websites to define "specialist" in a medical malpractice action and contending it fell within the judicial notice exception), *quashed on other grounds*, 62 So. 3d 1129 (Fla. 2011).

[110] Miller v. GGNSC Atlanta, LLC, 746 S.E.2d 680, 686 n.11 (Ga. Ct. App. 2013).

[111] *Compare Gent*, 611 F.3d at 84 n.5 (taking judicial notice of information that came from a website), *and Oken*, 23 So.3d at 148 n.2 (defending use of Internet websites as acceptable under the judicial notice exception), *with* United States *ex rel.* Dingle v. Bioport Corp., 270 F.Supp.2d 968, 972–73 (W.D. Mich. 2003) (taking judicial notice of only some pertinent information that originated on the Internet), *and* NYC Med. & Neurodiagnostic, P.C. v. Republic W. Ins. Co., 798 N.Y.S.2d 309, 313 (N.Y. Supp. App. 2004) (holding that independent factual research on the part of judges is error).

[112] Kiniti-Wairimu v. Holder, 312 F. App'x 907, 908–09 (9th Cir. 2009).

[113] *E.g., NYC Med. & Neurodiagnostic, P.C.*, 798 N.Y.S.2d at 312–13 (determining that the court was wrong to conduct its own research to reach its conclusion on the case).

[114] State of Washington Ethics Advisory Comm. Op. 09-05 (2009), *available at* http://www.courts.wa.gov/programs_orgs/pos_ethics/?fa=pos_ethics.dispopin&mode=0905.

other judges'.[115] Obviously, judges should be concerned about lines being drawn too finely.

### *B. Do Not Do What These Judges Did*

Judges are human. As such, they sometimes do things that might be considered unwise. For example, the Chief Judge of the United States Court of Appeals for the Federal Circuit sent a message to a lawyer commending the lawyer's skills and inviting him to forward the e-mail to his clients—the judge later apologized to the court for this act,[116] and the lawyer was publicly reprimanded.[117] In another situation, a judge friended a lawyer who was appearing in a matter before him, created posts with that lawyer about the pending custody case, reviewed a web page of the wife, and even quoted a poem that the wife had posted on that page.[118] Yet another example arises from Judge Kozinski and the "private" images he believed to be privately stored online (including undressed men appearing with sexually aroused animals) that were actually available publicly because he did not understand the technology.[119] Although these are just a few examples, they illustrate situations judges should avoid.

## CONCLUSION AND SOME PRACTICAL TIPS ON WHAT TO DO

This Article began with the premise that judges likely could not be Luddites in this technology saturated world. Even if they could only use an abacus and typewriter, the attorneys, clerks, staff, and jurors around them would not remain mired in the past. What judges must do is understand technology even if they do not embrace it. Part of that is refraining from using software or devices without knowing the risks they present.

The technology of today can be a significant benefit for judges, but it can also be a significant problem. Yet, there are some practical things that judges can do to ensure that they act in an ethical manner while they are surrounded by technology. One practical tip for judges is understanding Facebook privacy settings. Judges can learn about these settings on a specific Facebook page that helps individuals understand the various potential settings for privacy on Facebook and learn how to adjust

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[115] *Id.*

[116] Letter from Randall R. Rader, Chief Judge, United States Court of Appeals for the Federal Circuit, to the Judges of the United States Court of Appeals for the Federal Circuit, (May 23, 2014), *available at* http://www.cafc.uscourts.gov/images/stories/5-23-14_RRR%20_Letter.pdf.

[117] *In re Reines,* No. 14-MA004 14-4, 2014 WL 5649959, at *2 (Fed. Cir. Nov. 5, 2014).

[118] *In re* Terry, Inquiry No. 08-234 (N.C. Judicial Standards Comm'n Apr. 1, 2009), *available at* http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf.

[119] Slater, *supra* note 5.

Facebook privacy settings.[120] Judges should also know how to address metadata in Microsoft Word and other documents. How to deal with metadata varies by which version of Word is being used, but helpful resources are available online.[121] Password protection for e-mail attachments is another aspect of technology that judges should consider. How this can be done depends on the version of Microsoft Word, once again, the Internet is a good place to find instructions on this topic.[122] Judges should also be able to encrypt e-mail attachments. This procedure varies depending on which version of e-mail software the judge is using, but online resources are available to explain.[123]

Lastly, when dealing with the potential issues arising from jurors utilizing the Internet, judges should consider the proposed model jury instructions in Appendix A. Mastering these basic techniques and using these various approaches to technology will enable judges to better avoid the many pitfalls that exist in today's technological world.

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[120] *Basic Privacy Settings & Tools*, FACEBOOK, https://www.facebook.com/help/325807937506242/ (last visited Nov. 14, 2014).

[121] *See Find and Remove Metadata in Your Legal Documents*, MICROSOFT OFFICE, http://office.microsoft.com/en-ca/word-help/find-and-remove-metadata-hidden-information-in-your-legal-documents-HA001077646.aspx (last visited Nov. 14, 2014) (explaining how to find and remove metadata in the 2003 edition of Microsoft Office); *Remove Hidden Data and Personal Information by Inspecting Documents*, MICROSOFT OFFICE, http://office.microsoft.com/en-us/word-help/remove-hidden-data-and-personal-information-by-inspecting-documents-HA010354329.aspx (last visited Nov. 14, 2014) (discussing how to remove hidden data and personal information in the 2010 and 2013 editions of Microsoft Word).

[122] *See Password Protect Documents, Workbooks, and Presentations*, MICROSOFT OFFICE, http://office.microsoft.com/en-us/word-help/password-protect-documents-workbooks-and-presentations-HA010148333.aspx (last visited Nov. 14, 2014) (detailing how to set passwords for documents, workbooks, and presentations in the 2007 edition of Microsoft Office); *see also Tony* Bradley, *How Can I Protect My Microsoft Office Files?*, ABOUT TECHNOLOGY, http://netsecurity.about.com/od/frequentlyaskedquestions/f/faq_encryptms.htm (last visited Nov. 14, 2014) (explaining how to protect various types of Microsoft Office files from multiple editions of Microsoft Office).

[123] *See IT Services/Documentation: Encrypt A Microsoft Office Word File (Windows 2010)*, UNIVERSITY OF CHICAGO, http://answers.uchicago.edu/page.php?id=15910 (last visited Nov. 14, 2014) (discussing how to encrypt a document from the 2010 edition of Microsoft Word);*How to Password Protect or Encrypt MS Word Documents*, LINKER IT SOFTWARE, http://www.oraxcel.com/projects/encoffice/help/protect_word.html (last visited Nov. 14, 2014) (examining how to encrypt Microsoft Word Documents in the 2002 and 2003 edition of Word).

## APPENDIX A

# PROPOSED MODEL JURY INSTRUCTIONS THE USE OF ELECTRONIC TECHNOLOGY TO CONDUCT RESEARCH ON OR COMMUNICATE ABOUT A CASE†

*Prepared by the Judicial Conference Committee on Court Administration and Case Management*
*June 2012*

[Note: These instructions should be provided to jurors before trial, at the close of a case, at the end of each day before jurors return home, and other times, as appropriate.]

BEFORE TRIAL:

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom.

Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end.

I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube. You may not use any similar technology of social media, even if

† JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT, PROPOSED MODEL JURY INSTRUCTIONS: THE USE OF ELECTRONIC TECHNOLOGY TO CONDUCT RESEARCH ON OR COMMUNICATE ABOUT A CASE (2012), *available at* http://www.uscourts.gov/uscourts/News/2012/jury-instructions.pdf.

I have not specifically mentioned it here. I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

I hope that for all of you this case is interesting and noteworthy.

AT THE CLOSE OF THE CASE:

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as the telephone, a cell phone, smart phone, iPhone, Blackberry or computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or website such as Facebook, MySpace, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations. I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

You may not use these electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented in this courtroom. Information on the internet or available through social media might be wrong, incomplete, or inaccurate. You are only permitted to discuss the case with your fellow jurors during deliberations because they have seen and heard the same evidence you have. In our judicial system, it is important that you are not influenced by anything or anyone outside of this courtroom. Otherwise, your decision may be based on information known only by you and not your fellow jurors or the parties in the case. This would unfairly and adversely impact the judicial process.

# *RILEY V. CALIFORNIA*: PRIVACY STILL MATTERS, BUT HOW MUCH AND IN WHAT CONTEXTS?

*Adam Lamparello and Charles E. MacLean*[*]

*"Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is . . . simple—get a warrant."*[1]

## INTRODUCTION

Privacy still matters. The question is how much, and in what contexts, it matters.

In *Riley v. California*, Chief Justice Roberts wrote for a unanimous Court, holding that law enforcement officers could seize but not search an arrestee's cell phone incident to arrest without a warrant or absent exigent circumstances.[2] The Court rejected the Government's argument that concerns for officers' safety and the preservation of evidence—the initial, pre-digital era justifications for searches incident to arrest[3]—supported warrantless searches of arrestees' cell phones.[4] Chief Justice Roberts's majority opinion flatly rejected the Court's rationale in *United States v. Robinson*,[5] which had expanded law enforcement's power to conduct warrantless searches to an unprecedented degree.[6] The *Riley* Court also declined to extend the search incident to arrest standard found in *Arizona v. Gant*[7]—and for good reason. As the Court recognized, cell phones are used by millions of individuals to store the "papers[ ] and

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1 Riley v. California, 134 S. Ct. 2473, 2495 (2014).

2 *Id.* at 2493–94.

3 Chimel v. California, 395 U.S. 752, 762–63 (1969) (holding in 1969 that two justifications—officer safety and the preservation of evidence—framed the limits of the search incident to arrest doctrine).

4 *See Riley*, 134 S. Ct. at 2484–86 (citing *Chimel*, 395 U.S. at 762–63).

5 *Id.* at 2484–85 (citing United States v. Robinson, 414 U.S. 218, 235 (1973)).

6 *See* Derik A. Scheurer, *Are Courts Phoning It In? Resolving Problematic Reasoning in the Debate over Warrantless Searches of Cell Phones Incident to Arrest*, 9 WASH. J.L. TECH. & ARTS 287, 294–95 (2014) ("*Robinson* significantly departed from Supreme Court precedent on the search-incident-to-arrest exception" because it "effectively severed the search-incident-to-arrest exception from a fact-based analysis." Although "[p]rior cases required either an evidentiary link that tied the object of the search to the basis for the arrest or an evident threat to police safety[,] . . . the *Robinson* Court removed such factual considerations from the equation.").

7 *Riley*, 134 S. Ct. at 2492 (citing Arizona v. Gant, 556 U.S. 332, 343 (2009).

effects"[8] that have historically been protected from warrantless—and suspicionless—intrusion by the Government.[9]

In short, times have changed. Private information is no longer stored only in homes or other areas traditionally protected from warrantless intrusion.[10] The private lives of many citizens are contained in digital devices no larger than the palms of their hands—and carried in public places.[11] But that does not make the data within a cell phone any less private, just as the dialing of a phone number does not automatically waive an individual's right to keep her call log or location private.[12] One should keep in mind these are not individuals suspected of committing violent crimes. The Government is monitoring the calls and locations of citizens who have done nothing wrong, who are driving to work while talking to their spouses, or who are using their cell phones to call a loved one in the hospital.[13] The Government also has the power to know where

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[8] U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

[9] *See Riley*, 134 S. Ct. at 2484 (noting that "[a] smart phone of the sort taken from Riley was unheard of ten years ago[,]" but that "a significant majority of American adults now own such phones"); *id.* at 2488–89 (rejecting the Government's argument that items subject to search under *Robinson* and *Chimel*—a billfold, address book, wallet, and purse—are analogous to modern cell phones and stating that "[a] conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom.").

[10] *Id.* at 2490–91.

[11] *See id.* at 2489–90 (noting that "[t]he term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone" and stating that while "[m]ost people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read[,]" modern cell phones allow individuals to carry around such information in "a container the size of the cigarette package in *Robinson*").

[12] *See id.* at 2492–93 ("We also reject the United States' final suggestion that officers should always be able to search a phone's call log, as they did in Wurie's case. The Government relies on *Smith v. Maryland*, which held that no warrant was required to use a pen register at telephone company premises to identify numbers dialed by a particular caller. The Court in that case, however, concluded that the use of a pen register was not a 'search' at all under the Fourth Amendment. There is no dispute here that the officers engaged in a search of Wurie's cell phone. Moreover, call logs typically contain more than just phone numbers; they include any identifying information that an individual might add, such as the label 'my house' in Wurie's case." (citations omitted)).

[13] *See* Laura K. Donohue, *Bulk Metadata Collection: Statutory and Constitutional Considerations*, 37 HARV. J.L. & PUB. POL'Y 757, 871 (2014) (noting that Government officials have acknowledged that the National Security Agency ("NSA") monitors phone calls made through Verizon, AT&T, and Sprint, which "means that every time the average U.S. citizen

you are and even record the numbers you are calling.[14] Unless the Government has a good reason for using it—often referred to as probable cause or reasonable suspicion[15]—this practice should have no place in a society that values civil liberties.

Do the Government's surveillance practices make us safer? Maybe.[16] Should that matter? No. Assurances that we are "safer" come at too high a price if the cost is our personal freedom. Surveillance may make us safer, but it also makes every citizen less secure—and a little hesitant before dialing a number or downloading a YouTube video.[17] If the Court were to permit these and other warrantless intrusions into a person's private life, the Fourth Amendment's place in the constitutional hierarchy might be just a notch above the Third Amendment's prohibition against the quartering of soldiers,[18] or slightly below the often-discussed but never-

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makes a telephone call, the NSA is collecting the location, the number called, the time of the call, and the length of the conversation").

[14] *See* Joseph D. Mornin, Note, *NSA Metadata Collection and the Fourth Amendment*, 29 BERKELEY TECH. L.J. 985, 985–86, 985 n.4 (2014) ("Metadata includes information about a phone call—who, where, when, and how long—but not the content of the conversation."); John Yoo, *The Legality of the National Security Agency's Bulk Data Surveillance Programs*, 37 HARV. J.L. & PUB. POL'Y 901, 911–12 (2014) (noting the Foreign Intelligence Surveillance Court held the Government's collection of metadata for "billions of innocent calling records" is justified "'[b]ecause known and unknown international terrorist operatives are using telephone communications, and because it is necessary to obtain the bulk collection of a telephone company's metadata to determine those connections between known and unknown international terrorist operatives as part of authorized investigations'" (quoting *In re* FBI for an Order Requiring the Production of Tangible Things from [Redacted], No. BR 13-109, at 18 (FISA Ct. Aug. 29, 2013), *available at* http://www.uscourts.gov/uscourts/courts/fisc/br13-09-primary-order.pdf).

[15] *See* Christopher Slobogin, *Cause to Believe What? The Importance of Defining a Search's Object—Or, How the ABA Would Analyze the NSA Metadata Surveillance Program*, 66 OKLA. L. REV. 725, 729–30 (2014).

[16] *Compare* John McLaughlin, Editorial, *Misplaced Fear of the NSA*, WASH. POST, Jan. 3, 2014, at A13 (contending that congressional oversight of the NSA makes private information safer in the hands of the Government than private companies), *with* Editorial, *Bad Times for Big Brother*, N.Y. TIMES, Dec. 22, 2013, at SR10 (contending that citizens need both physical security from terrorist attacks and mental security from the fear of being watched by the Government).

[17] *See, e.g.*, PEW RESEARCH CTR., PRIVACY AND DATA MANAGEMENT ON MOBILE DEVICES 6 (2012), http://pewinternet.org/Reports/2012/Mobile-Privacy.aspx (finding that 57% of cell phone app users have uninstalled an app or refused to install an app due to overriding privacy concerns).

[18] *See* Thomas L. Avery, *The Third Amendment: The Critical Protections of a Forgotten Amendment*, 53 WASHBURN L.J. 179, 179 (2014) ("The U.S. Supreme Court has never had occasion to apply or interpret the Third Amendment, and only once has a federal court directly addressed a Third Amendment claim on the merits. Indeed, the Third Amendment is the least litigated Amendment in the Bill of Rights." (footnote ommitted)).

used Privileges and Immunities Clause.[19] Simply put, *Riley* came at the right time, and hopefully it is the beginning of enhanced protections for privacy rights.

What we know after *Riley* is that law enforcement's power to rummage through an individual's private life is not unlimited.[20] The Court's analysis also suggests that it will balance an individual's privacy interests against the Government's interest in crime prevention.[21] The Court, however, did not address whether the Fourth Amendment applies to *remote* intrusions of a cell phone, such as the collection of metadata.[22] Finally, we do not know the context within which the Government's interest in crime prevention may outweigh or diminish an individual's expectation of privacy, thereby permitting otherwise prohibited searches such as those performed incident to arrest.

Thus, although *Riley* is a victory for individual privacy rights and a signal to law enforcement that its investigative powers are not without limits, the critical question is: how much does privacy matter? This Article argues that if the guiding principle in *Riley*—the reasonableness of the search[23]—governs the Court's analysis in upcoming cases, then other warrantless intrusions on individual privacy, such as the collection of cell phone metadata or forensic searches of laptops at the border, may end or be limited—as they should. Cell phones and other digital data contain "'the privacies of life,'"[24] and a search of their contents would "typically

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[19] *See* Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051, 1116 (2000) ("Right up to the present day, only one extant (and very recent) Supreme Court decision has ever upheld a claim under the [Privileges and Immunities] Clause . . . ."); *see also, e.g.*, Thomas H. Burrell, *Privileges and Immunities and the Journey from the Articles of Confederation to the United States Constitution: Courts on National Citizenship and Antidiscrimination*, 35 WHITTIER L. REV. 199 (2014); Lori Johnson, *Within Her Sphere: Determining a Woman's Place in the Constitutional Order Under the Privileges and Immunities Clause*, 79 MISS. L.J. 731 (2010); Douglas G. Smith, *The Privileges and Immunities Clause of Article IV, Section 2: Precursor of Section 1 of the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 809 (1997).

[20] *Riley*, 134 S. Ct. at 2495 ("The fact that technology now allows an individual to carry [private] information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.").

[21] *See id.* at 2484, 2488 ("The search incident to arrest exception rests not only on the heightened Government interests at stake in a volatile arrest situation, but also on an arrestee's reduced privacy interests upon being taken into police custody.").

[22] *See infra* notes 75–77 and accompanying text.

[23] *Riley*, 134 S. Ct. at 2482 ("'[T]he ultimate touchstone of the Fourth Amendment is "reasonableness."'" (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006))).

[24] *Id.* at 2495 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

expose to the government far *more* than the most exhaustive search of a house."[25]

Ultimately, the Government's indiscriminate, widespread, and suspicionless collection of information, even if it only involves call records and identifies a user's location, cannot be reconciled with the "right of the people to be secure in their . . . papers[] and effects."[26] Simply put, with respect to the search of cell phone metadata, laptops, and other digital devices, the answer to what the Government must do before searching these items should also be simple: "get a warrant."[27]

## I. CHIEF JUSTICE ROBERTS'S MAJORITY OPINION—DISTINGUISHING THE PHYSICAL AND VIRTUAL WORLDS

Chief Justice Roberts's majority opinion recognized that the "'touchstone of the Fourth Amendment is "reasonableness"'"[28] and focused on "whether application of the search incident to arrest doctrine to this particular category of effects would 'untether the rule from the justifications underlying the *Chimel* exception.'"[29]

Answering this question in the affirmative—and holding that warrantless cell phone searches incident to arrest are *per se* unreasonable[30]—the Court explained that neither the *Chimel* justifications,[31] nor the expansive view of law enforcement authority embraced in *Robinson*,[32] nor the *Gant* standard[33] could justify the warrantless search of information that the Founders—and the Court—historically considered private.[34]

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[25] *Id.* at 2491.

[26] U.S. CONST. amend. IV; *see also* Donohue, *supra* note 13, at 871–72 (noting that the NSA collects call metadata on "hundreds of millions of people").

[27] *Riley*, 134 S. Ct. at 2495.

[28] *Id.* at 2482 (quoting *Stuart*, 547 U.S. at 403).

[29] *Id.* at 2485 (quoting Arizona v. Gant, 556 U.S. 332, 343 (2009)).

[30] *Id.* at 2495.

[31] Chimel v. California, 395 U.S. 752, 762–63 (1969) (officer safety and preservation of evidence).

[32] *See* Scheurer, *supra* note 6, at 295 ("With *Robinson*, the Court effectively severed the search-incident-to-arrest exception from a fact-based analysis. As long as an officer executes a lawful arrest, he or she may conduct a 'full' search of the arrestee and, by the implication of *Chimel*, the area within the arrestee's 'immediate control.'").

[33] *Riley*, 134 S. Ct. at 2484 (citing *Gant*, 556 U.S. at 343).

[34] *See id.* at 2484–85 (declining to extend the categorical rule found in *Robinson*); *id.* at 2485–87 (rejecting both *Chimel* justifications); *id.* at 2492 (rejecting a standard based on *Gant*); *id.* at 2491 (stating that the Founders established protections for citizens' private items).

### *A. The Search Incident to Arrest Doctrine Does Not Authorize Warrantless Cell Phone Searches*

#### 1. Cell Phones Are Not Weapons

The Court's decision in *Chimel* recognized that the threats posed to officer safety during an arrest permit a limited search of the arrestee's person and areas into which the arrestee may reach for a weapon.[35] A cell phone cannot be used as an offensive weapon or escape mechanism, and police are authorized to seize the phone upon arrest.[36] As Chief Justice Roberts explained, whatever threat that may conceivably exist is eliminated by the seizure:

> Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Law enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon—say, to determine whether there is a razor blade hidden between the phone and its case. Once an officer has secured a phone and eliminated any potential physical threats, however, data on the phone can endanger no one.[37]

Thus, although "unknown physical objects may always pose risks . . . during the tense atmosphere of a custodial arrest[,] . . . [n]o such unknowns exist with respect to digital data."[38]

#### 2. The Preservation of Evidence Is Not Implicated

The Government argued that warrantless searches were justified to prevent the destruction of potentially incriminating evidence, through either "remote wiping [or] data encryption."[39] Remote wiping happens "when a third party sends a remote signal or when a phone is preprogrammed to delete data upon entering or leaving certain geographic areas."[40] Encryption allows individuals to protect cell phone data in a manner that "renders a phone all but 'unbreakable' unless police know the password."[41]

The Court found that neither of these possibilities presented a serious risk that the contents of a cell phone would be destroyed.[42] Indeed, "[r]emote wiping can be fully prevented by disconnecting a phone from the

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35 *Chimel*, 395 U.S. at 762–63.

36 *Riley*, 134 S. Ct. at 2485.

37 *Id.*

38 *Id.*

39 *Id.* at 2486.

40 *Id.*

41 *Id.*

42 *Id.*

network."[43] With respect to data encryption, "[l]aw enforcement officers are very unlikely to come upon [a password-protected] phone in an unlocked state because most phones lock at the touch of a button or, as a default, after some very short period of inactivity."[44]

### *B. The Focus on Privacy, Not Trespass*

Perhaps more importantly, the Court held that individuals have a reasonable expectation of privacy in data stored in cell phones because the information is fundamentally different than that which is typically stored in physical objects.[45] In so holding, the Court refused to apply *Robinson,* which held that the "custodial arrest of a suspect based on probable cause [was] a reasonable intrusion under the Fourth Amendment . . . [such that] a search incident to the arrest *requires no additional justification.*"[46] Likewise, the Court did not extend the rationale in *Gant,* which sanctioned "an independent exception for a warrantless search of a vehicle's passenger compartment 'when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."'"[47] As Chief Justice Roberts wrote in the majority opinion, the *Gant* standard would "prove no practical limit at all when it comes to cell phone searches."[48]

#### 1. Cell Phones Cannot Be Analogized to Cigarette Packs or Containers

At the outset, "[o]ne of the most notable distinguishing features of modern cell phones is their immense storage capacity."[49] This distinguishes the search of a cell phone from the search of a person, which is "limited by physical realities and tend[s] as a general matter to constitute only a narrow intrusion on privacy."[50] Chief Justice Roberts explained as follows:

> The current top-selling smart phone has a standard capacity of 16 gigabytes (and is available with up to 64 gigabytes). Sixteen gigabytes translates to millions of pages of text, thousands of pictures, or hundreds of videos. Cell phones couple that capacity with the ability to store many different types of information: Even the most basic phones that sell for less than $20 might hold photographs, picture messages, text messages, Internet browsing history, a calendar, a thousand-entry

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[43] *Id.* at 2487.

[44] *Id.*

[45] *Id.* at 2488–89.

[46] *Id.* at 2483 (emphasis added) (quoting United States v. Robinson, 414 U.S. 218, 235 (1973)).

[47] *Id.* at 2484 (quoting Arizona v. Gant, 556 U.S. 332, 343 (2009)).

[48] *Id.* at 2492.

[49] *Id.* at 2489.

[50] *Id.*

> phone book, and so on. We expect that the gulf between physical practicability and digital capacity will only continue to widen in the future.[51]

Indeed, "[c]ell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person."[52]

### 2. Cell Phones Contain Private Information

The Court also recognized that the storage capacity issue produces "several interrelated consequences for privacy"[53] because a cell phone "collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record."[54] Chief Justice Roberts noted that "Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD."[55] In other words, the thousands of photographs found on a cell phone, which contain dates, locations, and descriptions, reveal an individual's private life, while a simple wallet photograph provides no such insight.[56]

As a result, "a cell phone search would typically expose to the government far more than the most exhaustive search of a house" because a cell phone "contains a broad array of private information never found in a home in any form—unless the phone is."[57] Furthermore, the fact that "[p]rior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day"[58] does not "make the information any less worthy of the protection for which the Founders fought."[59] As Chief Justice Roberts noted in the majority opinion, today "it is the person who is not carrying a cell phone, with all that it contains, who is the exception."[60] Indeed, it is ludicrous to say that carrying a cell phone in a public place somehow makes the information it

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51 *Id.* (citations omitted).

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.* at 2490.

56 *Id.* at 2489.

57 *Id.* at 2491.

58 *Id.* at 2490.

59 *Id.* at 2495.

60 *Id.* at 2490. Furthermore, even though an arrestee has a reduced expectation of privacy upon arrest, "diminished privacy interests [do] not mean that the Fourth Amendment falls out of the picture" or that "every search 'is acceptable solely because a person is in custody.'" *Id.* at 2488 (quoting Maryland v. King, No. 12-207, slip op. at 26 (U.S. June 3, 2013)).

contains less private, or to equate it with someone standing naked in front of a large window in their home who then complains of an invasion of privacy when stunned onlookers peer into the window.

Although the Court ultimately recognized that its decision would "have an impact on the ability of law enforcement to combat crime,"[61] it also noted that "[p]rivacy comes at a cost,"[62] particularly when the privacy intrusion of a cell phone search extends far beyond that of a physical search.[63] Indeed, warrantless searches of an arrestee's cell phone would resemble "the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity."[64]

## II. WHAT *RILEY* MEANS FOR THE FUTURE

*Riley* is significant in several respects. The Court recognized that pre-digital case law neither confronted nor contemplated the issues raised by rapid technological advances.[65] Additionally, an individual's expectation of privacy in her cell phone does not change simply because she is in a public place.[66] And unlike the *ad hoc*, case-by-case approach characteristic of its earlier Fourth Amendment jurisprudence, which threatened to stretch the doctrine "beyond its breaking point,"[67] the *Riley* Court established a categorical bright-line rule that provides guidance to law enforcement and safeguards basic privacy rights.[68] Moreover, by basing its analysis on the Fourth Amendment's reasonableness standard,[69] the Court's opinion indicates that future cases involving digital privacy rights will involve balancing an individual's privacy interest against law enforcement's interest in crime prevention.[70]

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[61] *Id.* at 2493.

[62] *Id.*

[63] *Id.* at 2489.

[64] *Id.* at 2494.

[65] *See id.* at 2484 (noting that the application of the search-incident-to-arrest exception to cell phones is a question of first impression because the technology behind Riley's phone was "nearly inconceivable just a few decades ago, when *Chimel* and *Robinson* were decided").

[66] *See id.* at 2490 ("Today . . . it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate. Allowing the police to scrutinize such records on a routine basis is quite different from allowing them to search a personal item or two in the occasional case." (citation omitted)).

[67] Thornton v. United States, 541 U.S. 615, 625 (2004) (Scalia, J., concurring).

[68] *Riley*, 134 S. Ct. at 2494–95.

[69] *Id.* at 2482.

[70] *Id.* at 2484 ("[W]e generally determine whether to exempt a given type of search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the

After all, technology cuts both ways. It gives individuals the ability to store a virtual treasure trove of information, much of it traditionally considered private under the Fourth Amendment, in an object no larger than the size of their hands.[71] Technology, however, has also become an "important tool[] in facilitating coordination and communication among members of criminal enterprises."[72] Additionally, the information on cell phones can "provide valuable incriminating information about dangerous criminals,"[73] and modern technology, more generally, can be an important investigatory tool for the Government, both domestically and internationally.[74]

Accordingly, what remains unknown is how weighty an individual's privacy interest will be outside of the arrest context, where the intrusion is less significant, or where the Government's interest is more substantial.[75] The Court did not, for example, indicate whether an individual's privacy interests in a cell phone's contents may vary depending on the *specific* type of information being searched, such as an individual's contact list or call log as opposed to confidential bank statements.[76] Furthermore, the Court did not indicate whether collecting

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promotion of legitimate governmental interests.'" (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).

71 *Id.* at 2489 (discussing the extensive storage capacity of modern cell phones).

72 *Id.* at 2493.

73 *Id.*

74 *See, e.g.*, Bert-Jaap Koops, *Law, Technology, and Shifting Power Relations*, 25 BERKELEY TECH. L.J. 973, 978–79 (2010) (noting that although "increasingly sophisticated technology enables criminals to protect their communications from police surveillance and store incriminating electronic evidence[,] . . . technology also facilitates criminal investigation by supplying unprecedented surveillance tools"); Caitlin T. Street, Note, *Streaming the International Silver Platter Doctrine: Coordinating Transnational Law Enforcement in the Age of Global Terrorism and Technology*, 49 COLUM. J. TRANSNAT'L L. 411, 420–24 (2011) (discussing the "sophisticated surveillance and weapons technology" that is "critical in countering the international terrorism threat").

75 *See Riley*, 134 S. Ct. at 2493–94 ("Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search . . . . [E]ven though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone. . . . [These include] the need to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury.").

76 *See id.* at 2490 ("Although the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different."). *But cf. id.* at 2493 ("[A]t oral argument California suggested a different limiting principle, under which officers could search cell phone data if they could have obtained the same information from a pre-digital counterpart. . . . The fact that someone could have tucked a paper bank statement in a pocket does not justify a search of every bank statement from the last five years. And to make matters worse, such an analogue test would allow law enforcement to search a range of items contained on a phone, even though people would be

*all* information from a cell phone, whether directly or through remote monitoring, will be considered a "search" for Fourth Amendment purposes.[77]

*Riley* also did not address how this more generalized privacy interest applies in other contexts, including where the Government's conduct is arguably less invasive and the privacy interest less pronounced, such as in the collection of metadata,[78] or where the Government's interest in crime prevention is heightened, such as in the searches of laptops at the border.[79] In other words, it is unclear whether all, or merely some, of the information collected from a cell phone, directly or through remote monitoring, may in some cases be outside of Fourth Amendment protections.

Furthermore, it is unclear how *Riley*'s focus on privacy can be reconciled with the trespass theory that the Court relied on in *United States v. Jones*,[80] in which the Court held that using a GPS tracking device to remotely monitor a suspect's vehicle's movement for nearly a month constituted a search under the Fourth Amendment.[81] In a 5-4 decision, the majority based its decision on the fact that the physical installation of the device on the car constituted a trespass[82] but did not expressly consider under *Katz v. United States*[83] whether the intrusion violated the

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unlikely to carry such a variety of information in physical form. . . . In addition, an analogue test would launch courts on a difficult line-drawing expedition to determine which digital files are comparable to physical records. Is an e-mail equivalent to a letter? Is a voicemail equivalent to a phone message slip? It is not clear . . . ." (citations omitted)).

77 *Cf. id.* at 2492–93 (distinguishing *Smith v. Maryland*, 442 U.S. 735 (1979), which had allowed the telephone company's collection of numbers dialed by a certain caller because that collection "was not a search" (internal quotation marks omitted)).

78 *See* United States v. Davis, No. 12-12928, slip op. at 23 (11th Cir. June 11, 2014) ("[W]e hold that cell site location information is within the subscriber's reasonable expectation of privacy. The obtaining of that data without a warrant is a Fourth Amendment violation."), *vacated & reh'g en banc granted*, No. 12-12928, 2014 WL 4358411, at *1 (11th Cir. Sept. 4, 2014); Klayman v. Obama, 957 F. Supp. 2d 1, 41 (D.D.C. 2013) ("[P]laintiffs have a substantial likelihood of showing that their privacy interests outweigh the Government's interest in collecting and analyzing bulk telephony metadata and therefore the NSA's bulk collection program is indeed an unreasonable search under the Fourth Amendment.").

79 *See* United States v. Cotterman, 709 F.3d 952, 966 (9th Cir. 2013) ("We recognize the important security concerns that prevail at the border. The government's authority to protect the nation from contraband is well established and may be 'heightened' by 'national cris[e]s,' such as the smuggling of illicit narcotics, the current threat of international terrorism and future threats yet to take shape." (alteration in original) (quoting United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985))), *cert. denied*, No. 13-186, 2014 WL 102985, at *1 (U.S. Jan. 13, 2014).

80 United States v. Jones, 132 S. Ct. 945, 949 (2012).

81 *Id.* at 948–49.

82 *See id.* at 947, 949 (5-4 decision).

83 *See* Katz v. United States, 389 U.S. 347, 351–52 (1967) (noting that privacy attaches not to a place, but to a person demonstrating his desire for it); *see also* United States

occupant's reasonable expectation of privacy.[84] Thus, it remains uncertain whether the generalized privacy interest in cell phone data will be limited to physical intrusions, whether the expectation of privacy diminishes when the Government remotely tracks information, and whether the duration of the Government's monitoring may turn an otherwise permissible search into a Fourth Amendment violation.[85]

Nonetheless, *Riley* will impact future cases because there are important parallels between the Court's decision and cases that it soon may decide, particularly involving the collection of cell phone (and internet) metadata[86] and searches of laptop computers at the border.[87] Indeed, if reasonableness continues to guide the Court's analysis, law enforcement's sweeping surveillance powers may soon come to an end.[88]

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v. Miller, 425 U.S. 435, 442–43 (1976) (holding that the defendant had no expectation of privacy in banks' records of his financial activity because they were voluntarily conveyed to the bank and were included in the bank's business records).

[84] *Jones*, 132 S. Ct. at 950.

[85] It is not surprising that Chief Justice Roberts's majority opinion in *Riley* resulted in the relatively limited holding that an arrestee's *diminished* expectation of privacy while in custody does not *extinguish* the arrestee's privacy rights in information that has historically been protected under the Fourth Amendment. As a result of this holding, the Court left many questions unresolved. Narrow rulings are a hallmark of Chief Justice Roberts, who strives for "unanimous or near-unanimous decisions, on the ground that they promote the rule of law" and "lead to narrow, minimalist opinions." *Chief Justice Roberts and Minimalism*, U. CHI. L. SCH. FAC. BLOG (May 25, 2006, 9:52 AM), http://uchicagolaw.typepad.com/faculty/2006/05/chief_justice_r.html. Indeed, Chief Justice Roberts has stated that "'[i]f it is not necessary to decide more to dispose of a case, in my view it is necessary not to decide more.'" *Id.*

[86] Recently, a panel of the Eleventh Circuit held that a warrant is required to obtain cell site location data, and the full court granted a rehearing *en banc* soon afterwards. *See* United States v. Davis, No. 12-12928, slip op. at 23 (11th Cir. June 11, 2014), *vacated & reh'g en banc granted*, No. 12-12928, 2014 WL 4358411, at *1 (11th Cir. Sept. 4, 2014). *See also* Colin Campbell, *Antonin Scalia Has a Civil Liberties Debate in Brooklyn*, N.Y. OBSERVER (Mar. 22, 2014, 2:34 PM), http://observer.com/2014/03/antonin-scalia-has-a-civil-liberties-debate-in-brooklyn/ ("Mr. Napolitano then asked if mass surveillance of cellphones and emails would be prohibited by the Fourth Amendment . . . . 'You're getting into the NSA stuff, right?' Mr. Scalia remarked . . . . This may come before the court. And I don't want to get myself recused.'").

[87] Only a few months before deciding *Riley*, the Supreme Court denied certiorari to a case involving a forensic search of a laptop begun at the border. *See* United States v. Cotterman, 709 F.3d 952, 957 (9th Cir. 2013) ("[W]e consider the reasonableness of a computer search that began as a cursory review at the border but transformed into a forensic examination of Cotterman's hard drive."), *cert. denied*, No. 13-186, 2014 WL 102985, at *1 (U.S. Jan. 13, 2014). This kind of case may, of course, come before the Court again.

[88] Ann E. Marimow & Craig Timberg, *Low-Level U.S. Judges Limit Digital Evidence*, WASH. POST, Apr. 25, 2014, at A01 (discussing recent, though pre-*Riley*, magistrate decisions that have limited digital device searches by contrasting law enforcement's sweeping surveillance powers with the Fourth Amendment's "reasonableness" requirement).

### *A. The Collection of Cell Phone Metadata*

In *Smith v. Maryland,* the Court held that law enforcement's installation of a pen register in a suspect's home to record outgoing calls did not constitute a search under the Fourth Amendment.[89] The Court held that the petitioner did not have a "legitimate" expectation of privacy in the numbers he dialed on his phone.[90] The Court stated as follows:

> [P]etitioner can claim no legitimate expectation of privacy here. When he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and "exposed" that information to its equipment in the ordinary course of business. In so doing, petitioner assumed the risk that the company would reveal to police the numbers he dialed. The switching equipment that processed those numbers is merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber.[91]

The Court's decision was based in part on the third-party doctrine, which allows the Government to conduct warrantless searches of otherwise-private information when an individual has voluntarily conveyed that information to a third party.[92]

The Government has relied on *Smith* to support its collection of cell phone metadata, which records the user's calls *and* location.[93] Recent case law, however, has rejected the analogy much the same way that the *Riley* Court refused to equate cell phones with physical objects.[94] In *Klayman v. Obama,* for example, the court held that, unlike a pen register, which was "operational for only a matter of days,"[95] the Government metadata collection operation "involves the creation and maintenance of a historical database containing *five years*' worth of data."[96] Furthermore, pen registers "'record the numbers dialed from the [individual's] telephone,'" but metadata collection yields, "*on a daily basis*[,] electronic copies of call detail records" that can reveal the user's location.[97] Indeed, although it is

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89 442 U.S. 735, 745–46 (1979).

90 *Id.* at 745.

91 *Id.* at 744.

92 *Id.* at 743–44.

93 *See* Donohue, *supra* note 13, at 866–67, 871.

94 *See* Klayman v. Obama, 957 F. Supp. 2d 1, 31 (D.D.C. 2013) ("When do present-day circumstances—the evolutions in the Government's surveillance capabilities, citizens' phone habits, and the relationship between the NSA and telecom companies—become so thoroughly unlike those considered by the Supreme Court thirty-four years ago that a precedent like *Smith* simply does not apply? The answer, unfortunately for the Government, is now.").

95 *Id.* at 32 (distinguishing *Smith*, 442 U.S. at 737).

96 *Id.*

97 *Id.* (quoting *Smith*, 442 U.S. at 737).

reasonable for phone companies to occasionally assist law enforcement,[98] it is an entirely different matter for citizens to "expect all phone companies to operate . . . a joint intelligence-gathering operation with the Government."[99]

Likewise, in *United States v. Davis*, the Eleventh Circuit held that the warrantless collection of cell phone metadata to identify a suspect's location violates the Fourth Amendment.[100] Significantly—and contrary to the Fifth Circuit[101]—the court held that individuals have a reasonable expectation of privacy in data that identifies their whereabouts.[102] The Eleventh Circuit reasoned that such location information is similar to communicative data because "it is private in nature,"[103] and its collection would impermissibly "convert what would otherwise be a private event into a public one."[104] Importantly, the court distinguished *Jones*, which "involved the movements of the defendant's automobile on the public streets and highways,"[105] by holding that *Jones*'s reliance on a trespass theory did not suggest that the *Katz* privacy rationale was no longer applicable.[106]

The Eleventh Circuit's decision creates a circuit split that the Supreme Court may ultimately resolve.[107] Based on the reasoning employed in *Riley*, the Court may very well hold that the Government's metadata collection practices violate the Fourth Amendment. Unlike the analysis in *Jones,* the *Riley* Court's reasoning focused on the privacy

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[98] *Id.* at 33.

[99] *Id.*

[100] United States v. Davis, No. 12-12928, slip op. at 23 (11th Cir. June 11, 2014), *vacated & reh'g en banc granted*, No. 12-12928, 2014 WL 4358411, at *1 (11th Cir. Sept. 4, 2014).

[101] *See In re* U.S. for Historic Cell Site Data, 724 F.3d 600, 624 (5th Cir. 2013) ("[T]here is substantial doubt as to whether cell phone users have a reasonable expectation of privacy in cell site location information . . . .").

[102] *Davis*, slip op. at 23.

[103] *Id.* at 20.

[104] *Id.*

[105] *Id.* at 19.

[106] *Id.* at 18 ("In light of the confluence of the three opinions in the Supreme Court's decision in *Jones*, we accept the proposition that the privacy theory is not only alive and well, but available to govern electronic information of search and seizure in the absence of trespass.").

[107] *Compare Davis*, slip op. at 23 (holding that a warrant is required to search cell phone location information), *vacated & reh'g en banc granted*, No. 12-12928, 2014 WL 4358411, at *1 (11th Cir. Sept. 4, 2014), *with In re* U.S. for Historic Cell Site Data, 724 F.3d 600, 624 (5th Cir. 2013) (stating that cell phone users likely do not have a reasonable expectation of privacy in their cell location information).

infringement that resulted from searches on an arrestee's cell phone[108] and recognized that cell phones are not analogous to physical objects traditionally subject to post-arrest searches.[109] Although the collection of metadata is arguably less intrusive and occurs from a distance,[110] it records a user's call history and location without even the slightest hint of suspicion.[111] Furthermore, metadata collection is neither limited in duration nor targeted at individuals already suspected of criminal conduct.[112] Under *Riley*'s reasonableness standard, which recognized a generalized expectation of privacy in cell phone data,[113] the Government's indiscriminate and prolonged collection of metadata[114] appears unreasonable.

### *B. Laptop Searches at the Border—and in the Home*

*Riley* may also affect the Government's ability to conduct intrusive, or "forensic," searches of laptops at the border without any degree of suspicion.[115] Of course, border searches of a vehicle's physical contents have traditionally been justified on grounds relatively similar to the search incident to arrest doctrine—officer safety[116] and the discovery of contraband.[117]

As the *Riley* Court correctly recognizes, however, digital devices contain a vast amount of private information that renders searches of them far more intrusive.[118] Furthermore, just as the justifications for

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[108] *See Riley*, 134 S. Ct. at 2494–95 (holding that cell phones are protected from warrantless searches because of the privacy interests implicated).

[109] *Id.* at 2488–89.

[110] *See, e.g.*, *Historic Cell Site Data*, 724 F.3d at 610, 613, 615 (holding that historical cell site data is not subject to a reasonable expectation of privacy because users knowingly expose this information to cell providers).

[111] *See* Donohue, *supra* note 13, at 759–60, 872 (describing the "call detail information" of law-abiding citizens that cell phone service providers must turn over to the NSA).

[112] *See* Susan Freiwald, *Cell Phone Location Data and the Fourth Amendment: A Question of Law, Not Fact*, 70 MD. L. REV. 681, 723–24 (2011) ("The government apparently seeks location information about ostensibly innocent parties regularly. . . . [M]ore than two hundred and ninety million Americans who use cell phones are at risk of location data surveillance.").

[113] *See Riley*, 134 S. Ct. at 2494–95.

[114] Freiwald, *supra* note 112, at 746–47.

[115] *Cf.* United States v. Cotterman, 709 F.3d 952, 962 (9th Cir. 2013) (noting in a border laptop search case that "the comprehensive and intrusive nature of a forensic examination—not the location of the examination . . . is the key factor triggering the requirement of reasonable suspicion here."), *cert. denied*, No. 13-186, 2014 WL 102985, at *1 (U.S. Jan. 13, 2014).

[116] *See* United States v. Brignoni-Ponce, 422 U.S. 873, 880–81 (1975).

[117] United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985).

[118] *Riley*, 134 S. Ct. at 2489.

searching incident to arrest are not triggered by the mere presence of a cell phone,[119] the justifications for border searches are not necessarily sufficiently implicated by the presence of a laptop to make a search reasonable.[120] Importantly, the Ninth Circuit recently considered this issue and held that border agents must have reasonable suspicion before conducting forensic searches of laptops.[121] However, the Eastern District of New York held that such searches are permissible because the "'Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border.' "[122] The court did recognize, however, that if warrantless forensic searches (which occur rarely) were more routine, reasonable suspicion would be required.[123]

The Court's decision in *Riley* provides additional support for requiring reasonable suspicion before border agents perform forensic searches at the border.[124] Given the Government's heightened interests in this context,[125] however, the Court would probably permit more superficial searches of a motorist's laptop, provided they are limited to areas: (1) traditionally deemed searchable in that context;[126] (2) that implicate officer safety or the presence of contraband;[127] or (3) to which no reasonable expectation of privacy attaches.[128]

## CONCLUSION

*Riley* is a landmark decision because of its reasoning, not merely its result.[129] Chief Justice Roberts's majority opinion focused on reasonableness and recognized that digital devices implicate fundamental privacy concerns.[130] Indeed, *Riley* suggests that the Court will take a more

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[119] *Id.* at 2485–87.

[120] *See Cotterman*, 709 F.3d at 962, 966–68.

[121] *Id.* at 967–68.

[122] Abidor v. Napolitano, 990 F. Supp. 2d 260, 278 (E.D.N.Y. 2013) (quoting United States v. Flores-Montano, 541 U.S. 149, 152 (2004)).

[123] *Id.* at 282.

[124] *Cf. Cotterman*, 709 F.3d at 962.

[125] *Id.* at 966.

[126] *See id.* at 960 (discussing the traditional limits of the border search exception).

[127] *See* United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985); United States v. Brignoni-Ponce, 422 U.S. 873, 880–81 (1975).

[128] *See* Katz v. United States, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.").

[129] *See Landmark Supreme Court Ruling Protects Cell Phones from Warrantless Searches*, NAT'L L. REV. (June 30, 2014), http://www.natlawreview.com/article/landmark-supreme-court-ruling-protects-cell-phones-warrantless-searches (recognizing that the Court's analysis in *Riley* stemmed from an understanding of "the unique role that cell phones play in modern life").

[130] *Riley*, 134 S. Ct. at 2484–85, 2488–89.

active role in ensuring that the Government's investigative and surveillance practices do not lead to the modern-day version of the general warrant.[131]

Quite frankly, it is about time. The National Security Agency's surveillance program has resulted in alarming encroachments by the Government into the private lives of its citizens and made any threshold standard of suspicion seem like an inconvenience, not a requirement.[132] Hopefully, *Riley* is the first step toward restoring the proper—reasonable—constitutional balance.

[131] *Id.* at 2494–95.

[132] *See* Mornin, *supra* note 14, at 1000–02 (discussing the extent of the NSA's monitoring of metadata over time, including individual call and aggregate call analysis).

# FLEXIBLE INTERPRETATIONS OF "THE POWERS THAT BE" FROM CONSTANTINE TO MANDELA AND BEYOND

*Louis W. Hensler III*[*]

## INTRODUCTION

The phrase "the powers that be" has long been part of English idiom.[1] William Tyndale, the English biblical scholar and Protestant reformer,[2] apparently introduced this phrase into the English language with his translation of the first sentence of the second verse of the thirteenth chapter of St. Paul the Apostle's epistle to the Romans: "The powers that be are ordeyned off God."[3] The phrase was incorporated without change into the King James Bible,[4] arguably the most influential literary work in the history of the English language,[5] and from there it, like many other biblical phrases, became idiomatic in English.[6]

While "the powers that be" is arguably the most famous phrase from this passage of Paul's most famous epistle,[7] the entire passage, consisting

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1 *See, e.g.*, J. MICHAEL RICHARDSON & J. DOUGLAS RABB, THE EXISTENTIAL JOSS WHEDON: EVIL AND HUMAN FREEDOM IN BUFFY THE VAMPIRE SLAYER, ANGEL, FIREFLY AND SERENITY (2006) (using "the powers that be" throughout to refer to those in authority); *cf.* David Crystal, *How Are the Mighty Fallen?*, HIST. TODAY, Jan. 2011, at 42–43 (explaining how many biblical phrases have become a part of the English lexicon).

2 *See* David Daniell, *Introduction* to TYNDALE'S NEW TESTAMENT vii–viii, xv–xvi (1989).

3 *Romans* 13:2 (Tyndale).

4 *Compare Romans* 13:1 (Tyndale) ("The powers that be, are ordeyned off God"), *with Romans* 13:1 (King James) ("the powers that be are ordained of God"). *See also* Daniell, *supra* note 2, at vii ("Much of the New Testament in the 1611 Authorized Version (King James Version) came directly from Tyndale . . . .").

5 MELVYN BRAGG, THE BOOK OF BOOKS 5–6 (2011).

6 *See* Crystal, *supra* note 1, at 42–43.

7 *See generally* William L. Pettingill, *Foreword* to WENDELL P. LOVELESS, PLAIN TALKS ON ROMANS 9 (1946) (commenting on the importance of Paul's letter to Rome).

of the first seven verses of chapter thirteen, has been highly influential in the course of law and politics in the West for roughly 1,800 years:[8]

> 1 Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God. 2 Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation. 3 For rulers are not a terror to good works, but to the evil. Wilt thou then not be afraid of the power? do that which is good, and thou shalt have praise of the same: 4 For he is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to *execute* wrath upon him that doeth evil. 5 Wherefore *ye* must needs be subject, not only for wrath, but also for conscience sake. 6 For for this cause pay ye tribute also: for they are God's ministers, attending continually upon this very thing. 7 Render therefore to all their dues: tribute to whom tribute *is due*; custom to whom custom; fear to whom fear; honour to whom honour.[9]

Scholars have suggested that *Romans* 13:1–7 is "the most influential part of the New Testament on the level of world history."[10] The influence of this New Testament passage has been not only deep, but also broad, having "a remarkably wide sphere of influence, including fields of law, political philosophy, public administration, education, politics and many others."[11] With regard to political philosophy, *Romans* 13:1–7 has been called "[t]he biblical *locus classicus* on the authority of civil government"[12] and "the most famous, and most disputed, discussion of political authority in the New Testament."[13] The passage has been cited and discussed in scores of published opinions by American courts,[14] law review articles,[15]

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[8] Ernest Bammel, Romans *13, in* JESUS AND THE POLITICS OF HIS DAY 365, 365 (Ernest Bammel & C.F.D. Moule eds., 1984).

[9] *Romans* 13:1–7 (King James).

[10] Bammel, *supra* note 8, at 365.

[11] B.C. Lategan, *Reception: Theory and Practice in Reading* Romans *13, in* TEXT AND INTERPRETATION: NEW APPROACHES IN THE CRITICISM OF THE NEW TESTAMENT 145, 153 (P.J. Hartin & J.H. Petzer eds., 1991).

[12] Craig A. Stern, *Crime, Moral Luck, and the Sermon on the Mount*, 48 CATH. U. L. REV. 801, 819 (1999).

[13] OLIVER O'DONOVAN, THE DESIRE OF NATIONS: REDISCOVERING THE ROOTS OF POLITICAL THEOLOGY 147 (1996).

[14] *See, e.g.*, Fields v. Brown, 503 F.3d 755, 793, 798 (9th Cir. 2007); Sandoval v. Calderon 241 F.3d 765, 775, 778–79 (9th Cir. 2001); *In re* People v. Harlan, 109 P.3d 616, 622, 627, 631, 635–36 (Colo. 2005); Brand v. State, 828 S.W.2d 824, 826 (Tex. App. 1992).

[15] *See, e.g.*, Louis W. Hensler III, *Misguided Christian Attempts to Serve God Using the Fear of Man*, 17 REGENT U. L. REV. 31, 49 (2004); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1465 (1990).

and in an essay by a sitting Associate Justice of the United States Supreme Court.[16]

The kernel of Paul's teaching in the passage, at least on the surface, appears to be that his readers must submit to "the powers that be" because they are ordained by God. Even opponents of this straightforward interpretation must confess that "Paul seems to declare that all political authority is ordained by God and should not be resisted."[17] Not surprisingly, however, Christians down through the centuries often have disagreed with the actions of the government of the time.[18] When that happens, *Romans* 13:1–7 has led Christians to struggle with the following question: How can Paul's teaching here about the role of rulers as "servants of God" be squared with the practical experience that rulers sometimes are and/or do evil?[19] How can an evil ruler be God's ordained "minister" or servant? Indeed, the question must have been present from the very inception of Paul's teaching, as noted by Theology Professor Clinton Morrison: "To the critical reader the question arises: How could Paul, when confronted with the actual situation in which the early Church found itself with regard to the State, express such an affirmative opinion concerning the governing authorities with such unshaken conviction and unconditional certitude?"[20] The Church's attempts to answer that question in varying historical contexts have taken a long and winding road. "The difficulty in interpreting Romans 13:1–7 is demonstrated by positions taken by Christians throughout the centuries, ranging from complete surrender to critical submission to the ruling authorities."[21] Indeed, the range of Christian interpretations is even broader, also encompassing interpretations that demand revolution against ruling authorities.[22]

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[16] *See, e.g.*, Antonin Scalia, *God's Justice and Ours*, FIRST THINGS, May 2002, at 17 *as reprinted in* RELIGION IN LEGAL THOUGHT AND PRACTICE 437, 437–38 (Howard Lesnick ed., 2010).

[17] David M. Smolin & Kar Yong Lim, *Living as Christians Under Civil Law: The New Testament Letters, Law, and Politics, in* LAW AND THE BIBLE 208, 215 (Robert F. Cochran Jr. & David VanDrunen eds., 2013).

[18] Indeed, "disagreed" may be an understatement. Jesus, Paul, and many early Christians were killed, frequently gruesomely, by the powers that be. *See generally infra* notes 77–106 and accompanying text.

[19] *See infra* note 113 and accompanying text.

[20] CLINTON D. MORRISON, STUDIES IN BIBLICAL THEOLOGY: THE POWERS THAT BE 11 (1960); *see also* Joel A. Nichols & James W. McCarty III, *When the State is Evil: Biblical Civil (Dis)Obedience in South Africa,* 85 ST. JOHN'S L. REV. 593, 602 (2011) [hereinafter Nichols & McCarty, *When the State is Evil*] (characterizing *Romans* 13 as "a difficult passage, for it does not seem to contain caveats for Christians living under unjust or evil rulers but, on its face, appears to be a clear statement of obedience and submission.").

[21] Smolin & Lim, *supra* note 17, at 215.

[22] *E.g.*, *id.* at 214 (noting that Calvin argued for political revolution under certain circumstances).

The primary goal for this paper is to canvass significant interpretations of *Romans* 13:1–7 within historical context. A secondary goal is to show that interpretation of *Romans* 13 has been heavily influenced by historical context, including then-existing political agendas. But this subject is not merely of historical interest. A tertiary hope (I dare not label it a "goal") is that this paper might spur some re-examination of the historical and ongoing use of *Romans* 13 as a weapon to be deployed in some political fight, and whether such use is appropriate.

This look at *Romans* 13 is organized in this way. First, the passage is introduced. Second, significant discussions of *Romans* 13 are surveyed up through the time of Samuel Rutherford. Third, the role of *Romans* 13 is discussed in three significant political conflicts: the American Revolution, Nazi Germany, and Apartheid South Africa. After that, some contemporary Christian views of *Romans* 13 are discussed. I conclude with a few personal observations and opinions.

## I. INTRODUCTION TO *ROMANS* 13

"There can be few documents, if any, which have had more study concentrated on them than the Epistle to the Romans."[23] The literary work frequently referred to as the "book" of *Romans* purports on its face to be an epistle, or letter[24] written by Paul the Apostle.[25] Unlike some other New Testament books traditionally attributed to Paul, Pauline authorship of the letter to the Romans is generally accepted even by most contemporary critical scholars.[26] In the letter, Paul is writing to Christians in Rome,[27] people whom he has not yet met,[28] which may explain his "exceptionally long self-introduction."[29] As part of this self-introduction at the outset of

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[23] INTERNATIONAL CRITICAL COMMENTARY, ROMANS 1–8, at 30 (J.A. Emerton & C.E.B. Cranfield eds., 1975).

[24] *See* JAN BOTHA, SUBJECT TO WHOSE AUTHORITY? 78 (1994).

[25] *See Romans* 1:1–8 (King James).

[26] *See* ANCIENT CHRISTIAN COMMENTARY ON SCRIPTURE, VI ROMANS at *xvii* (Gerald Bray & Thomas C. Oden eds., 1998) [hereinafter ANCIENT CHRISTIAN COMMENTARY]; *see also* ALBERT BARNES, BARNES' NOTES ON THE NEW TESTAMENT 539 (Ingram Cobbin ed., 1st Am. reprtg. ed. 1962); JOSEPH A. FITZMYER, THE ANCHOR BIBLE: ROMANS 40 (1993); INTERNATIONAL CRITICAL COMMENTARY, *supra* note 23, at 2; JOHN T. NOONAN, JR., THE BELIEVER AND THE POWERS THAT ARE 8 (1987). While Pauline authorship of *Romans* is generally accepted, some question Pauline authorship of the first part of chapter 13, especially in the light of the tension between its command to submit to powers and the first century church's experience of persecution at the hands of those powers. *See* SAMUEL A. PAUL, THE UBUNTU GOD 59–63 (2009).

[27] *Romans* 1:7 (King James).

[28] *See Romans* 1:13 (King James).

[29] BOTHA, *supra* note 24, at 103.

the letter, Paul identifies his own apostolic authority.[30] Paul likely wrote this epistle in "the mid or the late fifties,"[31] before his final arrest in Jerusalem and eventual trial before Caesar in Rome.[32] Nero was in power at the time.[33]

What we now know as the thirteenth chapter of Paul's letter to the Romans falls within the main body of the letter.[34] The first eleven chapters of the letter (after the opening material in chapter one) are dedicated to theology.[35] Beginning with chapter twelve, Paul's letter begins a more practical *paraenetic*[36] section.[37] In the very first verse of this practical section, Paul begins by exhorting his readers, in light of God's great mercy to them (as spelled out in the first eleven chapters), to present their whole selves back to God's service as "a living sacrifice."[38] Paul goes on in this first practical chapter to spell out in some detail what it means to serve God as a living sacrifice.[39] For example, exerting his apostolic authority, Paul prohibits his readers from returning "evil for evil."[40] To the contrary, Paul commands them to prepare to behave before others in a winsome way.[41] Similarly, Paul commanded his readers to "live peaceably with all."[42] Then Paul returned to the theme of responding to evil, again prohibiting his readers from taking their own vengeance when wronged, commanding them instead to leave vengeance to God.[43] It is in this context that Paul, three verses later, launched into the now famous passage in *Romans* 13:1–7.

While *Romans* 13:1–7 fits quite well in the broader context of Paul's letter, it also is "a distinct rhetorical unit" in that "it displays a discernible

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30 *See Romans* 1:1 (King James); BOTHA, *supra* note 24, at 79.

31 FITZMYER, *supra* note 26, at 87; *see also* NOONAN, *supra* note 26, at 8.

32 *See* ANCIENT CHRISTIAN COMMENTARY, *supra* note 26, at *xvii;* BARNES, *supra* note 26, at 539–40.

33 NOONAN, *supra* note 26, at 8.

34 BOTHA, *supra* note 24, at 81.

35 *See* FITZMYER, *supra* note 26, at 96.

36 "Paraenesis" is moral exhortation. *See* BOTHA, *supra* note 24, at 86 n.10.

37 Paul D. Feinberg, *The Christian and Civil Authorities*, 10 MASTER'S SEMINARY J. 87, 89 (1999) ("Romans 13:1–7 is a part of a paraenesis."); *see* BARNES, *supra* note 26, at 639 (explaining that *Romans* 12 begins a practical section of the letter, in which Paul exhorts individuals to live holy lives); FITZMYER, *supra* note 26, at 637 ("*Romans* 12–15 forms a catechetical unit, a paraenetic development of the consequences of justification.").

38 *Romans* 12:1 (King James); BARNES, *supra* note 26, at 639–40.

39 *Romans* 12:6–10 (King James); BARNES, *supra* note 26, at 639–40.

40 *Romans* 12:17 (King James).

41 *Romans* 12:17 (King James); BARNES, *supra* note 26, at 647.

42 *Romans* 12:18 (King James); BARNES, *supra* note 26, at 647.

43 *Romans* 12:19 (King James).

beginning and end, connected by some demonstrative argumentation."[44] The passage does not mention the "state" as such,[45] but nevertheless frequently is characterized as a passage about politics or the state. For example, it has been called the chapter that treats "most fully . . . the nature and end of civil government [as] any one in the new-testament,"[46] "the most important [passage] ever written for the history of political thought,"[47] "the famous 'church-state' text,"[48] and "the longest passage in the New Testament about the civil state."[49] Noteworthy for its absence is any suggestion that the Christian community should have their own political ambitions. Quite to the contrary, "Paul does his utmost to combat all political inclinations among the Christians."[50]

Paul begins the passage by declaring to his readers a broad obligation to submit: "Let every soul be subject unto the higher powers"; the Greek word translated in the King James Bible as "be subject unto" is *hypotassomai*, "a hierarchical term."[51] It is important to note that the word is not synonymous with "obey." "The Greek language has good words to denote obedience, in the sense of completely bending one's will and one's actions to the desires of another. What Paul calls for, however, is sub*ord*ination."[52] The word chosen by Paul generally does not mean "obedience": "[F]orms of *hypotassomai* are found 21 times in the LXX, [the early Greek translation of the Hebrew Old Testament] and only once is the word used to connote the idea of obedience. Furthermore, it occurs thirty times in the New Testament, but the idea of obedience is not dominant."[53] The difference can be practically quite significant:

> The conscientious objector who refuses to do what his government asks him to do, but still remains under the sovereignty of that

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[44] BOTHA, *supra* note 24, at 186; *see also* Bammel, *supra* note 8, at 366.

[45] *See* FITZMYER, *supra* note 26, at 662.

[46] Isaac Backus, *An Appeal to the Public for Religious Liberty* (1773), *reprinted in* 1 POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA: 1730–1805, at 327, 336 (Ellis Sandoz ed., 2d ed. 1998).

[47] J.W. ALLEN, A HISTORY OF POLITICAL THOUGHT IN THE SIXTEENTH CENTURY 132 (Methuen & Co. Ltd. 1977) (1928).

[48] BOTHA, *supra* note 24, at 1.

[49] Nichols & McCarty, *When the State is Evil*, *supra* note 20, at 602; *see also* RANDALL A. TERRY, THE SWORD: THE BLESSINGS OF RIGHTEOUS GOVERNMENT AND THE OVERTHROW OF TYRANTS 12–13 (1995) (characterizing *Romans* 13 as "the most often referenced passage on civil government in America today").

[50] Bammel, *supra* note 8, at 374.

[51] PAUL, *supra* note 26, at 72.

[52] JOHN H. YODER, THE POLITICS OF JESUS 212 (1972) [hereinafter YODER, POLITICS OF JESUS]; *see also* PAUL, *supra* note 26, at 72.

[53] PAUL, *supra* note 26, at 72; *see also* Edward P. Antonio, *The Politics of Proselytization in Southern Africa*, 14 EMORY INT'L L. REV. 491, 495 (2000).

> government and accepts the penalties which it imposes, or the Christian who refuses to worship Caesar but still permits Caesar to put him to death, is being subordinate even though he is not obeying.[54]

Paul commands this submission to *exousiae*, translated in the King James Bible as "powers."[55] The term *exousiae* is "remarkably open" and "unmarked," i.e., the reader could interpret the term "in a wide variety of ways."[56] But the obligation to submit to *exousiae* is a broader concept than the idea of submission to government, which is merely one form of *exousiae*.[57] "Traditional commentators consistently note the sweep of Paul's admonitions"[58] to submit found in this passage.[59]

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[54] YODER, POLITICS OF JESUS, *supra* note 52, at 212.

[55] *Romans* 13:1 (King James) ("Let every soul be subject unto the higher powers."). Most modern English translations translate *exousia* as "authorities" instead of "powers." *See infra* notes 326–27 and accompanying text; *see also* NOONAN, *supra* note 26, at 8 ("Paul refers to the government as the '*exousia*,' 'the powers,' not 'the authorities' or 'the state,' as some translations put it.").

[56] *See* Lategan, *supra* note 11, at 158.

[57] *See* LYNN BUZZARD & PAULA CAMPBELL, HOLY DISOBEDIENCE: WHEN CHRISTIANS MUST RESIST THE STATE 156 (1984).

[58] *Id.*

[59] Some have gone so far as to suggest that the "*exousia*" to which Paul commands submission do not refer to civil rulers at all, but rather to church rulers. *See* PAUL, *supra* note 26, at 79. Perhaps the first to come up with this idea was the founding prophet of the Mormon church, Joseph Smith, who claimed direct inspiration from God to edit *Romans* 13 by inserting the words "in the church" into the clause "for there is no power but of God" between the words "power" and "God." *See Joseph Smith Translation*, LDS.ORG, https://www.lds.org/scriptures/gs/joseph-smith-translation-jst (last visited Nov. 13, 2014) (noting Joseph Smith's claimed inspiration). *Compare Joseph Smith Translation of the Bible*, OLIVELEAF, *available at* http://www.lafeuilledolivier.com/TraductionJosephSmith/JST.pdf (last visited Nov. 13, 2014) ("For there is no power *in the church* but of God . . . ." (emphasis added)), *with Romans* 13:1 (King James) ("For there is no power but of God . . . ."). Thus Joseph Smith changed "Paul's teaching regarding the Saints' submission to secular political power" to "submission to the authorities of the Church." A comparable approach was taken by another tightly-knit religious group in the early twentieth century, the Jehovah's Witnesses. *See* NOONAN, *supra* note 26, at 233. In 1916, Joseph Franklin Rutherford, a lawyer, became president of the "corporation that held title to all church property." *Id.* At this time, Jehovah's Witnesses were persecuted and imprisoned for promoting their separationist and pacifist views. *See id.* Until 1929, "the Witnesses had accepted the conventional view that Paul, in Romans 13:1, commanding obedience to the 'powers,' had meant the civil authorities." *Id.* at 234; *see also* M. JAMES PENTON, APOCALYPSE DELAYED: THE STORY OF JEHOVAH'S WITNESSES 139 (1985). But in 1929, Rutherford "took a new doctrinal stance as outlined in the issues of 1 and 15 June of *The Watch Tower* . . . ." PENTON, *supra* at 139. There he redefined the phrase "higher powers" in *Romans* 13:1 to mean Jehovah and Jesus. *See The Higher Powers: Part 1*, 50 WATCH TOWER 163, 163 (1929), *available at* http://www.youblisher.com/p/98413-Watchtower-year-1929/; *The Higher Powers: Part 2*, 50 WATCH TOWER 179, 179 (1929), *available at* http://www.youblisher.com/p/98413-Watchtower-year-1929/. "The governments of the world were therefore classified as having no basis in divine authority and were to be seen as demonic." PENTON, *supra* at 139.

Paul provides a theological rationale for his declared obligation to submit: "The powers that be are ordained of God." But what does this mean? And how can Paul's declaration that the powers are ordained by God be squared with human experience with evil powers? And the tension between reader experience and the text of *Romans* 13 is not limited to the clause "the powers that be are ordained of God."[60] The words of *Romans* 13 that most stretch the reader's credulity based upon bitter experience with at least some evil rulers are those of the third verse: "For rulers are not a terror to good works, but to the evil. Wilt thou then not be afraid of the power? [D]o that which is good, and thou shalt have praise of the same."[61] "Notwithstanding the apparent clarity of the text, many attempts have been made to soften, modify, or otherwise limit the scope of its requirements."[62]

One possible interpretation of what Paul meant when he wrote that "the powers that be are ordained of God" is that "God is sovereign, and this [sovereignty] seemingly extends to the placement of particular governing authorities over their subjects."[63] In this process, God sovereignly superintends so that the ruling of even evil rulers ends up redounding to good in some ultimate sense: "Paul means that consciously or unconsciously, willingly or unwillingly, in one way or another, the power will praise the good work and punish the evil."[64] Some variation on this idea that God uses even bad rulers as His "servants" for good has been a common historical response to the apparent difficulty with Paul's teaching in *Romans* 13.[65] The well-known and scholarly respected twentieth-century Christian pacifist theologian John Howard Yoder labeled this sort of interpretation of *Romans* 13—the idea that "whatever state now exists in any given time and place is the state which God desires to exist then and there"—as *positivistic*[66] interpretation.

But this *positivistic* view of Paul's teaching in *Romans* 13, perhaps the facially most obvious take on the text, is not the only Christian interpretation of what Paul meant by "the powers that be are ordained of God"; another common approach goes in the opposite direction. Some have tried to resolve the tension between Paul's teaching and practical experience by reading verse three as Paul's normative teaching

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60 Nichols & McCarty, *When the State is Evil*, *supra* note 20, at 602.

61 *Id.*; *Romans* 13:3 (King James).

62 BUZZARD & CAMPBELL, *supra* note 57, at 157.

63 Nichols & McCarty, *When the State is Evil*, *supra* note 20, at 602.

64 INTERNATIONAL CRITICAL COMMENTARY, *supra* note 23, at 665.

65 JOHN HOWARD YODER, THE CHRISTIAN WITNESS TO THE STATE 74–75 (1964) [hereinafter YODER, CHRISTIAN WITNESS].

66 *Id.* at 74; *see also* BUZZARD & CAMPBELL, *supra* note 57, at 143; YODER, POLITICS OF JESUS, *supra* note 52, at 5, 6.

concerning what rulers ought to do rather than as a description of what rulers in fact do,[67] although the context pushes against this reading.[68] Paul is addressing believers in general, not a group of rulers.[69] Moreover, his rhetorical question and his own answer show that Paul is trying to assure those who might be afraid of rulers, not trying to make rulers do right: "Wilt thou then not be afraid of the power? do that which is good, and thou shalt have praise of the same . . . ."[70]

Some, perhaps recognizing that *Romans* 13 is addressed to the ruled, not to rulers, treat it as setting out the conditions under which the believing subject is obligated by conscience to submit.[71] *Romans* 13 serves as a sort of yardstick against which the legitimacy of rulers can be measured.[72] Yoder identified this *legitimistic* interpretation of *Romans* 13—the passage includes "certain basic outlines of the prescriptions which God has divinely established for the state to fulfill."[73] The "state" that fails to fulfill those God-ordained functions is no state, and no submission is owed to that state.[74]

A whirlwind review of historical interpretations of *Romans* 13 will reveal instances of most of these approaches.

## II. FLEXIBLE HISTORICAL INTERPRETATIONS OF *ROMANS* 13

Throughout the history of the Christian West, *Romans* 13 has been interpreted in a variety of ways, and a survey of that interpretive history makes one thing abundantly clear—any particular interpretation of *Romans* 13 is impacted heavily by the interpreter's historical circumstances.

### *A. The Context of Paul's Writing: "the Powers That Be" Persecute the Church Pre-312 A.D.*

"Romans 13 was written about pagan government."[75] The government shortly after the writing of *Romans* 13 was not merely pagan, it was actively hostile to Christianity.[76] Therefore, the first historical

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67 Smolin & Lim, *supra* note 17, at 216.

68 *See infra* Part II.A.

69 *See infra* notes 88–94 and accompanying text.

70 *Romans* 13:3 (King James).

71 YODER, CHRISTIAN WITNESS, *supra* note 65, at 75.

72 *See id.* at 76–77.

73 YODER, CHRISTIAN WITNESS, *supra* note 65, at 74. Yoder also sometimes called the *legitimistic* approach the *normative* approach. *See* YODER, POLITICS OF JESUS, *supra* note 52, at 201.

74 YODER, POLITICS OF JESUS, *supra* note 52, at 201.

75 *Id.* at 195.

76 *See* BUZZARD & CAMPBELL, *supra* note 57, at 119–20.

circumstance for the interpretation of *Romans* 13 by the church was an atmosphere of state hostility toward Christianity. "[F]rom its inception,"[77] Christianity generated conflict "with the Roman government and Roman culture."[78] From the time that Paul wrote his epistle to the Romans until the conversion of Constantine to Christianity in 312 (and subsequent legalization of Christianity in 313), Christians were, for the most part, officially persecuted by the Roman Empire.[79] "Martyrdom set the tone for the church for decades as Christianity spread in spite of vigorous official attempts to stamp [it] out . . . ."[80] While Jesus himself had been apolitical,[81] he was, nevertheless, put to death by the governing political and religious authorities of the time and place.[82] The apostle Paul, who also eventually became a martyr, "is in fact writing under a dictatorship with largely corrupt and capricious representatives, not to speak of the petty despotism of departments and officials."[83] In this historical context, Paul taught the fledgling Christian church to submit to rulers. This relationship of antipathy by the state over the church made for an awkward context for Paul's teaching of submission to human rulers.[84] How can Paul characterize, as he did, evil rulers as God's "ministers," and why should Christians submit to such rulers? While these questions originated in the context of first century hostility of the state against the church, they have persisted down through the ages.[85]

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77 MORRISON, *supra* note 20, at 11.

78 BUZZARD & CAMPBELL, *supra* note 57, at 119.

79 *See* David M. Smolin, *The City of God Meets Anabaptist Monasticism: Reflections on the Twenty-Fifth Anniversary of* Wisconsin v. Yoder, 25 CAP. U. L. REV. 841, 842 (1996) [hereinafter Smolin, *City of God*]; NOONAN, *supra* note 26, at 11; BUZZARD & CAMPBELL, *supra* note 57, at 119–20.

80 DOUG BANDOW, BEYOND GOOD INTENTIONS: A BIBLICAL VIEW OF POLITICS 123 (1988); *see* CHARLES VILLA-VICENCIO, BETWEEN CHRIST AND CAESAR 3 (1986).

81 David Smolin summed up well Jesus' approach to politics: "It would be difficult to devise . . . a more decided and determined apoliticism." David M. Smolin, *Church, State, and International Human Rights: A Theological Appraisal*, 73 NOTRE DAME L. REV. 1515, 1519 (1998). "Having rejected the role of military and political leader of a nationalist Israelite restoration, Jesus in effect leaves no political instructions, mission, or goals behind him." *Id.* at 1526–27.

82 *See Mark* 15:1–37 (King James).

83 ERNST KÄSEMANN, COMMENTARY ON ROMANS 356 (Geoffrey W. Bromiley ed. & trans., 1980).

84 *See id.* at 355–56.

85 *See* Smolin & Lim, *supra* note 17, at 219; *see also* MORRISON, *supra* note 20, at 11; ORIGEN: COMMENTARY ON THE EPISTLE TO THE ROMANS, BOOKS 6–10, at 223 (Thomas P Sheck trans., The Catholic Univ. of Am. Press 2002).

It is worth noting here that Paul's teaching concerning submission to hostile powers is not entirely unique to the ruler-ruled relationship.[86] He taught Christians to submit to hostile powers generally, but the ruler-ruled relationship does seem to stand apart from the others that Paul addressed.[87] Paul's writings address several other institutions of human authority in the first-century Greco-Roman world, husband and wife,[88] master and servant,[89] parent and child.[90] In each of these instances, Paul addresses both sides of the relationship. Paul addressed his teaching to Christian masters, slaves, husbands, wives, parents, and children.[91] What is unique about Paul's instruction in *Romans* 13 regarding the relationship between ruler and ruled is that, unlike Paul's other teachings concerning relationships of power, in which he addresses both sides of the power relationship, the position of ruler fulfills no rhetorical role in *Romans* 13:1–7.[92] While first century rulers might have had an interest in Paul's writing, the ruler could not respond to the purpose of Paul's writing.[93] Paul addresses only the ruled, not the ruler.[94] That Paul would not address his teaching to first century rulers is not surprising—the relationship between church and state at that time was very much an us versus them relationship.[95] It probably never occurred to the earliest Christians "that Caesar could become a Christian."[96]

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[86] *See Ephesians* 6:5–9 (King James) (commanding servants to be obedient to their masters); Bernardo Cho, *Subverting Slavery: Philemon, Onesimus, and Paul's Gospel of Reconciliation*, 86 EVANGELICAL Q. 99, 102, 104 (2014) (noting the generally hostile conditions of slavery in the first century).

[87] *See infra* notes 88–92 and accompanying text.

[88] *Ephesians* 5:21–33 (King James); *see also* I *Corinthians* 7:3–4 (King James).

[89] *Ephesians* 6:5–9 (King James).

[90] *Ephesians* 6:1–4 (King James).

[91] *See supra* notes 88–90 and accompanying text.

[92] *Compare supra* notes 88–90 and accompanying text (Paul addresses both husband and wife; master and servant; as well as parent and child), *with* BOTHA, *supra* note 24, at 163 (calling the authorities in *Romans* 13:1–7 "[i]nterested parties" without a rhetorical role).

[93] *See* BOTHA, *supra* note 24, at 163 (stating Paul's purpose is to set up an operational base for future missionary activities and arguing in favor of submission to the state since constant conflict with the authorities would hamper missionary activity).

[94] *See id.*

[95] *See id.*

[96] *See* VILLA-VICENCIO, *supra* note 80, at 4. In *Defensive Arms Vindicated,* an essay published anonymously in 1783 likely in New York, the writer opines that Paul did not write to rulers because, as non-Christians, they would not have understood their duties. *See Defensive Arms Vindicated* (1783), *reprinted in* 1 POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730–1805, at 711, 722–23 (Ellis Sandoz ed., 2d ed. 1998). The author opined further that if there had been a tyrannical Christian ruler at the time, Paul would not have enjoined submission to such a ruler. *Id.* at 723.

This condition of state hostility toward the church persisted, more or less, until the fourth century.[97] An illustration of the church's awareness of this relationship of hostility comes from Irenaeus, bishop of Lyons in the late second century, who raised the subject of political rule under the heading of "Satanology."[98] To say the least, the state was not seen as friendly to the church, and it was not.[99] Not surprisingly, then, early interpretations of *Romans* 13 tended to focus on how to deal with hostile "powers that be" with no thought given to influencing such powers:

> Though they believed they were obligated to honor the governing authorities, the early Christians did not believe in participating in political affairs. And their attitude naturally flowed from their circumstances—they expected no change in their status as a persecuted minority and looked for their rescue to come from Christ's early return, not a conversion of the emperor.[100]

Nevertheless, some early church leaders accepted the idea that even though rulers tended to be hostile to the church, those particular hostile rulers had been personally selected by God himself. In his major work railing against gnostic dualism, Irenaeus quoted *Romans* 13 to show God's direct control over the selection of human rulers.[101] Irenaeus disputed the idea, apparently expounded by some at the time, that when Paul referred to God's "ordaining" the "powers that be," Paul was speaking of God's control over "angelical powers" or of "invisible rulers."[102] Irenaeus resolved the tension between the character of the rulers that Christians knew and the role for rulers that Paul proclaimed (ministers of God) in another way. According to Irenaeus, God imposed the fear of the sword wielded by these human rulers to bring to mankind "some degree of justice" and "mutual forbearance through dread of the sword."[103] In this limited way, human rulers are "God's ministers."[104] But Irenaeus taught that all human rulers, not only the good ones, perform the role of God's minister.[105] Accordingly, God appoints kings

> suited to those who are at the time placed under their government. Some of these rulers are given for the correction and the benefit of their

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97 *See infra* notes 127–31 and accompanying text.

98 FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT 15 (Oliver O'Donovan & Joan Lockwood O'Donovan eds., 1999) [hereinafter IRENAEUS TO GROTIUS].

99 *See* Smolin & Lim, *supra* note 17, at 219.

100 BANDOW, *supra* note 80, at 123.

101 Irenaeus of Lyons, from Against Heresies, Book 5, *in* IRENAEUS TO GROTIUS, *supra* note 98, at 16.

102 *Id.*

103 *Id.* at 17.

104 *Id.*

105 *See id.*

> subjects, and for the preservation of justice; but others for the purposes of fear and punishment and rebuke; others, as the subjects deserve it, are for mockery, insolence and pride; while the just judgment of God . . . passes equally upon all.[106]

Thus, all people receive from God rulers suited to their needs. Good people may get good rulers who make them better. Bad people may receive bad rulers as a punishment. But all rulers, good and bad, are God's ministers for good.

Perhaps a different *Romans* 13 interpretation is perceptible in the writings of Origen (c. 185–c. 254) a few decades after Irenaeus articulated his view.[107] Origen was one of the third century's intellectual leaders of the Eastern Church[108] who helped launch what eventually became the common practice of writing systematic commentaries on New Testament texts.[109] As part of his voluminous written output, Origen penned in Greek what is considered "[t]he earliest extant commentary" on St. Paul's epistle to the Romans.[110] Unfortunately, it is hard to be confident that we have Origen's view because it has come down to us through a late fourth century ten-volume Latin translation and abridgement by the Roman theologian, Tyrannius Rufinus (c. 345–c. 410).[111]

Origen's extant commentary on *Romans* 13 begins in Book 9, chapter 25, where Origen places *Romans* 13 in context: "[T]he Apostle is laying down precepts for believers and he wants us to preserve rest and peace in this present life, so far as it depends on us."[112] Origen then addresses in more detail a question that had been discussed briefly by Irenaeus: "What then? Is even that authority that persecutes God's servants, attacks the

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[106] *Id.*

[107] *See* IRENAEUS TO GROTIUS, *supra* note 98, at 15, 39.

[108] *Id.* at 39.

[109] *See* PAUL JOHNSON, A HISTORY OF CHRISTIANITY 58–59 (1976).

[110] INTERNATIONAL CRITICAL COMMENTARY, *supra* note 23, at 32; ANCIENT CHRISTIAN COMMENTARY, *supra* note 26, at *xxii.* This characterization of Origen's work as the earliest extant commentary on *Romans* 13:1–7 excludes St. Peter's first epistle, which appears to exegete *Romans* 13. *Compare Romans* 13:1–7 (King James) ("Let every soul be subject unto the higher powers."), *with 1 Peter* 2:13–19 (King James) ("Submit yourselves to every ordinance of man . . . ."). This is probably because *1 Peter*, like *Romans*, has long been considered part of the canon of Scripture, so that Peter's commentary on Paul is thought of as Scripture's commentary on itself. It is possible that *1 Peter* is the first commentary on *Romans* 13:1–7.

[111] For our purposes this may be significant because it means that it will be impossible to be certain whether any particular gloss is that of the pre-Constantinian Origen or the post-Constantinian Rufinus. As it turns out, surviving Greek fragments of Origen's text have tended to vindicate the later Latin translation by Rufinus. *See* INTERNATIONAL CRITICAL COMMENTARY, *supra* note 23, at 32.

[112] ORIGEN, *supra* note 85, at 222.

faith, and subverts religion, from God?"[113] Origen responds to this rhetorical question by drawing a perhaps imperfect analogy between rulers as given as a gift from God and sight as a gift from God.[114] Origen's text reasons that even though vision is a gift from God, people have the power to use the gift of sight for good or for evil.[115] So God has given human rulers for good purposes even though they may be put to a bad use.[116] Nevertheless, according to Origen, worldly judges are God's ministers because they punish many of "the crimes that God wants to be punished."[117] This far, Origen is consonant with Irenaeus.

But perhaps a shift is perceptible in response to a related tension that Origen notes in *Romans* 13. Paul had written that if the reader will "do that which is good," the reader will receive praise.[118] But, Origen observes, "there is no custom for [secular authorities] to praise highly those who do not sin."[119] Thus, Origen's experience flies in the face of what Paul seems to be saying. Origen's solution to the tension that he perceives between his interpretation of Paul's text and Origen's own personal experience is to spiritualize Paul's meaning—perhaps Paul means that those who obey human law will receive praise from God "on the day of judgment."[120] In summary, Christian teaching for the first few centuries of church history fairly consistently saw Paul's teaching in *Romans* 13 as a Christian obligation that applied to all rulers, good and bad. They tended to resolve the seeming tension between this teaching and their experience by appealing, as Paul had, to God's sovereignty, which extends to the ability to turn the bad efforts of evil rulers to good for God's people.

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[113] *Id.* at 223.

[114] *Id.*

[115] *Id.*

[116] I call the analogy imperfect because Origen is distinguishing between good and bad rulers, but he does not distinguish between good and bad eyesight. If he had explained how even bad eyesight is a gift from God (as Irenaeus explained with regard to bad rulers), then the analogy would have better fit his point. As it is, Origen's reader is left to wonder how even a bad ruler might be a gift from God for good from the perspective of those oppressed by the ruler. Irenaeus explained this, but Origen does not. To the contrary, Origen says that "Paul troubles" him by saying that "the secular authority and the worldly judgment" are the "minister[s] of God." *Id.* at 224.

[117] *Id.* at 225. More than a century later, Chrysostom expressed a similar idea when he wrote concerning the ruler from God's perspective: "I give you advice about responsible behavior, and he [the ruler] supports that advice through laws. I urge that it is wrong to cheat and steal, and he holds assizes to deal with just those activities." John Chrysostom, The Twenty-Fourth Homily on Romans, *in* IRENAEUS TO GROTIUS, *supra* note 98, at 94.

[118] *Romans* 13:3 (King James).

[119] ORIGEN, *supra* note 85, at 225.

[120] *Id.*

### *B. The "Conversion" of Constantine: The Church Becomes "the Powers That Be"*

"The year 313 has rightly been taken to mark a turning-point in European history."[121] The accession and "conversion"[122] of Constantine drastically transformed the relationship between the Christian Church and the Roman state.[123] As has already been noted, "[d]uring the first three centuries the tendency of events had been, on the whole, to accentuate the elements of opposition between the Church and the world."[124] Not surprisingly, then, Paul's epistle to the Romans in particular (and the Old and New Testaments of the Christian Bible in general) was and were addressed to the ruled, not to rulers: "most of scripture is written for people who are not in charge, who are fleeing, who are standing before magistrates, who are slaves in Egypt or about to be hauled into Babylon."[125]

Fewer than 100 years before the "conversion" of Constantine, "Tertullian had pronounced the notion of a Christian Caesar to be a contradiction in terms."[126] So it is difficult to imagine the Church's sense of reversal of fortune when what had theretofore seemed an inherent contradiction appeared, and the Christian Church suddenly faced "a new phenomenon: an empire whose head was actively pro-Christian."[127] "For the church the transformation was miraculous: persecution stopped and patronage began almost overnight."[128] "Imperial power was suddenly seen to be on God's side, whereas before it was seen to be demonic—and therefore to be despised and rejected by Christians."[129] "[T]he end of imperial hostility toward the church caused believers to abandon the Tertullian policy of noncooperation with the state."[130] After Constantine's conversion, the church's political power grew.[131] No longer was the state

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[121] CHARLES NORRIS COCHRANE, CHRISTIANITY AND CLASSICAL CULTURE 195 (2003).

[122] Although there is plenty of academic debate on the nature of Constantine's "conversion," it has been argued with some persuasive force that it is more accurate "to speak of [Constantine's] development in terms of the 'exchange of divine patronage'" than in terms of his "conversion." ALISTAIR KEE, CONSTANTINE VERSUS CHRIST: THE TRIUMPH OF IDEOLOGY 13 (1982).

[123] *See infra* notes 126–32 and accompanying text.

[124] COCHRANE, *supra* note 121, at 195.

[125] BUZZARD & CAMPBELL, *supra* note 57, at 153–54.

[126] COCHRANE, *supra* note 121, at 234.

[127] NOONAN, *supra* note 26, at 11.

[128] *See* KEE, *supra* note 122, at 39.

[129] VILLA-VICENCIO, *supra* note 80, at 6.

[130] BANDOW, *supra* note 80, at 124.

[131] See David M. Smolin, *A House Divided? Anabaptist and Lutheran Perspectives on the Sword*, 47 J. LEGAL EDUC. 28, 29 (1997) [hereinafter Smolin, *A House Divided*].

automatically seen by Christians as a likely source of persecution; quite to the contrary, it now was possible to imagine a ruler self-consciously seeking to use his position of civil power to serve the Christian God. "The distinction between church and state increasingly blurred as the Christian clergy received official support and Constantine ruled on theological disputes . . . ."[132]

While this new perspective was initiated under Constantine, it reached new heights in the late 4th century under Theodosius, who "proclaimed Christianity the official religion of the Empire."[133] The state and the emperor now were seen by Christians as "sacred."[134] The emperor's acts also were seen as sacred: "Law observance was . . . prescribed as a divine admonition, ignorance or neglect of which was treated as sacrilege."[135] This drastic reversal of political fortune created a difficulty for Christians—"trying to reconcile this [political] power with the earthly life and death of Jesus and the corollary experience of the early church."[136] The context had shifted radically. What relevance, if any, did the old teachings of Jesus and the apostles, including Paul, have in this new state of affairs?

This shift in perspective presented a new possibility for the interpretation of *Romans* 13. Now, for the first time, *Romans* 13 might be applied to rulers as well as to ruled.[137] From the perspective of the ruler, this new possibility held both offensive and defensive potential.[138] On the one hand, *Romans* 13 now could be (and frequently would be throughout subsequent history) quoted by the political authorities themselves when their own actions were questioned.[139] On the other hand, *Romans* 13 might also be wielded by the ruled as a measuring stick for the actions of Christian rulers.[140] Both of these approaches to the passage would become commonplace with little or no regard to whether the original context of Paul's teaching ought to impact its interpretation now that conditions on the ground had changed drastically.

An early written example of this new perspective toward Paul's teaching might be discernible in the writings of Ambrose of Milan, one of

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[132] BANDOW, *supra* note 80, at 124.

[133] Smolin, *City of God*, *supra* note 79, at 849.

[134] COCHRANE, *supra* note 121, at 354.

[135] *Id.*

[136] Smolin, *City of God*, *supra* note 79, at 842.

[137] *See infra* notes 141–42 and accompanying text.

[138] *See infra* notes 333–35 and accompanying text.

[139] *See infra* note 333–34 and accompanying text.

[140] *See infra* notes 335–38 and accompanying text.

the "Eight Great Doctors of the Undivided Church."[141] While St. Paul himself notably directed no instruction to the ruler, Ambrose did. In his letter to Studius, apparently a Christian layman and judge, Ambrose cited *Romans* 13:4 for the proposition that the civil magistrate has "the apostle's authority."[142] Such instruction to a magistrate would have been unimaginable at an earlier time.

### *C. The Middle Ages Begin: The Church over "the Powers That Be"*

The substantial foundation for church-state relations throughout the middle ages was laid in the writings of the Church Fathers after the Constantinian revolution. It did not take long for the church to forget the state's originally antagonistic relationship toward the first followers of Jesus. The aforementioned commentary by Origen[143] is the only extant thorough, pre-Constantinian commentary on the entire epistle to the Romans, and even that has come down to us through a post-Constantinian translation and abridgement. The next complete commentary on *Romans* was written by an unknown scholar later dubbed "Ambrosiaster," apparently a contemporary of Ambrose.[144] Ambrosiaster, whose "knowledge of Greek was rudimentary"[145] wrote in Latin,[146] and his commentary is "[t]he earliest Latin commentary on Romans which has come down to us."[147] The commentary of Ambrosiaster evidences no familiarity with Origen's earlier commentary.[148]

In this first post-Constantinian commentary on *Romans*, the impact of the Church's changed context can already been seen in the re-

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[141] The pope has conferred this title on Ambrose, Augustine, Jerome, and Gregory I in the West and on Chrysostom, Basil the Great, Gregory of Nazianzus, and Athanasius of Alexandria in the East. *See* Louis W. Hensler III, *What's* Sic Utere *for the Goose: The Public Nature of the Right to Use and Enjoy Property Suggests a Utilitarian Approach to Nuisance Cases*, 37 N. KY. L. REV. 31, 36 n.21 (2010).

[142] Ambrose of Milan, Letter 50, *in* IRENAEUS TO GROTIUS, *supra* note 98, at 83.

[143] *See supra* notes 108–20 and accompanying text.

[144] Erasmus first discovered that the commentary was not written by Ambrose and invented the name "Ambrosiaster," which has stuck to the commentary ever since. *See* ANCIENT CHRISTIAN COMMENTARY, *supra* note 26, at 380; INTERNATIONAL CRITICAL COMMENTARY, *supra* note 23, at 35 n.1. Since it was not discovered until almost a millennium after the fact that Ambrosiaster was not Ambrose, all that we know for certain about the identity of Ambrosiaster is that he was "a well-educated Roman writing during the pontificate of Pope Damascus I (366–84)." Gerald Bray, *Ambrosiaster, reprinted in* READING ROMANS THROUGH THE CENTURIES 21 (Jeffrey P. Greenman & Timothy Larsen eds., 2005).

[145] ANCIENT CHRISTIAN TEXTS: COMMENTARIES ON ROMANS AND 1–2 CORINTHIANS, AMBROSIASTER, at *xvi* (Gerald L. Bray & Thomas C. Oden eds., Gerald L. Bray trans., Downers Grove: InterVarsity Press, 2009) [hereinafter ANCIENT CHRISTIAN TEXTS].

[146] *See* ANCIENT CHRISTIAN COMMENTARY, *supra* note 26, at *xxiii*.

[147] INTERNATIONAL CRITICAL COMMENTARY, *supra* note 23, at 34.

[148] *See* ANCIENT CHRISTIAN TEXTS, *supra* note 145, at *xxi*.

interpretation of *Romans* 13. Ambrosiaster saw Paul's injunction to obedience to human law as a sort of stepping stone toward righteousness: "The earthly law is a kind of tutor, who helps little children along so that they can tackle a stronger degree of righteousness."[149] This view would have been unthinkable in the context of Church/state hostility in which Paul wrote.[150] Ambrosiaster further read Paul as teaching that "the ministers of the earthly law have God's permission to act, so that no one should despise it as a merely human construction."[151] While this idea that earthly rulers have God's "permission" might be within the boundaries of pre-Constantinian thought, it is a step removed from the previously dominant idea that a sovereign God uses even the bad deeds of evil rulers to accomplish His good purposes.[152] But Ambrosiaster went even further: "In effect, Paul sees the divine law as being delegated to human authorities."[153] Ambrosiaster's significant shift from "God sovereignly uses even bad rulers to do good" to "God delegates the divine law to human authorities" was part of a larger work that became quite influential. "[B]y the end of the fourth century Ambrosiaster's commentary had become a standard work of Latin biblical study . . . ."[154]

John Chrysostom (c. 347–407), another contemporary of Ambrose but from the East[155], prepared thirty-two Greek sermons "that compose a verse-by-verse exposition of Romans."[156] *Romans* 13 is the focus of Chrysostom's *Twenty-Fourth Homily on Romans*.[157] Chrysostom equated the submission that Paul required of subjects to their rulers with the subjection that Paul's other epistles required of household servants to masters.[158] Chrysostom saw the obligation of true submission toward rulers as going beyond mere obedience.[159] Chrysostom continued to struggle with the question that had plagued the church in the pre-Constantinian era—how can an evil ruler be called "God's minister"?[160]

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149 ANCIENT CHRISTIAN COMMENTARY, *supra* note 26, at 313.

150 *See supra* notes 75–85 and accompanying text.

151 ANCIENT CHRISTIAN COMMENTARY, *supra* note 26, at 313.

152 *Compare id.* (asserting ministers of earthly law act with God's permission), *with* ORIGEN, *supra* note 85, at 225 (asserting God wills the punishment of crime through worldly judges).

153 ANCIENT CHRISTIAN COMMENTARY, *supra* note 26, at 313.

154 *See* ANCIENT CHRISTIAN TEXTS, *supra* note 145, at *xvi.*

155 *See* THE COLUMBIA ENCYCLOPEDIA, *John Chrysostom, Saint*, 1419 (Barbara A. Chernow & George A. Vallasi eds., 5th ed. 1993).

156 ANCIENT CHRISTIAN COMMENTARY, *supra* note 26, at *xxiv.*

157 Chrysostom, *supra* note 117, at 92.

158 *See* ANCIENT CHRISTIAN COMMENTARY, *supra* note 26, at 313.

159 *See id.*

160 Chrysostom, *supra* note 117, at 92.

Chrysostom's solution to this difficulty has become one of the most widely-adopted by Christians seeking to avoid the apparent sweep of Paul's teaching in *Romans* 13.[161] Chrysostom did not agree with Irenaeus that God appoints all rulers—rather, Chrysostom taught that Paul was talking about God's ordaining the institution of government, not appointing particular rulers.[162] Thus, according to Chrysostom, while the institution of government is "ordained" by God, individual rulers may not be so ordained.[163] Under this interpretation, Paul is commanding merely respect for the office of the ruler, not necessarily submission to the particular ruler's commands.

Chrysostom buttressed his interpretation by pointing out the openness of the terminology used by Paul in *Romans* 13—the text says "'there is no authority except from God,'" not "'there is no ruler except from God.'"[164] Chrysostom thought the word used by Paul *exousia* was more likely to refer to the institution of government than to individual rulers.[165] But Chrysostom's interpretation seems doubtful because he fails to take account of Paul's next sentence. As Chrysostom notes, Paul writes that "there is no authority [*exousia* (singular)] except from God."[166] Chrysostom fails to account for Paul's next clause: "the powers [*exousiai* (plural)] that be are ordained of God."[167] Even if the clause quoted by Chrysostom could be interpreted to apply to the concept of government generally, and not to individual rulers, that interpretation is difficult to maintain through the next phrase, which speaks of the powers using the plural, thus suggesting that Paul has multiple individual powers in mind, and not merely one concept of institutional power.

Chrysostom's interpretation may have been foreshadowed in Origen's idea that evil human rulers are God's good gift put to a bad use.[168] Origen's idea moves toward abstracting from particular rulers, who may be evil, to the general concept of rulers, which is good.[169] And just as Origen used the analogy of eyesight as a gift, even though the eyesight might sometimes be bad, Chrysostom uses an analogy to illustrate his reasoning.[170] God instituted marriage, just as He instituted government.[171] But that does

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[161] *See id.* at 90.

[162] *See* ANCIENT CHRISTIAN COMMENTARY, *supra* note 26, at 313.

[163] Chrysostom, *supra* note 117, at 92, 94.

[164] *Id.* at 92.

[165] *Id.*

[166] *Id.*

[167] *Romans* 13:1 (King James).

[168] *See supra* notes 113–17 and accompanying text.

[169] *See* ORIGEN, *supra* note 85, at 223.

[170] *See id.*; Chrysostom, *supra* note 117, at 92.

[171] Chrysostom, *supra* note 117, at 92–93.

not mean that God personally puts each married couple together: "For we see many badly mismatched couples joined in lawful matrimony, and we would never attribute this state of things to God."[172] Chrysostom capped the analogy by noting that Jesus himself had taught that God made males and females so that they could be joined in a "'one flesh'" relationship.[173] Consistent with Irenaeus' earlier thought, Chrysostom does explicitly note that the ruler can be God's unwitting servant: "[G]overnment fulfills God's law. Without being conscious of doing so, perhaps, but what of that?"[174] If a particular government can fulfill God's law without being conscious of doing so, it is not clear why Chrysostom did not accept Irenaeus' idea that God appoints all rulers, good and bad, to (perhaps unwittingly) accomplish His good purposes?

Saint Augustine (354–430), elected Bishop of Hippo in Africa in 395, quickly became the intellectual leader of the western church.[175] By Augustine's time, the original gap between the Church and the political "powers that be," which resulted in Paul's addressing *Romans* 13 exclusively to subjects and not to government, was gone: "government was deeply involved with religion" and "Christians were deeply involved with the government."[176] Augustine's *Propositions from the Epistle to the Romans* "is basically a reworked transcript of answers given in discussion with fellow clergymen who were having difficulty understanding Paul."[177] These propositions probably were written in the mid-390s, when

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[172] *Id.* at 93.

[173] *Id.* (quoting *Matthew* 19:4f). Chrysostom's analogy may not fit very well with the teaching of Jesus recorded in the 19th chapter of the St. Matthew's gospel, the biblical passage that Chrysostom cites. There Jesus was responding to a question from Jewish leaders concerning a dispute over acceptable grounds for divorce. *See Matthew* 19:6–9 (King James). The law of Moses provides that a man who divorces his wife "because he hath found some uncleanness in her" must "write her a bill of divorcement." *Deuteronomy* 24:1–4 (King James). The Mishnah, a book of legal rules compiled by Jewish authorities in second-century Palestine, records divergent views over what would be allowable grounds for divorce under this standard of "because he hath found some uncleanness in her."*Gittin* 9:10; *see also* JUDITH ROMNEY WEGNER, CHATTEL OR PERSON? THE STATUS OF WOMEN IN THE MISHNAH 46 (1988). Jesus' answer, according to the gospel accounts, was that only fornication was an appropriate ground of divorce. Jesus' stated reason for this answer was that a married couple "are no more twain, but one flesh. What therefore God hath joined together, let not man put asunder." *Matthew* 19:6 (King James). So, if God ordained the institution of government, just as He ordained the institution of marriage, as Chrysostom argued, and if Jesus is right that a man may not freely divorce his wife, because God has joined the man and woman together, Chrysostom's analogy would logically suggest that God has put each ruler and each subject together in a relationship to which the subjects must submit.

[174] Chrysostom, *supra* note 117, at 94.

[175] *See* NOONAN, *supra* note 26, at 12; INTERNATIONAL CRITICAL COMMENTARY, *supra* note 23, at 35.

[176] *See* NOONAN, *supra* note 26, at 12.

[177] *See* PAULA FREDRIKSEN LANDES, AUGUSTINE ON ROMANS, at *ix* (1982).

Augustine's career was not yet fully mature.[178] There Augustine noted the same tension in Paul's teaching that that had been noted by Christian writers before him.[179] Augustine observed that Paul's teaching that the Christian's doing good would lead to praise "can provoke some people, because they know that Christians have often suffered persecution at the hands of these authorities."[180] But Augustine felt no need to explain away the near universal experience of authorities doing evil, for "Augustine saw the state as a necessary evil."[181] Augustine did seek to dispel the perceived provocation of those who know that Christians had been persecuted by authorities by pointing out that Paul never promised that the human authority would praise the one who does good.[182] Rather, Paul commanded, "do what is good and you will have praise of him."[183] Augustine imagined that such praise may be obtained "either when you win it by your allegiance to God, or when you earn the crown of martyrdom by persecution."[184] Thus, the Christian who does good obtains praise, not from the ruler, but from God.[185] This way of resolving the apparent tension between Paul's teaching and human experience resembles that in Origen's earlier commentary on *Romans*.[186] In the same way, Augustine explains how an evil ruler can, consistent with *Romans* 13:4, be a servant for the Christian's good.[187]

But despite his connections with earlier strands of Christian thought, Augustine's ministry was firmly planted in post-Constantinian soil.[188] The difference in perspective wrought by the conversion of Constantine is perhaps seen most clearly in Augustine's letter to Boniface, governor of

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[178] *See* ANCIENT CHRISTIAN COMMENTARY, *supra* note 26, at *xxv*; INTERNATIONAL CRITICAL COMMENTARY, *supra* note 23, at 35.

[179] *See* ANCIENT CHRISTIAN COMMENTARY, *supra* note 26, at *xxv*.

[180] Augustine, *Propositions from the Epistles to the Romans, reprinted in* AUGUSTINE ON ROMANS, *supra* note 177, at 3, 43 [hereinafter Augustine, *Propositions*].

[181] BUZZARD & CAMPBELL, *supra* note 57, at 123. Similarly, Ernst Käsemann suggests that Paul hopes at most for an orderly alternative to anarchy, not justice, from the powers that be. *See* KÄSEMANN, *supra* note 83, at 356.

[182] *See* Augustine, *Propositions*, *supra* note 180, at 43.

[183] *Id.*

[184] *Id.*

[185] *See* ANCIENT CHRISTIAN COMMENTARY, *supra* note 26, at 315.

[186] *See supra* note 116 and accompanying text.

[187] *See* Augustine, *Propositions*, *supra* note 180, at 43; *see also* ANCIENT CHRISTIAN COMMENTARY, *supra* note 26, at 315. David Smolin has insightfully noted that because Augustine was converted to Christianity through the study of pagan philosophy, he was in an especially good position to understand "that God could bring good . . . out of that which fails to accord proper worship to God. That which is evil, from an absolute perspective, nonetheless under God's providential care is made to serve the good." *See* Smolin, *City of God*, *supra* note 79, at 850.

[188] *See* NOONAN, *supra* note 26, at 19.

Africa. The letter, titled *The Correction of the Donatists,* embraces the use of force to drive the "heretical" Donatists back to what had become the orthodox Church.[189] The Donatists whom Augustine was persecuting apparently complained that the Christian authorities who were persecuting them should follow the example of the Apostles, who "did not seek [laws against impieties] from the kings of the earth."[190] Augustine's response was direct: "Then there was no emperor who had believed in Christ, no emperor who would serve Him by passing laws in favor of religion and against impiety . . . ."[191] Of course, earlier emperors had passed laws in favor of religion and against impiety, but Christians, including Jesus and Paul themselves, had been at the receiving, not at the giving, end of that earlier persecution.[192] Augustine defended physical persecution by citing the positive examples of the "[m]any" cases of "bad slaves" who were "called back to the Lord by the lash of temporal scourges."[193] By "embracing in principle the use of coercion against schismatics and heretics, [Augustine] lays a general foundation for religious persecution,"[194] making him, in essence, "the first theorist of the Inquisition."[195]

Pelagius (c. 354–c. 420), "the first known British commentator on Romans,"[196] is best known as a heretic, and we have his commentary on *Romans* largely because it was thought for centuries to be the work of Jerome.[197] Pelagius opined that secular rulers receive their authority from God even though not all such rulers will be just.[198] Like Augustine and Origen, Pelagius acknowledged that authorities might unjustly kill those who do good, but the good nevertheless "have no reason to fear" because the martyr will "come into glory."[199]

Theodoret was "bishop of Cyrus from 423 for over thirty-five years,"[200] and his Pauline Commentary has been dated to the 440s.[201] In his

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189 *Id.*

190 Augustine of Hippo, *The Correction of the Donatists (Letter 185), reprinted in* NOONAN, *supra* note 26, at 19 [hereinafter Augustine, *Correction of the Donatists*].

191 *Id.*

192 *E.g.*, *Matthew* 27:1–31 (King James); *Acts* 16:16–27 (King James).

193 Augustine, *Correction of the Donatists*, *supra* note 190, at 20.

194 NOONAN, *supra* note 26, at 19.

195 Smolin, *City of God*, *supra* note 79, at 862.

196 INTERNATIONAL CRITICAL COMMENTARY, *supra* note 23, at 36.

197 *See* ANCIENT CHRISTIAN COMMENTARY, *supra* note 26, at *xxiv*.

198 *See id.* at 314.

199 *Id.* at 315.

200 ROBERT CHARLES HILL, THEODORET OF CYRUS, COMMENTARY ON THE LETTERS OF ST. PAUL, VOL. ONE 1 (Robert Charles Hill trans., 2001).

201 *See id.* at 2.

commentary on *Romans* 13, Theodoret's position on the connection between God and bad human rulers is somewhat unclear. At first he seems to side with Chrysostom, Theodoret's "predecessor in the School of Antioch."[202] A few decades before Theodoret wrote his Pauline commentary, Chryostom had taught in more detail what Theodoret espouses in his commentary, that God appoints the power of rulers in general, but not the particular rulers themselves.[203] Some of Theodoret's commentary seems to agree with Chrysostom, at least to the extent that although God ordains the concept of rule, He does not appoint particular wicked authorities: "the divine apostle made ruling and being ruled dependent on the providence of God, not the appointment of this one or that: the authority of unjust people is not by God's mandate—only the provision for government."[204] But then Theodoret takes a page out of Irenaeus' book, teaching that "in his wish to correct the fallen," God "even allows them to be ruled by wicked rulers."[205] Theodoret finally returns to Chrysostom's argument: "For it is not the wickedness of individual rulers which comes from God but the establishment of the ruling power itself."[206]

Advice to the Christian ruler also came from Sedulius Scottus between 855 and 859, when he wrote *On Christian Rulers* "to instruct Lothar II, Emperor Lothar I's son and king of Lotharingia, in his royal duties."[207] Notably gone is the idea of all rulers as God's servants, including the bad ruler serving God's purpose of punishment: "[H]e is a faithful and proper servant who has done with sincere devotion whatever his lord and master has commanded to him."[208] Indeed, Sedulius held up Constantine himself as an example of service to God as a ruler.[209]

The *Glossa Ordinaria* was "the standard biblical commentary of the later medieval and early modern periods."[210] Its "glosses are taken from the church fathers . . . up through Bede . . . and then edited and brought into their final form by scholars in France during the first half of the twelfth century."[211] The commentary in the *Glossa* adopted Irenaeus' position that both good and evil authorities were ordained by God:

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[202] *Id.* at 2.

[203] *See supra* notes 155–74 and accompanying text.

[204] HILL, *supra* note 200, at 122.

[205] *Id.*

[206] ANCIENT CHRISTIAN COMMENTARY, *supra* note 26, at 314.

[207] IRENAEUS TO GROTIUS, *supra* note 98, at 221.

[208] Sedulius Scottus, On Christian Rulers, *in* IRENAEUS TO GROTIUS, *supra* note 98, at 222.

[209] *Id.*

[210] THE *GLOSSA ORDINARIA* ON ROMANS at ix (Michael Scott Woodward ed. & trans., Kalamazoo: Medieval Institute Publications, 2011).

[211] *Id.*

"Concerning a good authority, it is clear that God has appointed it. It can be seen that he has also reasonably appointed evil authority, since the good are themselves purified by it and the evil condemned, while the authority itself sinks lower."[212] All "power" comes from God, including the wicked ruler's power to harm: "The power of harming is given to wicked and unworthy rulers so that the patience of the good may be proved and the iniquity of the evil may be punished."[213] Even an evil ruler "does not harm the good person but purifies him."[214] The commentary clearly recognizes that rulers do not always praise good and punish evil, but notes that those who do good always will be praised or benefitted, even by evil rulers: "*you will have praise from it*—even if it is an evil authority, since you have occasion for a greater crown."[215]

The influence of Thomas Aquinas (c. 1225–1274) cannot be overstated.[216] For much of Christianity, Aquinas is essentially authoritative.[217] Pope Clement VIII declared Aquinas' works to be without error,[218] and so the Roman Catholic Church has generally regarded them.[219] Aquinas provides contextual commentary on Paul's teaching, orienting Paul's teaching in *Romans* 13 within the context of Paul's broader teaching concerning practical Christian living.[220] Aquinas apparently understood Paul to be requiring submission to all higher powers, good and bad: "he says indefinitely *higher powers* so that we may subject ourselves to them by reason of the sublimity of their office, even if they are wicked."[221] Aquinas makes this universal obligation of submission abundantly clear in his comments on verse three, in which Paul states that "rulers are not a terror to good works, but to the evil."[222] Aquinas comments that "[t]his can also refer to evil rulers, who are not a terror to good conduct, but to bad. For even though they sometimes unjustly persecute those who do good, the latter have no reason to fear; because if they endure it patiently, it turns out for their good . . . ."[223]

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[212] *Id.* at 192.

[213] *Id.* at 192–93.

[214] *Id.* at 194.

[215] *Id.*

[216] *See* NOONAN, *supra* note 26, at 37.

[217] *Id.*

[218] *See id.*

[219] *See id.*

[220] Thomas Aquinas, *Lectures on the Letter to the Romans*, 503–04 (Jeremy Holmes et al. eds., Fabian Larcher trans.) *available at* http://www.scribd.com/doc/211315740/Aquinas-on-Romans.

[221] *Id.* at 505.

[222] *Romans* 13:3 (King James).

[223] Aquinas, *supra* note 220, at 509.

Similarly, Aquinas explains that Paul's encouragement to "do that which is good, and thou shalt have praise of the same"[224] applies also to "evil rulers, whose unjust persecution ends in praise for those who endure it patiently."[225] Further, echoing the earlier line of teaching beginning with Irenaeus and citing the Old Testament example of Assyria sent to punish Israel, Aquinas argues that "even wicked rulers are God's ministers for inflicting punishments according to God's plan; although this is not their intention."[226]

The Christian Church's occasional affinity for the power of the sword perhaps reached its pinnacle at the opening of the fourteenth century when Pope Boniface VIII issued in 1302 *Unam Sanctam,* his extreme assertion of Church authority in general and papal authority in particular.[227] Boniface asserted that "kings and knights" wield the "temporal sword," but they do so "for the Church" and "at the will and sufferance of the priest."[228] In support of this proposition that the temporal authority must be subject to the spiritual authority of the Church, Boniface quoted *Romans* 13:1 ("There is no power but of God, and the powers that are of God are ordained.").[229] Thus the completion of the Constantinian revolution! Paul taught the early Christian to submit to a hostile emperor, and a little more than a millennium later, the very same words of Paul were used to support the idea that the emperor must submit to the Church.

### *D. Seeds of Separation of Church and State Sown in the Reformation*

#### 1. Martin Luther

*Romans* 13:1–7 was "central to Luther and other reformers."[230] Because of the intervening "conversion" of Constantine and the consequent political triumph of Christianity in the West, Martin Luther taught and wrote in a political context quite foreign to that into which the Apostle Paul taught and wrote *Romans* 13.[231] Whereas Paul was

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[224] *Romans* 13:3 (King James).

[225] Aquinas, *supra* note 220, at 510.

[226] *Id.* at 511.

[227] M. GOSSELIN, THE POWER OF THE POPE DURING THE MIDDLE AGES 233 (Matthew Kelly trans., 1853); *see* Letter from Pope Boniface VIII, *Unam Sanctam, reprinted in* SELECT HISTORICAL DOCUMENTS OF THE MIDDLE AGES 435, 435–36 (Ernest F. Henderson trans., 1892).

[228] Boniface, *supra* note 227, at 436.

[229] *Id.*

[230] Glen Bowman, *Elizabethan Catholics and Romans 13: A Chapter in the History of Political Polemic*, 47 J. CHURCH & ST. 531, 531 (2005).

[231] *Compare supra* notes 30–32, 75–85 and accompanying text, *with infra* note 233 and accompanying text.

persecuted by both religious and secular authorities of his day, and ultimately put to death by the latter, the principal threat to Luther was from purely religious authorities, and he owed his very life to the protection provided by secular authorities.[232] Nevertheless, Luther read *Romans* 13, at least as of 1515–1516, as dictating the same Christian response to "higher powers" outside the church that Paul had commanded in almost fifteen hundred years earlier.[233] Luther clearly concluded that Paul's teaching concerning submission to rulers applied, not only to good rulers, but also to "evil and unbelieving rulers."[234] As discussed above, some taught that *Romans* 13 could be used as a yardstick, not only for the conduct of the believing ruled, but also for the ruler by interpreting Paul's phrase "the powers that are are ordained by God" to mean that "the powers that are of God are ordered."[235] Luther definitively rejected such reinterpretation. Luther's conclusion from Paul's teaching in *Romans* 13:1 was that "whatever powers exist and flourish, exist and flourish because God has ordered them."[236]

In 1523, Luther published his most thorough written work on the secular state, and he started the substantive part of that work by citing *Romans* 13 as one of two biblical bases "for the civil law and sword."[237] Just as Boniface VIII had cited *Romans* 13:1 in support of papal authority over temporal rulers, Luther cited the same verse as rejecting the idea that worldly rulers must be subject to the pope: "St. Paul says to all Christians, 'Let every soul (I take that to mean the pope's soul also) be subject to the temporal authority; for it does not bear the sword in vain, but serves God by punishing the wicked and benefiting the good.'"[238]

This survey of the teachings of Martin Luther on *Romans* 13 is a good place to revisit the distinction, introduced by Chrysostom, between the abstract concept of government and the more concrete specific individual governors. Word choice becomes important here. Modern English translations of *Romans* 13 translate the original Greek *exousia* into the

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[232] *See* LUTHER AND CALVIN ON SECULAR AUTHORITY, at *vii* (Harro Höpfl ed. & trans., Cambridge University Press 1991) [hereinafter ON SECULAR AUTHORITY].

[233] LUTHER: LECTURES ON ROMANS 358 n.1 (Wilhelm Pauk ed. & trans., The Westminster Press 1961) ("Here the apostle instructs the people of Christ how they should conduct themselves toward the higher powers that are without."); *see* ON SECULAR AUTHORITY, *supra* note 232 and accompanying text.

[234] *Id.*

[235] *Id.* at 358 n.2.

[236] *Id.* at 359 n.2.

[237] Martin Luther, *Temporal Authority: To What Extent it Should Be Obeyed*, *reprinted in* IRENAEUS TO GROTIUS, *supra* note 98, at 585.

[238] Martin Luther, *To the Christian Nobility of the German Nation Concerning the Reform of the Christian Estate* (1520), *reprinted in* LUTHER: SELECTED POLITICAL WRITINGS 37, 43 (J.M. Porter ed., 1974) [hereinafter POLITICAL WRITINGS].

rather abstract English word "authority." Older English translations used the somewhat more concrete word "power." It is worth noting here that the Vulgate, Luther's "Bible" before he translated the Bible into German, translated *exousia* as *potestas* [power] instead of *auctoritas* [authority].[239] Luther's translation came down firmly on the side of the more concrete rather than the more conceptual term. "The principal organizing idea in Luther's political thought is *Oberkeit*."[240] *Oberkeit* does not connote an abstract concept as the word "authority" does.[241] *Oberkeit* "cannot fail to call to mind the *persons* who are in authority, 'superiors' . . . . And this property of the term sits well with the character of Luther's thought, for he tends to personalize political authority."[242] This word choice facilitates Luther's acceptance of the idea that God chooses individual rulers.

> Luther moved readily from the abstract *Oberkeit* to the personal *die Oberen* ('superiors'), signifying persons of superior political status. This translation of *Oberkeit* as 'authority' is far from felicitous. It not only implies a distinction between 'authority' and 'power' which Luther precisely did *not* make. It also suggests an abstract quality to Luther's thought which it lacks: when speaking of *Oberkeit* he thought in terms of persons (and more often than not one person, a prince or lord), equipped with power. He alternated freely between 'authority' (*Oberkeit*) and 'those in authority' (*die Oberen*).[243]

"[F]or Luther, the natural socio-political state of man is Hobbesian, and the only solution is the government with its sword and law . . . ."[244] Therefore, Luther's teaching on government focuses on restraint of mankind's depredations of his fellows:

> And so God has ordained the two governments, the spiritual which fashions true Christians and just persons through the Holy Spirit under Christ, and the secular government which holds the unchristian and wicked in check and forces them to keep the peace outwardly and be still, like it or not.[245]

In interpreting *Romans* 13, Luther focused on the Christian's obligation to submit to government force, not on the need to cooperate with some abstract concept of orderly government:

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239 *See* ON SECULAR AUTHORITY, *supra* note 232, at *xiv*.

240 *Id.*

241 *See id.*

242 *Id.*

243 *Id.* at *xxxii* (citations omitted).

244 POLITICAL WRITINGS, *supra* note 238, at 8.

245 Martin Luther, *On Secular Authority: How Far Does the Obedience Owed to It Extend?*, *reprinted in* ON SECULAR AUTHORITY, *supra* note 232, at 1, 10–11 [hereinafter Luther, *How Far Does Obedience Extend?*] (alteration in original); *see also* Martin Luther, *Temporal Authority: To What Extent it Should be Obeyed, reprinted in* POLITICAL WRITINGS, *supra* note 238, at 55–56.

> The crucial term here is *Gewalt*, which, according to the Grimms' *Deutsches Wörterbuch*, means any or all of: power, strength, might, efficacy . . . empire, rule, dominion, mastery, sway, jurisdiction, government, protection . . . *potestas*, *facultas*, *imperium*, *dictio*, *arbitrium*, *ius* . . . *potentia*, *vis*, *violentia*, *iniuria*, *indignitas*. Its most prominent meaning, however, is force, power or might. . . . *Gewalt* can mean—and often in the text does mean—mere coercion, force, or violence.[246]

The mere existence of the power, not its "legitimacy," was the crucial fact for Luther:

> For what is crucial, given Luther's Augustinian cast of thought, is not that power should be exercised legitimately and by duly authorized officeholders (*potestates*), but that someone should use force (*Gewalt*) to prevent the ungodly from tearing each other to pieces, even if those who use such force are no better than those against whom they use it. God's will and purposes are served whether rulers act from benevolent or wicked motives. 'Frogs need storks.' Nor was the distinction (of which Luther was of course perfectly well aware) between an office and its occupant of any consequence: it is enough for Christians to know that power itself is of divine ordinance, and provided rulers do not use their power to 'hurl souls into hell', one person will do as well as another for a ruler. Calvin took much the same view. Thus Luther's original (1522) translation of the crucial scriptural passage Romans 13.1–3—much of Protestant political thought may be read, and indeed presented itself, as a commentary on this text—was: 'Let everyone be subject to the *Oberkeit* and power (*Gewalt*), for there is no power (*Gewalt*) but from God. But the power (*Gewalt*) which is in every place [this seems to mean: whatever *Gewalt* is to be found anywhere] . . .' The 1544 version, however, reads: 'Let every person be subject to the *Oberkeit*, which has power (*Gewalt*) over him. For there is no *Oberkeit* but from God. But wherever there is *Oberkeit* . . . .' The version Luther offered in *On Secular Authority* is almost identical to the 1522 text. Thus it seems that there was a distinction for Luther between *Gewalt* and *Oberkeit*; although he could use them interchangeably, the latter had more of a connotation of legitimacy, the former of force. In 1523 the distinction was a matter of indifference to him, but it was force and coercion he was concerned to stress.[247]

Thus, for Luther, the point of Paul's teaching in *Romans* 13 was that God had given the power of coercion, or force, to rulers, and Christians must submit to that power, not that God had given good government and that Christians ought to submit to the government as long as it is good.[248]

> The crucial point is that *Gewalt* erodes the distinction between 'power' and 'authority'. [sic] This is hardly surprising, given Luther's 1523 view

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[246] ON SECULAR AUTHORITY, *supra* note 232, at *xv* (first three alterations in original).

[247] *Id.* at *xv–xvi*.

[248] *See id.* at *xxxvii*.

> of the proper function of government as repressive and punitive; repressing and punishing can be done as well by those whose power is illegitimate as by those with legitimate power.[249]

In the second part of *On Secular Authority,* Luther interpreted *Romans* 13 to limit secular authority: "Paul is speaking of superiors and power. But . . . no one has power over the soul except God. St. Paul cannot be speaking of obedience where there is no power . . . ."[250] Luther buttresses his argument by again citing *Romans* 13 for a list of those "powers" that do belong to the secular ruler:

> And he [Paul] makes clear that this is what he means when he lays down a limit to both power and obedience: 'Give to each what is due to him, tax where tax is due, customs duties where customs duties are due, honour where honour, fear where fear.' In other words, secular obedience and power extend only to taxes, duties, honour, fear, outward things.[251]

### 2. The Anabaptists

Luther's understanding of the proper relationship between the church and the sword, as taught by Paul in *Romans* 13, may have been developed in part through his conflict with more radical elements of the reformation movement.[252] "All of Luther's political thought was refined in the crucible of historical events, but no one event tested his thought to the extent of the Peasants' War of 1524–25."[253] The most radical elements of the reformation, collectively known as the Anabaptists, fall into two camps.[254] Both would radically change the existing order between church and state, but in starkly different ways.[255] The left wing of the Reformation would sweep away the Constantinian influence on the church's view of its relationship with the state: "With believers' baptism, nonresistance, and the rejection of the oaths binding Christians politically to Christendom, the Anabaptists sought to establish a faithful church

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[249] *Id.*

[250] Luther, *How Far Does Obedience Extend?*, *supra* note 245, at 28.

[251] *Id.* (quoting *Romans* 13:7).

[252] *See* POLITICAL WRITINGS, *supra* note 238, at 11–12.

[253] *Id.* at 11.

[254] That is: resistant and non-resistant. *See* J. S. HARTZLER & DANIEL KAUFFMAN, MENNONITE CHURCH HISTORY 69–71 (1905) (explaining that of the three Anabaptist views on the interaction between church and state, only one sect believed in violent millenarianism); Robert Friedmann, *Conception of the Anabaptists*, 9 CHURCH HIST., 341, 343–45 (1940) (explaining that while Thomas Müntzer, Heinrich Boehmer, and a few others led violent millenarian groups, the other sects of Anabaptists were peaceful, if not pacifists).

[255] *Compare infra* notes 256–57 and accompanying text, *with infra* notes 258–59 and accompanying text.

separated from Christendom."[256] Luther's interpretation of *Romans* 13 is not inconsistent with this non-resistant wing of the Anabaptist movement.[257]

By contrast, Luther came into direct conflict with the violent strain of the Anabaptists.[258] One of the leaders of this violent movement was Thomas Müntzer, who applied *Romans* 13 "into a kind of revolutionary manifesto by maintaining that the governments are instituted to execute the will of God and, conversely, if they fail to do so, those who do the will of God are bound to take the sword into their own hands."[259] Yoder suggests that this nascent form of resistance theology was rooted in the teachings of Huldrych Zwingli,[260] but because Zwingli and the radical Anabaptists were contemporaries, it may be impossible to prove who came upon the idea first.[261] Müntzer aimed his violent attacks both at the state and at the then-established church.[262] Müntzer and his followers destroyed the Mallerbach chapel near Allstedt in the spring of 1524, and Müntzer followed up that summer with his *Sermon to the Princes,* in which he turned Luther's interpretation of *Romans* 13 on its head: "Saint Paul . . . says that the sword of rulers is given for the punishment of evildoers and to protect the pious."[263] This is the first step in Müntzer's radical interpretation of *Romans* 13—the passage is a command to the powers that be themselves, not merely to those who are to submit to the powers that be.[264] Luther "saw the sense of the passage as an injunction for Christians to be obedient to secular authority since it is ordained by God," but Müntzer "uses the passage to enjoin positive action by rulers to promote a Christian society."[265] Thus, the approach of the radical Anabaptists fit well with the post-Constantinian ideas of Chrysostom and his followers, that *Romans* 13 could be put to a use that Paul could not have imagined—as an injunction to temporal rulers.[266]

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[256] Smolin, *A House Divided*, *supra* note 131, at 30; *see also* VILLA-VICENCIO, *supra* note 80, at 62 ("[T]he question never seriously arose whether a sixteenth-century Anabaptist could be a magistrate—it was as impossible an option to contemplate as it would have been for a Christian in the pre-Constantinian church.").

[257] *See* Smolin, *A House Divided*, *supra* note 131, at 29.

[258] *See* Thomas Müntzer, *A Highly Provoked Defense*, *reprinted in* THE RADICAL REFORMATION 74, 74–75 (Michael G. Baylor ed. & trans, Cambridge University Press, 1991).

[259] Bammel, *supra* note 8, at 365.

[260] *See* YODER, POLITICS OF JESUS, *supra* note 52, at 201.

[261] *See id.*

[262] *See* Smolin, *City of God*, *supra* note 79, at 867.

[263] Thomas Müntzer, *Sermon to the Princes, in* THE RADICAL REFORMATION, *supra* note 258, at 11, 28, 29 n.19 (citing *Romans* 13:1–4).

[264] *See id.* at n.18.

[265] *Id.*

[266] *See supra* notes 164–68 and accompanying text.

The second move in Müntzer's radical interpretation was to "democratize" the definition of "the powers that be." In his *A Highly Provoked Defense*, addressed directly to Luther, Müntzer responded to Luther's charge of rebellion by arguing that "the entire community has the power of the sword."[267] Therefore, when the community rises up in violent opposition to ungodly rulers, it is the community that is "the power that is" executing God's wrath.[268] Luther, by contrast, citing *Romans* 13, famously proclaimed "If you chop over your head, the chips fall into your eyes."[269] In other words, when the subject fights with his overlord, he disobeys *Romans* 13.

Luther's position is similar to the pre-Constantinian position taken by Irenaeus and to that ultimately taken by the moderate Anabaptist leader, Balthasar Hubmaier.[270] Although a few Anabaptists, like Müntzer, embraced the use of the sword, and many quietist Anabaptists, such as Menno Simons, rejected any Christian use of coercive force, particularly the sword[271], Hubmaier, in his 1527 essay on the sword, sought to convince his fellow Anabaptists, who had embraced extreme pacifism and almost completely withdrawn from society, that it was spiritually permissible for a Christian to participate in government, including participating in the use of force.[272] In discussing *Romans* 13, Hubmaier analogized human rulers to natural forces controlled by a sovereign God:

> Now, God always punishes the wicked, sometimes with hail, rain, and sickness, and sometimes through special people, who have been ordained and elected for this. Therefore Paul calls the authorities handmaidens of God. For what God can do himself he often prefers to do through his creatures as his tools.[273]

In this essay, Hubmaier discusses sixteen passages of Scripture relevant to the participation of the believing Christian in civil government, and he saves *Romans* 13 for last proclaiming, "This passage alone, dear brothers, is sufficient to sanction the authorities against all the gates of hell."[274] Like Luther, Hubmaier rejected any sort of violent rebellion against the powers that be—even against wicked rulers—because even wicked rulers are God's servants:

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[267] Müntzer, *supra* note 258, at 80.

[268] *See id.*

[269] Martin Luther, *Whether Soldiers, Too, Can be Saved, reprinted in* POLITICAL WRITINGS, *supra* note 238, at 107.

[270] *See* Balthasar Hubmaier, *On the Sword, reprinted in* THE RADICAL REFORMATION, *supra* note 258, at 181, 181 n.1.

[271] *See* Smolin, *City of God*, *supra* note 79, at 870–71.

[272] *See* Hubmaier, *supra* note 270, at 181 n.1.

[273] *Id.* at 187.

[274] *Id.* at 183–206.

> But if an authority is childish or foolish, indeed even unfit to rule, it is always good to get rid of him and accept another ruler. . . . But if that removal cannot be undertaken legally and peacefully, without great harm and rebellion, then unfit rulers should be tolerated because God has given them to us in his wrath and wants to plague us thus, as being worthy of no better rulers, because of our sins.[275]

### 3. John Calvin

John Calvin, who first published his commentary on Paul's epistle to the Romans in 1540[276], took a more optimistic view of temporal government than Luther. Calvin saw as the context of chapter thirteen Paul's refuting the perception that "the kingdom of Christ cannot be sufficiently advanced, unless all earthly powers (or authorities) be suppressed."[277] Calvin tended to see ordained government as more of an unqualified blessing. Government "powers are of God, not as the pestilence, hunger, war and such like punishments of sin, are said to be of him; but because he hath appointed them for the lawful and right administration of the world."[278] Calvin distinguished between good government, which is the ordinance of God, and bad government: "tyrannies and unjust dominations, inasmuch as they are full of deformity, are not of the ordinary government."[279] Calvin noted that first century princes disliked "piety" and persecuted "religion."[280] That such bad governments existed both when Paul wrote and at all other times before and since, Calvin did not doubt: "[I]f an evil prince be the scourge of the Lord to punish the sins of the people, let us remember it cometh to pass through our fault that the excellent blessing of God is made a curse unto us."[281] In thus seeing bad government as God's blessing that man has put to bad use rather than as God's punishment of man's evil, Calvin tended to align his view a little more closely with those of Origen and Chrysostom and their followers.[282] Calvin reads Paul's teaching as going beyond merely commanding Christian citizens to submit—Calvin thought Paul also was writing to rulers about how they ought to view their own role.[283] Calvin saw Paul as commanding magistrates to use the sword to

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275 *Id.*

276 *See* INTERNATIONAL CRITICAL COMMENTARY, *supra* note 23, at 38.

277 JOHN CALVIN, COMMENTARY UPON THE EPISTLE OF SAINT PAUL TO THE ROMANS 364 (Henry Beveridge ed., The Calvin Translation Society, 1844).

278 *Id.* at 365.

279 *Id.*

280 *See id.* at 364.

281 *Id.* at 366.

282 *See* ORIGEN, *supra* note 85, at 223.

283 *See* CALVIN, *supra* note 277, at 367–69.

punish evil men.[284] Thus, there emerged from the Protestant Reformation two strains of thought concerning "the powers that be." Luther and the more moderate/pacifist wings of the Anabaptists tended to focus on the Christian's obligation to submit to all rulers, good and bad, as instruments sovereignly ordained by God.[285] Calvin and the more radical Anabaptists tended to see *Romans* 13 as teaching further that rulers are to be self-conscious instruments of God.[286] But the leading reformers taught submission, where possible, even to evil rulers.[287]

4. The Magdeburg Confession

The Magdeburg Confession of 1550 was written by the leaders of a small Saxon city in response to the Holy Roman Emperor's order to "adopt a new imperial law on religion called the Augsburg Interim."[288] While the Confession has been called "a major distillation of the most advanced Lutheran resistance theories of the day,"[289] it actually follows more closely Calvin's approach to avoid the apparently broad sweep of submission that Paul commanded.[290] The Confession took the position that Paul was requiring submission only to those authorities who are "ministers" or "servants" of God.[291] Governments that persecute the good are not God's "ministers," are not "ordained of God," and, therefore, do not fall under the obligation of submission taught in *Romans* 13.[292] The idea here is that in describing powers as "ministers of God," Paul was delimiting the obligation of submission.[293] As long as the power acts as God's minister, then the power is owed an obligation of submission.[294] But when the power exceeds its authority by acting contrary to God's will, then the power loses its delegated authority and with it the obligation of submission.[295] This interpretation empowers the believer to evaluate the quality of a particular government and decide whether it is worthy of submission.

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284 *Id.* at 367.

285 *See* LUTHER: LECTURES ON ROMANS, *supra* note 233, at 358.

286 *See* CALVIN, *supra* note 277, at 367–69.

287 *See, e.g.*, *supra* Part II.D.

288 JOHN WITTE, JR., THE REFORMATION OF RIGHTS: LAW, RELIGION, AND HUMAN RIGHTS IN EARLY MODERN CALVINISM 106 (2007).

289 *Id.*

290 *See id.* at 106–07.

291 *See id.* at 108–09.

292 This response, that the role of the human minister as God's servant can be used to limit those powers that are ordained by God and to whom submission is owed by believers has become a common one. Lategan labeled this position "the evaluative move." *Id.*

293 *Id.*

294 *Id.*

295 *Id.*

5. Theodore Beza

In 1548, Theodore Beza, "after a nearly fatal illness, . . . experienced a profound religious conversion and became a follower of Calvin. By the early 1560's he had become one of Calvin's closest associates . . . ."[296] When Calvin died in 1564, Beza "was named to succeed Calvin as Moderator of the Company of Pastors at Geneva and thus became the leader of the Calvinist movement on the Continent."[297] In 1573, while still leading the Huguenots, Beza wrote "the first major statement of Huguenot resistance doctrine," *Right of Magistrates*.[298] Beza had previously approved the Magdeburg Confession, which laid the groundwork for an interpretation of *Romans* 13 that permitted Christian resistance to evil rulers.[299] Beza admitted that the tyrant "is most often an evil or scourge sent by God for the chastisement of nations."[300] Yet, he accepted the right of the "oppressed" to use "remedies in addition to repentance and prayers."[301] Beza did not, however, extend to the private citizen the right of resistance of a tyrannical sovereign—that right was reserved for lower magistrates.[302]

*E. Samuel Rutherford and the Popularization of Resistance Theology*

For Christians (with the possible exception of some Anabaptists) from shortly after Constantine until the mid-seventeenth century, *Romans* 13:1–7 generally "served as a sort of capsule constitution to guide the Christian statesman (who should punish evil and reward good) and the Christian citizen (who should conscientiously obey)."[303] In *Lex Rex*, Samuel Rutherford called that orthodoxy into question by solidifying the theretofore nascent resistance theology.[304] "Rutherford, a Presbyterian, was one of the Scottish commissioners at the Westminster Assembly in London (1643–1647) and later became Rector at St. Andrews University in Scotland."[305] Rutherford repeatedly used *Romans* 13 to support the Christian's right to resist a tyrant. For example, he cited *Romans* 13:4 for the proposition that the subject's obligation to submit to "all power of the

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[296] CONSTITUTIONALISM AND RESISTANCE IN THE SIXTEENTH CENTURY 98 (Julian H. Franklin ed. & trans., 1969).

[297] *Id.*

[298] *See id.* at 30.

[299] *Id.* at 32.

[300] *Id.* at 104.

[301] *Id.* at 105.

[302] *See id.* at 106–07.

[303] YODER, POLITICS OF JESUS, *supra* note 52, at 193.

[304] SAMUEL RUTHERFORD, LEX REX 141 (Robert Ogle and Oliver & Boyd 1843).

[305] FRANCIS A. SCHAEFFER, A CHRISTIAN MANIFESTO 99 (1982).

law" is contingent on the authority's fulfilling its obligation "to command and rule justly and religiously for the good of the subjects, and is only set over the people on these conditions, and not absolutely, cannot tie the people to subjection without resistance, when the power is abused to the destruction of laws, religion, and the subjects."[306] Rutherford's approach is consonant with that taken in the Magdeburg Confession. Also, like Chrysostom, Rutherford grounded his understanding of the distinction between the person of the king and the office of the ruler on *Romans* 13.[307] Rutherford affirmed that Paul was writing of the office, not the particular person.[308] By thus bringing Chrysostom and the Magdeburg Confession fully together, Rutherford made it possible for the follower of Paul to resist a tyrannical ruler while obeying Paul's command to submit to the office.[309] Thus, Rutherford concluded that *Romans* 13 commands "subjection to the power and office of the magistrate *in abstracto*."[310] According to Rutherford's reading, Paul's text would not require subjection "to the abused and tyrannical power of the king."[311]

To spell out Rutherford's logic in greater detail, he believed that Paul commanded subjection to "higher powers."[312] "But no powers commanding things unlawful, and killing the innocent people of God, can be . . . higher powers . . . ."[313] When tyrants command the unlawful and kill the innocent, they do so "not by virtue of any office."[314] Thus, rulers "commanding unjust things and killing the innocent" are not the "powers ordained of God" of which Paul writes in *Romans* 13.[315] The office is ordained of God, but such personal tyrannies are not.[316] Alluding to *Romans* 13, Rutherford asserted that the reason the office of ruler is not to be resisted is that such office "is not a terror to good works."[317] Rutherford thus infers that the personal ruler who is a terror to good works "may be resisted; and that in these we are not to be subject, but only we are to be subject to his power and royal authority, *in abstracto*, in so far as, according to his office, he is not a terror

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306 RUTHERFORD, *supra* note 304, at 141.

307 *Id.* at 143.

308 *Id.*

309 *Id.*

310 *Id.* at 144.

311 *Id.*

312 *Id.*

313 *Id.* Thus, Rutherford read some qualitative content into the word "higher."

314 *Id.*

315 *Id.* Apparently when Paul wrote "there is no power but of God," he meant to imply that there is no "higher power" but of God.

316 *See* SCHAEFFER, *supra* note 305, at 101 (discussing Rutherford's *Lex Rex*).

317 RUTHERFORD, *supra* note 304, at 145.

to good works."[318] Continuing to allude to the language of *Romans* 13, Rutherford argued that "[t]he lawful ruler is the minister of God . . . for good to the commonwealth; and to resist . . . is to resist the Lord his master."[319] "But the man who is king, commanding unjust things . . . is not the minister of God . . . ; therefore the man may be resisted, by this text, when the office and power cannot be resisted."[320] Rutherford repeatedly emphasizes Chrysostom's distinction between the abstract "office" and the concrete "officer": "Paul . . . forbiddeth us to resist the power, *in abstracto*; therefore, it must be the man, *in concreto*, that we must resist."[321] Rutherford forcefully rejected the interpretation that whatever "powers that be" are therefore "ordained of God" and therefore owed submission: "nor dream we that the naked accident of royal authority is to be feared and honoured as the Lord's anointed."[322] Rutherford addressed the example of the specific power that was in place at the time of Paul's writing, the Roman emperor Nero, and argued consistent with all else Rutherford had said that Nero, the bloodthirsty "persecutor of Christians," was owed no subjection.[323]

A significant shift in the interpretation of *Romans* 13 among English-speaking scholars can be discerned at about the turn of the twentieth century. With the publication of *The Twentieth-Century New Testament*, the familiar phraseology of *Romans* 13 that had been quite consistent in English translations for five hundred years underwent a significant change, and this change helped to solidify the interpretation of *Romans* 13 expounded most forcefully by Samuel Rutherford.[324] The Greek word *exousiais* had been consistently translated "powers" as in "the powers that be are ordained of God."[325] But with the dawning of the new century, English translators began to translate *exousiais* as "authorities."[326] The producers of this shift tended not to be "language or textual experts," but rather "ministers and laypersons" who were focusing on "ease of

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[318] *Id.*

[319] *Id.* Clearly, Rutherford did not accept existing rulers as given by God, but only those who do God's work.

[320] *Id.*

[321] *Id.* (citing *Romans* 13). The subject must submit to the office of the ruler while resisting the tyrant who holds that office.

[322] *Id.* at 147.

[323] *Id.* at 148.

[324] RUTHERFORD, *supra* note 304, at 145. *Compare Romans* 13:1 (The Twentieth-Century New Testament) ("For no Authority exists except by the will of God, and the existing Authorities have been appointed by God."), *with Romans* 13:1 (King James Version) ("For there is no power but of God: the powers that be are ordained of God.").

[325] *See supra* notes 55–59 and accompanying text.

[326] *See, e.g.*, *Romans* 13:1 (The Twentieth-Century New Testament).

reading."[327] This shift in translations facilitated a particular approach to *Romans* 13.[328] Describing civil magistrates as among the "powers" to which believers should submit carries a sense of something that is, without regard to its legitimacy.[329] Ernst Kasemann made this point forcefully:

> Paul is not . . . reflecting on the process by which those powers that be of which he speaks . . . came into existence. For him the man who has asserted himself politically has a God-bestowed function and authority simply as the possessor of power *de facto*. This is why I translate the Greek word *exousia* and its derivatives by power [German *Gewalt*], powers, holders of power: I want to include tyranny and despotism, which in any event reigned supreme over wide stretches of the Roman Empire.[330]

Switching the language used by Paul to refer to political officials from "powers" to "authorities" fits better with the idea that such "authority" might be either legitimate or illegitimate. Power, by contrast, either is or is not.

## III. MODERN CHURCH CONFLICTS WITH "THE POWERS THAT BE"

### *A. The American Revolution*

The republic that we know as the United States of America was born in revolution.[331] So to the extent that the people of the American colonies were Christian, which they dominantly were,[332] St. Paul's teaching that "every soul" must be "subject to the higher powers" and that "the powers that be are ordained of God" would seem to be particularly poignant for the American revolutionaries. Professor John Kang finds the roots of the American Revolution in an earlier dispute over the divine right of kings between England's King James I and Sir Robert Filmer on one side and English philosophers Locke and Sidney on the other.[333] The dispute turned on opposite interpretations of *Romans* 13. "Filmer and King James had commended Paul's epistle as divine benediction for absolute rule by even

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[327] J. Drew Conley, *English Versions Since 1880, in* FROM THE MIND OF GOD TO THE MIND OF MAN: A LAYMAN'S GUIDE TO HOW WE GOT OUR BIBLE, at 196–97 (James B. Williams ed., 1999).

[328] *See infra* notes 329–30 and accompanying text.

[329] ERNST KÄSEMANN, NEW TESTAMENT QUESTIONS OF TODAY 201 (W.J. Montague, trans., SCM Press 2d ed. 1969).

[330] *Id.* at 201–02.

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

[332] *Religion and the Founding of the American Republic*, LIBRARY OF CONGRESS, http://www.loc.gov/exhibits/religion/rel02.html (last visited Nov. 13, 2014).

[333] John M. Kang, *Appeal to Heaven: On the Religious Origins of the Constitutional Right of Revolution*, 18 WM. & MARY BILL RTS. J. 281, 300 (2009).

'monsters' like Nero."[334] On the other side, "Sidney urged the reader to focus on Paul's injunction that the king should work for the public good as a 'minister of God.'"[335] Kang saw American clergy as adopting Sidney's interpretation less than a century later.[336] Kang cited, among others, Jonathan Mayhew, Charles Chauncy, an anonymous pampleteer, Abraham Williams, and Benjamin Colman.[337] Buzzard and Campbell likewise observed that "[t]he New England clergy generally taught that as long as the king enforced God's commands, he was owed obedience and assistance. If, however, he violated God's commands, the people had the authority to resist him."[338]

My own review of colonial era sermons confirms the conclusions of Kang, Buzzard, and Campbell that colonial clergy tended to interpret *Romans* 13 as permitting revolution against an unjust monarch. I hope that a few examples will illustrate the typical interpretation of colonial clergy. The great-grandson of John Cotton, Elisha Williams graduated from Harvard in 1711 and took the pastorate of a Congregational church in Wethersfield, Connecticut "before becoming Yale University rector, a position he held until 1739."[339] He also served in the Connecticut General Assembly and on the Connecticut Supreme Court.[340] In response to the Great Awakening revivalists, a 1742 Connecticut statute "prohibited ministers from preaching outside their own parishes" without an express invitation from "resident ministers."[341] Williams responded with his "most famous work," *The Essential Rights and Liberties of Protestants* (1744).[342] Although this work was not universally well-received at the time,[343] its discussion of *Romans* 13 nevertheless provides a prominent contemporary interpretation of the time.[344] Williams' approach to the passage from Paul's letter is evident from his description of it as "[a] text often wrecked and tortured by such wits as were disposed to serve the designs of arbitrary power, of erecting a civil tyranny over a free people."[345] Williams

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[334] *Id.* at 311.

[335] *Id.*

[336] *Id.*

[337] *Id.* at 311–16.

[338] BUZZARD & CAMPBELL, *supra* note 57, at 58.

[339] 1 POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA: 1730–1805, *supra* note 46, at 52.

[340] *Id.*

[341] *Id.*

[342] *Id.*

[343] *See id.*

[344] *Id.* at 54.

[345] Elisha Williams, *The Essential Rights and Liberties of Protestants* (1744), *reprinted in* 1 POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, *supra* note 46, at 79.

thought a proper understanding of *Romans* 13 required an appreciation of the distinction "between the powers which are, and the powers which are not."[346] Subjection is owed only to the powers that be.[347] "On the other hand—the powers that are not, are not . . . the powers that are of GOD, not his ordinance, and so no subjection to them [is] required in this text."[348] Legal powers are "the powers that be" and "arbitrary" powers are the powers which are not.[349] As a then contemporary example, Williams noted that "civil authority relates to the civil interests," not to "religious establishments," and a civil authority that tries to make any religious establishment is a power that is not, and no subjection is owed to such illegitimate power.[350] Williams thus would permit the follower of Paul's teaching to sit in judgment on the legitimacy of the conduct of the civil magistrate, both within the existing legal order and as a matter of whether a particular political authority has been delegated from God, in deciding whether the magistrate is owed subjection. The obligation of submission is not general, perhaps with only exceptions in circumstances when the civil ruler would require disobedience to an even higher Power (a principle Williams describes as "invented for the support of tyranny").[351] Rather, the obligation of submission is limited in the first place to that area of jurisdiction delegated to the civil magistrate from God, and that jurisdictional grant includes only laws directed at the public good.[352]

The Harvard-educated Congregational clergyman in Massachusetts, Samuel West, was very influential throughout New England at the time of the American Revolution.[353] In 1776, West preached an Election Day sermon "before the Council and House of Representatives on the anniversary of the members' having been elected" titled *On the Right to Rebel Against Governors*.[354] In the sermon, West discussed *Romans* 13:1–6, which he described as the "great sheet-anchor and main support" of "the favorers of arbitrary government."[355] To avoid what West labeled "the

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346 *Id.*

347 *Id.*

348 *Id.*

349 *Id.*

350 *Id.* at 80; *See* Backus, *supra* note 46, at 336 ("[T]he crimes which fall within the magistrate's jurisdiction to punish, are only such as work ill to our neighbor . . . .").

351 *See* Williams, *supra* note 345, at 81–82.

352 *Id.* at 80, 82–83.

353 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760–1805, at 410 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

354 *Id.*

355 Samuel West, *On the Right to Rebel Against Governors, reprinted in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760–1805, *supra* note 353, at 424.

doctrine of unlimited passive obedience,"[356] he employed what will by now be a familiar interpretation of Paul's letter. He assumed that Paul was teaching that the "magistracy" rather than that particular "magistrates" are ordained by God.[357] Once he determined that magistrates are ordained of God only in the sense that the institution of magistracy is necessary "for the preservation and safety of mankind," then he succinctly concluded that "resistance must be criminal only so far forth as they . . . act up to the end of their institution, and ceases being criminal when they cease being the ministers of God."[358] Thus, West took *Romans* 13, not as a declaration that the "powers that be," be they good or ill, were put there by God and therefore are owed submission, but rather as a measuring stick to determine which powers are "ordained of God" and therefore due submission.

West found textual support for his approach in Paul's description of rulers as "not a terror to good works, but to the evil."[359] This text turns out to be the linchpin of West's interpretation. How could Paul say that a tyrant is not a terror to good works when experience proves the contrary?[360] Thus, only good rulers are the sort of rulers that Paul was discussing and to whom submission is owed, not evil rulers.[361] Good rulers are ordained by God, but wicked rulers are ordained by Satan.[362]

To his credit, West did not entirely ignore the context in which Paul had written his letter: "I know it is said that the magistrates were, at the time when the apostle wrote, heathens, and that Nero, that monster of tyranny, was then Emperor of Rome . . . ."[363] After suggesting that Paul may have written toward the beginning of Nero's reign, when the emperor might have been characterized as a "minister of God for good," West maintained that, to the extent that Nero was a tyrant, the plain meaning of Paul's text is that Nero was not ordained by God and therefore not due submission.[364] Perhaps, West suggested, Paul was satirizing Nero so as to suggest that no submission was due the tyrant.[365] West further noted that Paul did not name individual rulers and speculated that, even if Nero and many other "powers" at the time of Paul's writing were tyrannical, surely there must have been some who were "ordained of God" and therefore due

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[356] *Id.* at 425.
[357] *Id.* at 425–26.
[358] *Id.* at 426.
[359] *Id.* at 426.
[360] *Id.* at 430.
[361] *Id.* at 431.
[362] *Id.* at 427.
[363] *Id.* at 428.
[364] *Id.* at 429.
[365] *Id.*

submission.[366] Although West articulated these seemingly strained arguments, his preferred solution of the difficulty was to interpret Paul to be writing of the submission owed to the institution of the magistracy rather than to particular magistrates, good or evil.[367] West would interpret "the powers that be are ordained of God" to mean "the authority of the magistrates that are now . . . is ordained of the Deity."[368] Thus interpreted, *Romans* 13 is not so much a command to submit to human powers, but rather a liberation from oppressive government.[369]

West's sermon was not an isolated interpretation of *Romans* 13. To take just one more example, a similar approach to Paul's letter was exhibited six years later in another election sermon by a Congregational minister in Boston, this time by Zabdiel Adams, first cousin to President John Adams.[370] Like Samuel West, Adams interpreted Paul's phrase "the powers that be are ordained of God," not to mean that particular "rulers are elevated to their places by the immediate agency of heaven,"[371] but rather that government in general "is of divine appointment."[372] Thus, the ministers of Colonial America were able to reconcile the teaching of the Apostle Paul in *Romans* 13 with the American Revolution.

This attitude of colonial America toward *Romans* 13 persisted after the successful American Revolution. An essay titled *Defensive Arms Vindicated* (1783), an edited reprinting of a chapter of the same title from a volume written a century earlier by Alexander Shields, is addressed to "my dear brother soldiers."[373] Shields was a prominent "Scottish Covenanter, Presbyterian Minister, and author."[374] With regard to *Romans* 13, the writer of *Defensive Arms Vindicated* marshals several arguments to respond to the idea that Paul was commanding submission even to tyrants like Nero.[375] For one, Paul was commanding submission not to all rulers, but only to those "lawful rulers" who were "ordained of

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366 *Id.*

367 *Id.* at 429–30.

368 *Id.* at 430.

369 *See id.* at 431 ("[S]ubjects are to be allowed to do everything that is in itself just and right, and are only to be restrained from being guilty of wrong actions.").

370 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760–1805, *supra* note 353, at 539.

371 Zabdiel Adams, *An Election Sermon, reprinted in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760–1805, *supra* note 353, at 539, 542.

372 *Id.* at 543.

373 *See* 1 POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730–1805, *supra* note 96, at 712.

374 *Id.* at 714.

375 *Defensive Arms Vindicated*, *supra* note 96, at 722.

God, terrors to evil works, ministers of God for good."[376] Thus, the descriptions of rulers in *Romans* 13 was used to qualify the obligation of submission taught by Paul. Moreover, Paul wrote of "powers" in the plural, which suggests that he was not referring to Nero specifically, in which case he would have used the singular.[377] Further, Paul does not name Nero, who may not have been in power when Paul wrote or may not yet have become a tyrant.[378] The writer expanded on his first point later in the essay: "The tyrant's power and government in breaking charters, overturning laws, subverting religion, oppressing subjects, is not of God, therefore it may be resisted. This is clear, because that is only the reason why he is not to be resisted, because the ordinance of God is not to be resisted."[379] Thus, it is not whatever powers happen to be that are ordained of God, but only those powers that "punish evildoers and praise those that do well."

But, as William Stringfellow concluded after citing several such colonial sermons, trying to cabin *Romans* 13's obligation of submission by the lawfulness or legitimacy of the power in place is fraught with uncertainty: "We find one historic regime which can be and which was, in fact, simultaneously deemed legitimate and lawful, and illegitimate but lawful, and legitimate but unlawful, and illegitimate and unlawful, according to which faction in which country to which the regime pertains beholds it."[380]

### *B. The Third Reich*

Nazism called into question "the centrality and adequacy of Romans 13:1–7 as the foundation of a Christian doctrine of the state."[381] Nazi Germany produced a conflict between proponents of the two views that John Howard Yoder later labeled the *positivistic* and *legitimistic* interpretations of *Romans* 13.[382] Some cited *Romans* 13's traditional interpretation "to support absolute obedience to the Third Reich."[383] "[T]he positivistic position was represented during World War II by the so-called German Christians . . . ."[384] Their position was simple. Paul taught that "the powers that be" are ordained of God—therefore, the Nazi regime is

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[376] *Id.* at 723.

[377] *Id.*

[378] *Id.*

[379] *Id.* at 735–36.

[380] WILLIAM STRINGFELLOW, CONSCIENCE & OBEDIENCE: THE POLITICS OF ROMANS 13 AND REVELATION 13 IN LIGHT OF THE SECOND COMING 43 (1977).

[381] YODER, POLITICS OF JESUS, *supra* note 52, at 193.

[382] YODER, CHRISTIAN WITNESS, *supra* note 65.

[383] Feinberg, *supra* note 37, at 88.

[384] YODER, CHRISTIAN WITNESS, *supra* note 65.

God's government for Germany at that time and is owed submission by every Christian.[385] To appreciate the understanding of *Romans* 13 within Germany at the time of the Third Reich requires a consideration of Karl Barth's famous commentary on *The Epistle to the Romans*.[386] Barth (1886–1968) was "described by Pope Pius XII as the most important theologian since Aquinas."[387]

Yoder's later division of understandings of *Romans* 13 into the *positivistic* view and the *legitimistic* view bear some resemblance to Barth's approach, in which he saw Paul as rejecting both revolution against and legitimation of the powers that be.[388] Somewhat confusingly, Barth's "revolutionary" approach corresponds with Yoder's *legitimistic* approach, and Barth's "legitimism" corresponds with Yoder's *positivistic* approach.[389] According to Barth, the revolutionary would use *Romans* 13 to measure the existing powers that be, find them wanting, determine that they are owed no submission, and overthrow them, if possible.[390] One interested in *legitimism* would take "the powers that be" as the embodiment of God's order.[391] According to Barth, Paul teaches in *Romans* 13 that both views are to be rejected.[392] Paul teaches submission to the existing order without legitimizing it: "[T]here can be no more devastating undermining of the existing order than the recognition of it which is here recommended [by Paul], a recognition rid of all illusion [of legitimacy] and devoid of all the joy of triumph."[393] Barth taught that crucial to an understanding of *Romans* 13 is the understanding of the submission that Paul demands in the first verse as an abnegation of human judgment in favor of God's judgment alone.[394] The submission demanded by Paul is not to "the powers that be," as such, but to the God that ordains "the powers that be."[395]

Barth's theology heavily influenced that of the Lutheran pastor, Dietrich Bonhoeffer (1906–1945) whose "name is almost synonymous with

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[385] *Id.*

[386] *See* KARL BARTH, THE EPISTLE TO THE ROMANS 481 (Edwyn C. Hoskyns trans., Oxford University Press 6th ed. 1968).

[387] Kenneth K. Ching, *Would Jesus Kill Hitler?: Bonhoeffer, Church, and State*, 11 GEO. J. LAW & PUB. POL. 529, 533 (2013).

[388] BARTH, *supra* note 386, at 483.

[389] *See id.* at 481; *see also* YODER, CHRISTIAN WITNESS, *supra* note 65.

[390] BARTH, *supra* note 386, at 482.

[391] *Id.* at 484.

[392] *Id.* at 483–84.

[393] *Id.* at 483.

[394] *Id.* at 484.

[395] *Id.*

the church struggle in the Third Reich."[396] Bonhoeffer "lived in Germany during the rise of Nazism," and "died at the end of World War II, executed by the Nazis for his antiwar activities."[397] Nevertheless, Bonhoeffer's writings are, perhaps surprisingly, quite positivistic, to use Yoder's term for classifying interpretations of *Romans* 13.[398]

In the "State and Church" section of his book *Ethics,* Bonheoffer included a subsection on "The Divine Character of Government":[399] "Government is given to us not as . . . a task to be fulfilled but as a reality and as something which [ ]is . . . ."[400] The task of government, to Bonhoeffer, was quite limited: "[W]hether or not government is aware of its own true basis, its task consists in maintaining by the power of the sword an outward justice in which life is preserved and is thus held open for Christ."[401] All governments, without exception, fulfill this task:

> The mission of government to serve Christ is at the same time its inescapable destiny. Government serves Christ no matter whether it is conscious or unconscious of this mission or even whether it is true or untrue to it. If it is unwilling to fulfill this mission, then, through the suffering of the congregation, it renders service to the witness of the name of Christ. . . . It cannot in either case evade its task of serving Christ. It serves Him by its very existence.[402]

Therefore, "the demand for obedience" to government "is unconditional and qualitatively total."[403] "The Christian is neither obliged nor able to examine the rightfulness of the demand of government in each particular case. His duty of obedience is binding on him until government directly compels him to offend against the divine commandment . . . ."[404] And while Bonhoeffer did make room for particular instances of disobedience when the government would compel offense to God, he nevertheless insisted that the Christian so required to disobey the State must not "generalize from this offense . . . to conclude that this government now possesses no claim to obedience in some of its other demands, or even in all its demands."[405]

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396 *See* VILLA-VICENCIO, *supra* note 80, at 92.

397 Ching, *supra* note 387, at 547.

398 *See* LARRY L. RASMUSSEN, DIETRICH BONHOEFFER: REALITY AND RESISTANCE 48 (2005) ("Law is therefore a strongly binding limit in Bonhoeffer's thought . . . .").

399 DIETRICH BONHOEFFER, ETHICS 303 (Eberhard Bethge ed., Neville Horton Smith trans., SCM Press 1955).

400 *Id.* at 303 (citing *Romans* 13:1).

401 *Id.* at 306.

402 *Id.*

403 *Id.* at 307.

404 Dietrich Bonhoeffer, *State and Church, in* CHARLES VILLA-VICENCIO, BETWEEN CHRIST AND CAESAR, *supra* note 80, at 106, 109.

405 *Id.*

This view of the role of government is consistent with Bonhoeffer's earlier comprehensive discussion of *Romans* 13, which appears in chapter thirty of his book, *The Cost of Discipleship*.[406] That chapter addressed Christian discipleship in the "Visible Community,"[407] and includes Bonhoeffer's verse-by-verse commentary on *Romans* 13:1–7.[408] There Bonhoeffer "expounds Romans 13 in a way that matches any 'two-kingdoms' call for submission to the governing powers."[409] Bonhoeffer saw in Paul's command to submit to the higher powers a call to the sort of humble Christian service exemplified by Jesus himself.[410] Bonhoeffer noted again (as Luther, Bonhoeffer himself, and others also already had) that Paul's command was "addressed to the Christians, not to the powers."[411] Bonhoeffer understood Paul's command to demand submission to whatever powers "exist," be they good or bad, both sorts of powers God will use to work for the good of Christians.[412] But Bonhoeffer also saw that *Romans* 13's failure to address any command to "the powers that be" cuts the other way as well: "No State is entitled to read into St. Paul's words a justification of its own existence."[413] Thus, in his Barthian interpretation of *Romans* 13, Bonhoeffer rejects the common conception that the passage is a tract on Christian government:

> St. Paul certainly does not speak to the Christians in this way because the governments of this world are so good, but because the Church must obey the will of God, whether the State be bad or good. He has no intention to instruct the Christian community about the task and responsibility of government. His entire concern is with the responsibility of the Christian community towards the State.[414]

So Bonhoeffer saw the State as ordained by God in a limited way, much as Luther did[415]—it is a (sometimes passive or even resistant) tool that God uses to accomplish His purposes on earth.

This view of the state is confirmed in Bonhoeffer's understanding of Paul's assurance that "rulers are not a terror to good works, but to the evil." In Bonhoeffer's view, Paul noted that the Christian need not fear the State, not because the State is the self-conscious "minister of God," but

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406 *See* DIETRICH BONHOEFFER, THE COST OF DISCIPLESHIP 223, 235–38 (R.H. Fuller trans., SCM Press 6th ed. 1959) [hereinafter BONHOEFFER, COST OF DISCIPLESHIP].

407 *Id.* at 223–38.

408 *Id.* at 235–38.

409 RASMUSSEN, *supra* note 398, at 49.

410 BONHOEFFER, COST OF DISCIPLESHIP, *supra* note 406, at 235.

411 *Id.*; *see supra* text accompanying notes 240–51.

412 *Id.*

413 *Id.* at 236.

414 *Id.* at 236–37.

415 Ching, *supra* note 387, at 549.

because God sovereignly controls the State, even in its mistakes, to accomplish His divine purposes.[416] This is so even if the State punishes the one who does well—in that case, such punishment is the humble calling of the follower of Jesus, who likewise was punished for doing good.[417] Interestingly, Bonhoeffer reaffirmed this relatively early interpretation *in toto* even while later preparing his own defense for hearings while he was in Tegel Military Prison.[418]

Bonhoeffer's (and Barth's) understanding that the State serves as God's minister even when it acts "un-Christianly" or "anti-Christianly" helps to resolve some of the perceived tensions within Bonhoeffer's theology of the State. To illustrate the interplay of Bonhoeffer's interpretation of *Romans* 13 with his view of the role of the State, consider Professor Kenneth Ching's recent discussion whether Bonhoeffer saw the State as "redemptive."[419] Ching noted: "There are tensions here."[420] Ching posed the rhetorical question: "But how can we distinguish government actions that are Christian from those that are neutral?"[421] The Barth/Bonhoeffer interpretation of *Romans* 13 shows such questions to be somewhat beside the point. There is no theology for the State in *Romans* 13, and if not there, then where?[422] The *Romans* 13 question is not whether government actions are "Christian" or "neutral." Government actions are. "The powers that be" are. The follower of Jesus and Paul must submit. Submission does not necessarily mean obedience. Obedience to Christ may mean disobedience to the State. Even so, even in disobedience, the follower of Jesus and Paul submits to the State by quietly accepting the punishment due for the necessary disobedience. This interpretation of *Romans* 13 might be characterized as a theology of the State, but it is not a theology *for* the State.

### *C. Apartheid South Africa*

As had been the case in Nazi Germany, some Christians in South Africa cited *Romans* 13 in support of the apartheid regime.[423] *Romans* 13

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[416] BONHOEFFER, COST OF DISCIPLESHIP, *supra* note 406, at 237.

[417] *Id.* at 237–38.

[418] RASMUSSEN, *supra* note 398, at 49 n.92.

[419] *See* Ching, *supra* note 387, at 558–59.

[420] *Id.* at 559.

[421] *Id.* I hasten to acknowledge that Ching was not addressing (at least not directly) the precise issue that I am addressing. Ching was discussing what type of state action a Christian should favor. I am addressing the irrelevance of Romans 13 (from Bonhoeffer's perspective) to that question. Because we are addressing different questions, what I have written should not be read as a criticism of Ching's work on a separate question.

[422] *See id.* at 560–61 ("Bonhoeffer did not expressly answer such questions . . . .").

[423] Feinberg, *supra* note 37, at 88.

was "an important text to support the Afrikaners' view of covenantal destiny as a mandate to rule South Africa unswervingly and faithfully."[424] In particular, "the Dutch Reformed Church used Romans 13 to support its apartheid ideology."[425] Apartheid officials from the President of South Africa to individual members of the South African Security Police cited *Romans* 13 in support of the apartheid regime.[426] "Afrikaner theologians, pastors, and politicians alike all emphasized Paul's admonition in Romans 13 that everyone must submit to the governing authorities as the central Scripture concerning Christian relations to the state."[427] This application of *Romans* 13 is not hard to understand: "the apartheid state was ordained by God and must be obeyed by all living in South Africa."[428]

But many Christians in South Africa resisted this application of *Romans* 13,[429] and in 1974, the government in South Africa appointed a commission to investigate several resistant church organizations.[430] One such organization, the Christian Institute of South Africa, had been founded by the former Dutch Reformed pastor turned anti-apartheid activist, Beyers Naudé.[431] Some Christian leaders refused to testify, which "led to a series of court cases."[432] One significant statement in this regard was "signed by Theo Kotzé (director of the Cape Town region of the Christian Institute), Roelf Meyer (editor of the Christian Institute's official journal *Pro Veritate),* and Beyers Naudé."[433] This statement "reminded" its readers "that the Government does not have authority and power just because it is the Government as such, but because it is 'God's servant.' "[434] Thus, "[a]uthority is only legitimate when it does not act contrary to God's will."[435] "This interpretive move enabled Naudé to turn the conversation away from the individual and onto the government,"[436] a questionable move in light of the fact that *Romans* 13 was addressed to

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[424] *See* PAUL, *supra* note 26, at 58.

[425] *Id.* at 75.

[426] *Id.*

[427] Nichols & McCarty, *When the State is Evil*, *supra* note 20, at 609 (footnote omitted).

[428] Joel A. Nichols and James W. McCarty III, *Civil Law and Civil Disobedience: The Early Church and the Law, in* LAW AND THE BIBLE, *supra* note 17, at 183, 198 [hereinafter Nichols & McCarty, *Civil Law and Civil Disobedience*].

[429] *Id.* at 199.

[430] *See* VILLA-VICENCIO, *supra* note 80, at 201.

[431] Nichols & McCarty, *Civil Law and Civil Disobedience*, *supra* note 428, at 201–02.

[432] *See* VILLA-VICENCIO, *supra* note 80, at 201.

[433] *Id.*

[434] *Divine or Civil Obedience, 1973, in* BETWEEN CHRIST AND CAESAR, *supra* note 80, at 217, 219.

[435] *Id.*

[436] Nichols & McCarty, *Civil Law and Civil Disobedience*, *supra* note 428, at 202–03.

the individual believer, not to the government.[437] This interpretation would suggest that not all governments are ordained of God, but only good governments. However, Naudé's statement then goes on to argue that "[t]he words in Romans 13: 'The Government is ordained by God' and 'they are servants (ministers) of God' do not refer to a peculiar commission or dignity of the Government but to what it in fact is, whether it accepts Romans 13 or not."[438] This suggests that all governments, good and bad, are "ordained" by God and His "servants." Perhaps any tension between these two positions can be resolved through the position that God does not delegate authority to governments but rather uses them as tools to accomplish divine purposes.[439] But what implications would this position have for the Christian's obligation of submission? The drafters of the statement had an opinion on the subject: "If a Government violates the Gospel, it loses its authority to be obeyed in its office as ruler."[440] The drafters of the statement cited "[t]he Calvinist John Knox" and Calvin himself in support of this right of resistance.[441]

Likewise, when the South African Minister of Justice warned the South African Council of Churches national conference against its advocacy of civil disobedience, Allan Boesak, president of the WARC, responded with a letter dated August 24, 1979.[442] There Boesak argued that "the first verse of Romans 13" was "often taken as a blank legitimization of state interference."[443] But Boesak used Paul's description of the powers that be as "a servant of God, 'for your good'" to limit the legitimate exercise of government power: "[A] government wields authority for as long as there is evidence that it is accepting responsibility for the law and for justice."[444] Likewise, an "ecumenical working group" of the South African Council of Churches wrote in 1985 a document titled "A Theological Rationale and a Call to Prayer for the End to Unjust Rule."[445] That document seeks to square Christian resistance in South Africa with historical Christian traditions.[446] Perhaps ironically, the drafters of the

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[437] *See supra* text accompanying notes 92–95.

[438] *Divine or Civil Obedience, 1973*, *supra* note 434, at 219.

[439] *See supra* text accompanying notes 413–16.

[440] *Divine or Civil Obedience, 1973*, *supra* note 434, at 219.

[441] *Id.* at 219–20.

[442] VILLA-VICENCIO, *supra* note 80, at 203, 235.

[443] Allan Boesak, *Letter to the South African Minister of Justice, in* BETWEEN CHRIST AND CAESAR, *supra* note 80, at 235, 238.

[444] *Id.*

[445] VILLA-VICENCIO, *supra* note 80, at 203, 247.

[446] *See id.* at 203.

document found little support from Luther and Calvin[447], but a great deal more support from Popes John XXIII and Paul VI.[448]

*The Kairos Document* is "a biblical and theological comment on the political crisis in South Africa"[449] written by "an anonymous group of South African theologians."[450] The drafters of the document recognized that "[i]n the life and death conflict between different social forces that has come to a head in South Africa today, there are Christians . . . on both sides of the conflict—and some who are trying to sit on the fence!"[451] The drafters of the document recognized in this fact a challenge to the authority of Scripture: "Does it show that the Bible can be used for any purpose at all?"[452] It is clear that the drafters of *the Kairos Document* thought the answer to this rhetorical question was "no" and that their interpretation of Scripture is the only correct interpretation.[453] The drafters of the document attributed the division within the South African church to three differing theologies, which they labeled "'State Theology,' 'Church Theology' and 'Prophetic Theology.'"[454] The drafters of *the Kairos Document* embraced the third of these "theologies," and criticized the other two.[455]

They equated what they called "State Theology" with the South African apartheid State.[456] "State Theology" justifies apartheid "by misusing theological concepts and biblical texts for its own political purposes."[457] The prime example given was "the use of Romans 13:1–7 to give an absolute and 'divine' authority to the State."[458] *The Kairos Document* begins the consideration of *Romans* 13:1–7 by noting that "[t]he misuse of this famous text is not confined to the present government in South Africa. Throughout the history of Christianity totalitarian regimes have tried to legitimise an attitude of blind obedience and absolute servility towards the state by quoting this text."[459] The irony of this statement in light of the context in which Paul wrote *Romans*—during or

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447 *See supra* Part II.D for a discussion of the relevant views of Luther and Calvin.

448 *See* VILLA-VICENCIO, *supra* note 80, at 249; *see also infra* notes 476–81 and accompanying text.

449 *See* VILLA-VICENCIO, *supra* note 80, at 204.

450 Nichols & McCarty, *Civil Law and Civil Disobedience*, *supra* note 428, at 199.

451 *The Kairos Document*, *in* BETWEEN CHRIST AND CAESAR, *supra* note 80, at 251, 251.

452 *Id.*

453 *See id.* at 253.

454 *Id.* at 252.

455 *Id.* at 252, 261.

456 *Id.* at 252.

457 *Id.*

458 *Id.*

459 *Id.*

shortly before totalitarian Roman regimes that certainly would not cite Paul to legitimize themselves[460]—seems to escape the drafters of the document.

Nevertheless, the drafters of *the Kairos Document* seek to take Paul's teaching seriously while avoiding obedience to the apartheid regime. *The Kairos Document* identifies as the interpretive flaw of "State Theology" the assumption "that in this text Paul is presenting us with the absolute and definitive Christian doctrine about the State, in other words an absolute and universal principle that is equally valid for all times and in all circumstances."[461] Since this assumption is attributed to "State Theology" without citing a particular example, it is hard to judge whether Afrikaner Christians defended apartheid based on such an interpretation, but it is worth noting here that the strongest "quietist" responses to *Romans* 13:1–7 (such as that pursued by the Anabaptists during the reformation) emphasized the fact that *Romans* 13 is not addressed to the state at all, which seems at odds with the idea that *Romans* 13 provides the "definitive Christian doctrine about the State."[462] The Kairos writers suggest that Paul's command to submit to the powers that be in *Romans* 13 must be limited to its historical context, which the *Kairos* writers saw as Paul's combating antinomian heresy within the church at Rome.[463] Thus, Paul was merely establishing that some human power must exist to whom submission is owed.[464] Paul was not addressing whether such submission is owed if the power becomes oppressive.[465]

The drafters of *the Kairos Document* also take direct aim at the idea that "the powers that be," even the evil ones, are God's tool for accomplishing His will.[466] While the *Kairos* writers acknowledge that God allows oppressors "to rule for a while," they insist that such rule "was not God's will."[467] The exegetical strategy pursued here is the now familiar approach of reading Paul's call to obedience to the State as limited to good governments: "'*The State is there to serve God for your benefit*,' says Paul. That is the kind of State he is speaking of. That is the kind of State that must be obeyed."[468] And the converse also is true: "Inasmuch as a government does not fulfill its mission, and even does the exact opposite

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[460] *See supra* Part II.A.

[461] *The Kairos Document*, *supra* note 451, at 252–53.

[462] *Id.* at 252; *see also supra* text accompanying notes 270–75.

[463] *Id.* at 253.

[464] *Id.*

[465] *Id.*

[466] *Id.*

[467] *Id.*

[468] KAIROS THEOLOGIANS, THE MOMENT OF TRUTH: THE KAIROS DOCUMENTS 51 (Gary S. D. Leonard ed., 2010).

by punishing what is right and rewarding what is wrong, it cannot be viewed as blessed and ordained by God."[469]

The same sort of argument was made by Anglican Archbishop Desmond Tutu, the most prominent Christian leader of the anti-apartheid movement.[470] "After the establishment of a democratic government, President Nelson Mandela appointed him as chair of the South African Truth and Reconciliation Commission (TRC)."[471] In an April 8, 1988 letter to South African President P.W. Botha, Tutu declared "We accept wholeheartedly St. Paul's teaching in Romans 13—that we should submit ourselves to earthly rulers."[472] Noting that "governments" and "their apologists" cite "Romans 13, with glee," Tutu alludes to Paul's language suggesting that the ruler is to be God's "servant to do the subjects good," instilling "fear only in those who do wrong, holding no terror for those who do right."[473] Tutu then declared the following "corollary" to those propositions that he read in Paul: "you must not submit yourself to a ruler who subverts your good."[474]

It is noteworthy that upon the recent passing of the beloved national hero of South Africa, Nelson Mandela, the Baptist Union of Southern Africa, which had taken the position that no *Romans* 13 submission was owed to the apartheid regime, released this statement:

> The Apostle Paul wrote in Romans 13:4 concerning the responsibility which political leaders should exercise: "for he is God's servant for your good." Mr[.] Mandela did so in an exceptional way. He set an example to South Africa, and indeed to the world, of responsible leadership that is committed to service and not to personal power or gain. He devoted his life to South Africa and all its peoples.[475]

Thus, Nelson Mandela was truly "a power that be" in South Africa—he satisfied the perceived requirements of *Romans* 13 and was due submission per Paul's teaching. Apartheid was not.

## IV. CONTEMPORARY CHRISTIAN REFLECTIONS ON "THE POWERS THAT BE"

Before turning to contemporary evangelical Christian (largely Protestant) views of *Romans* 13, it is important to note contemporary Catholic doctrine as articulated in Vatican II. In April of 1963, Pope John

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469 Nichols & McCarty, *Civil Law and Civil Disobedience*, *supra* note 428, at 201.

470 *Id.* at 203.

471 *Id.*

472 DESMOND TUTU, THE RAINBOW PEOPLE OF GOD: THE MAKING OF A PEACEFUL REVOLUTION 152 (1994).

473 *Id.*

474 *Id.*

475 Press Release, Baptist Union of Southern Africa, Statement on the Death of Nelson Rolihlahla Mandela (Dec. 10, 2013) (on file with Regent University Law Review).

XXIII published his encyclical, *Pacem in Terris*.[476] John first grounded the origin of the state's authority in *Romans* 13[477] and then immediately followed up with a quotation of the leading forerunner of the legitimistic interpretation on *Romans* 13, John Chrysostom.[478] John XXIII's initial emphasis was that God is the author of government as necessary to human society,[479] but he quickly turned again to the legitimistic principle: "[R]epresentatives of the State have no power to bind men in conscience, unless their own authority is tied to God's authority, and is a participation in it."[480] And again, "laws and decrees passed in contravention of the moral order, and hence of the divine will, can have no binding force in conscience."[481]

While contemporary evangelical Christian voices do not sing in perfect harmony on the question of the Christian's obligation to submit to government as taught by Paul in *Romans* 13,[482] I believe that one view has started to dominate—the approach apparently embraced by Vatican II—the interpretation that John Howard Yoder has called the *legitimistic* interpretation of *Romans* 13, that the obligation of Christian submission is contingent on "the powers that be" performing the role of praising good and punishing evil.[483] This is the interpretation followed by the American revolutionaries and the opponents of apartheid in South Africa.[484]

A good place to start in surveying contemporary Protestant views of *Romans* 13 is John Howard Yoder. Yoder first rejects the perception that *Romans* 13 is "a kind of charter or constitution for the political realm."[485] Yoder therefore also rejected both what he called the positivistic and legitimistic (normative) interpretations as assuming too much about the significance of Paul's teaching in *Romans* 13.[486] According to Yoder, there is "good reason to doubt whether the intention of Paul in this passage was at all to provide this sort of metaphysic or ontology of the state. . . . The state is not instituted, i.e., established, but rather accepted in its empirical reality, as something that God can overrule toward His ends."[487] Thus,

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[476] *See* VILLA-VICENCIO, *supra* note 80, at 113.

[477] Pope John XXIII, *Pacem in Terris, in* BETWEEN CHRIST AND CAESAR, *supra* note 80, at 112, 117.

[478] *Id.*

[479] *Id.*

[480] *Id.* at 118.

[481] *Id.*

[482] *See supra* note 21 and accompanying text.

[483] *See infra* note 491 and accompanying text.

[484] *See supra* notes 359–62, 463–69, 472–74 and accompanying text.

[485] YODER, POLITICS OF JESUS, *supra* note 52, at 197.

[486] *Id.* at 201–02.

[487] YODER, CHRISTIAN WITNESS, *supra* note 65, at 75.

carefully reading *Romans* 13 in context, Yoder argues that Paul's text in *Romans* 13 neither approves nor condemns government in general or particular governments.[488] Yoder argues that God "orders" to His purposes but does not "ordain" or "institute" governments.[489]

Yoder accepts the positivistic view that all governments are permitted and used by God, but rejects the idea that God therefore approves those governments.[490] On the other hand, Yoder accepts the legitimistic (normative) idea that *Romans* 13 provides a measuring stick for government performance, but rejects the idea that the Christian is authorized to rebel against any government that does not measure up:

> [T]here are criteria whereby the functioning of government can be measured. According to the totality of the passage, we cannot measure whether we should revolt against the government, as if certain governments could fall short on the status of government, and therefore need to be revolted against. Nor can we measure by this yardstick whether a government has been permitted by God, because all government has been permitted by God. All the powers that be are subject to the ordering of God, and Christians are to be subject to them all. But we can judge and measure the extent to which a government is accomplishing its ministry, by asking namely whether it persistently (*present* participle) attends to the rewarding of good and evil according to their merits . . . .[491]

This interpretation would place the follower of Paul ever submitting and yet ever at odds with the state:

> No state can be so low on the scale of relative justice that the duty of the Christian is no longer to be subject; no state can rise so high on that scale that Christians are not called to some sort of suffering because of their refusal to agree with its self-glorification and the resultant injustices.[492]

An interesting twist on Yoder's view was recently taken by David M. Smolin and Kar Yong Lim.[493] Consistent with Yoder's view, Smolin and Lim also take the view that "what Paul advocated in Romans 13:1–7 was not an elaborate set of principles or a theory of political power or his theology of the state."[494] However, instead of seeing a limit on what Paul had to say about the nature of the state, as Yoder did, Smolin and Lim see a limit on the audience to whom Paul was commanding submission to the state. Smolin and Lim see Paul's command as addressed "to a minority

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[488] YODER, POLITICS OF JESUS, *supra* note 52, at 200.

[489] *Id.* at 203.

[490] *Id.* at 204.

[491] YODER, POLITICS OF JESUS, *supra* note 52, at 208.

[492] YODER, CHRISTIAN WITNESS, *supra* note 65, at 77.

[493] *See* Smolin & Lim, *supra* note 17, at 216.

[494] *Id.*

group who lived under the reality of a Roman hegemony and power that was unjust and oppressive. It was this vulnerable group of Christians that Paul addressed."[495]

Perhaps the leading voice in the late twentieth century evangelical protestant push toward the legitimistic interpretation of *Romans* 13 was Francis Schaeffer.[496] Francis August Schaeffer IV was born in Germantown, Pennsylvania in 1912 to parents of German ancestry.[497] Growing up, Schaeffer was considered a hard-working and conscientious child and, unbeknownst to him, on an intelligence test scored the second-highest score recorded in twenty years.[498] In 1931, Schaeffer began pre-ministerial studies at Hampden-Sydney College.[499] After graduating Magna Cum Laude, Schaeffer enrolled in Westminster Theological Seminary in Philadelphia.[500] He then transferred and graduated from Faith Theological Seminary and would later go back there to teach.[501] Schaeffer's best-known work probably is his book, *A Christian Manifesto,* which was dedicated "most of all" to Samuel Rutherford.[502] In interpreting *Romans* 13, Francis Schaeffer argued forcefully that the Christians' obligation to obey "the powers that be" is contingent on those powers' fulfilling their proper God-given role:

> God has ordained the state as a *delegated* authority; it is not autonomous. The state is to be an agent of justice, to restrain evil by punishing the wrongdoer, and to protect the good in society. When it does the reverse, *it has no proper authority.* It is then a usurped authority and as such it becomes lawless and is tyranny.[503]

The limits on the Christian's obligation to submit to the state found a receptive audience in American evangelical Christianity.[504] "Jerry Falwell's Old Time Gospel Hour alone has distributed 62,000 copies" of Schaeffer's book.[505]

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[495] *Id.*

[496] Michael S. Hamilton, *The Dissatisfaction of Francis Schaeffer*, CHRISTIANITY TODAY, Mar. 3, 1997 at 22, 22.

[497] COLIN DURIEZ, FRANCIS SCHAEFFER: AN AUTHENTIC LIFE 15–17 (2008).

[498] *Id.* at 18.

[499] *Id.* at 25.

[500] *Id.* at 32.

[501] *Id.* at 42–45, 121.

[502] SCHAEFFER, *supra* note 305, at 5.

[503] *Id.* at 91.

[504] *See* BUZZARD & CAMPBELL, *supra* note 57, at 2, 9 (identifying a growing number of conservative evangelicals willing to engage in civil disobedience).

[505] *Id.* at 10. More than a few evangelical Christian writers have followed Schaeffer's lead. *See, e.g.*, BANDOW, *supra* note 80, at 237–38 n.3 (arguing that rulers who do not act for the good of the ruled "are flouting the purpose for which their kingdoms were created, calling in question a Christian's duty to obey").

Not all evangelical Christians have been so quick to justify civil disobedience by Christians. The well-known and influential contemporary Christian pastor and media personality, John MacArthur, has written on *Romans* 13:1 "that the apostle, under the inspiration of the Holy Spirit, gives this command without qualification or condition. We are to obey *every* civil authority, no matter how immoral, cruel, ungodly, or incompetent he or she might be."[506] A view similar to MacArthur's had been described a few decades earlier by the Mennonite theologian, John Howard Yoder: "One of the most widely cited writers on the subject of the Christian's relation to the State . . . ."[507] Yoder explicitly rejects the common interpretation of *Romans* 13 that permits Christians to stand in judgment of the legitimacy of a particular state (a view that Yoder attributes to Karl Barth *vis-à-vis* Hitler[508]) before deciding whether to submit to that state: "It is just this conclusion that . . . Paul opposes in Romans 13. It is the powers that *be* to which we ought to be subjected under God for the sake of conscience."[509]

Professor Michael J. Deboer, a graduate of and former law teacher at Liberty University (founded by the Reverend Jerry Falwell), observes that "Paul seems to have assumed that civil rulers know (at least in significant part) God's moral law, the moral order of things, and that this moral law informs them as they perform their functions and make their judgments."[510] Thus, Deboer rejects the idea that Paul saw civil rulers as doing God's bidding whether they know it or not, even when they think they are doing the opposite.[511] The Liberty University Law Review also recently published another article by a recent Liberty Law graduate taking the position that *Romans* 13 provides a job description for the civil magistrate.[512] After noting that Paul uses the Greek word *diakonos* meaning "an *attendant*, i.e., (gen.) a *waiter* (at table or in other menial duties)," Benjamin Walton argues that "the civil magistrate is God's servant, and as such, he is to be attentive to and attendant upon the needs

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[506] JOHN F. MACARTHUR, JR., WHY GOVERNMENT CAN'T SAVE YOU 21 (2000); *see John MacArthur's Biography*, GRACE TO YOU, http://www.gty.org/connect/biography (last visited Nov. 13, 2014) (describing MacArthur's background and influence).

[507] BUZZARD & CAMPBELL, *supra* note 57, at 143.

[508] YODER, CHRISTIAN WITNESS, *supra* note 65, at 43 n.8.

[509] *Id.* at 43.

[510] Michael J. DeBoer, *Seek a Right View of the Bible—A Biblical and Theological Response to Herbert W. Titus and Some Lessons for Christian Law Students*, 2 LIBERTY U. L. REV. 339, 384 (2008).

[511] *See id.*

[512] Benjamin S. Walton, *The Authoritativeness and Usefulness of the Principles of God's Old Covenant Law for the New Covenant Church and State*, 5 LIBERTY U. L. REV. 419 (2011).

of his Lord. . . . His specific job description is punishing those who do evil and praising those who do well."[513] Walton is not troubled by the Christian doctrine of the Fall: "Since Jesus came to redeem and restore all of the created order, He came to redeem and restore the institutions of both the Church and the state."[514]

In his book, *Redeeming Law,* outspokenly Christian law professor Michael Schutt takes a very sanguine view, from an explicitly Christian perspective, of the civil magistracy.[515] Schutt cites *Romans* 13 for the proposition that God appoints the civil ruler as His instrument for the punishment of evil doers and for the praise of doers of good.[516] And these civil rulers are to be no mere passive instruments. Schutt's version of the *Romans* 13 civil magistrate is that she is God's vicegerent or "agent," not merely God's servant or instrument.[517] If *Romans* 13 were read as not addressing how the ruler should view her own role (since the ruler end of the ruler-ruled relationship is not directly addressed by Paul),[518] then *Romans* 13 simply teaches that magistrates are God's instruments, not His agents. But Schutt's vision of these human instruments in God's service is one of human rulers consciously trying to accomplish divine purposes on earth.[519] For Schutt, when St. Paul the Apostle speaks of human rulers as God's "servants," this implies agency—the human ruler consciously acts for God.[520] The civil ruler exercises "delegated

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[513] *Id.* at 447.

[514] *Id.* at 460.

[515] JEFFREY A. BRAUCH, A HIGHER LAW: READINGS ON THE INFLUENCE OF CHRISTIAN THOUGHT IN ANGLO-AMERICAN LAW 419–20 (2d ed. 2008).

[516] MICHAEL P. SCHUTT, REDEEMING LAW: CHRISTIAN CALLING AND THE LEGAL PROFESSION 202 (2007).

[517] *See id.* at 202.

[518] *See supra* text accompanying notes 86–96.

[519] *See* SCHUTT, *supra* note 516, at 51 ("The particular way we are to live out the offices . . . is determined by discernment of obligations germane to the particular post under the circumstances at hand.").

[520] *See id.* at 202 ("[T]he civil ruler is appointed by God as an agent—a servant—of God *to do us good.*"). Schutt's interpretation of "servant" or "minister" may be problematic. The word translated "servant" in *Romans* 13 is used at least sixteen times in the New Testament, overwhelmingly in reference to menial servants or slaves, and never for one who exercises discretionary authority in service of another. Jesus Christ is recorded as using the word, twice each in the Gospels *Matthew* and *Mark. See Matthew* 20:26, 23:11; *Mark* 9:35, 10:43 (describing the proper attitudes of His followers—they should be "servants," not masters). Christ also uses the word to describe one who follows the precise command of the king. *Matthew* 22:13. Twice in the account of changing water into wine the word is used to describe those who were commanded to draw water. *John* 2:5, 9. The other uses are by St. Paul the Apostle, twice here in *Romans* 13:4. In *Romans* 15:8 Paul exhorts his readers to accept one another just as Christ became the "servant" of the uncircumcision. In *Romans* 16:1, Phoebe was identified as a "servant of the church which is at Cenchrea." In *I Corinthians* 3:5 Paul emphasizes that he and Apollos are nothing, mere "servants." In *II*

authority . . . to punish wrongdoers . . . and to praise those who do right."[521] The civil magistrate, as God's agent, discerns God's will and uses human power to try to bring the Divine will about.[522] As such, the civil magistrate is obligated to pursue the "human" reflections, attempts, and parts of the eternal law according to principles or patterns that can be seen (albeit dimly) in the divine law (the Bible).[523]

Schutt's sanguine view of the civil magistrate leads to a similarly sanguine view of the nature of human law. To Schutt, the state is not "inherently untrustworthy in its role as minister of justice."[524] Human law is not merely instrumental and secular.[525] Schutt teaches that human law is not purely secular since it is (or should be) patterned on divine law and in fact relies on it.[526] If only mankind would bring to bear Schutt's biblical worldview on our attempts to apply law, we would see that there is

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*Corinthians* 3:6 Paul opines that Christians are adequate only as "servants" of Christ. In *II Corinthians* 6:4 Paul exhorts the Corinthians to endure afflictions as "servants" of God. Paul uses the word twice in *II Corinthians* 11, once to describe the "servants" of Satan, *II Corinthians* 11:15, and once to describe his own "service" for Christ in suffering beatings, afflictions, etc. *II Corinthians* 11:23. It is hard to square these other uses of the word "servant" with Schutt's vision.

[521] SCHUTT, *supra* note 516, at 202.

[522] *See id.* at 202 (suggesting the magistrate accomplishes this by meting out punishment for wrongdoers and rewarding the righteous).

[523] *See id.* at 30–31.

[524] *See id.* at 201–02.

[525] *See id.* at 33. Here I must disagree with my beloved colleague Michael Schutt. My view is that human law, like other human institutions, such as war and private property, is "secular" or "temporal" in the sense that it has a limited purpose—that it does not exist for its own sake. When the purpose is fulfilled, it no longer need exist and might eventually cease. Temporal institutions are instruments of their purposes. One who understands the purpose of the institution has some insight into the proper nature of the institution. Not everything is secular. Some things exist for their own sake. For example, perhaps music is a human institution that, in my opinion, is not instrumental. I believe that art and music are as eternal as humans are since they would exist even in an ideal, sinless human society. Human war would not. Private property, in my opinion, would not. *See* Louis W. Hensler III, *What's* Sic Utere *for the Goose: The Public Nature of the Right to Use and Enjoy Property Suggests a Utilitarian Approach to Nuisance Cases*, 37 N. KY. L. REV. 31, 35–47 (2010) (outlining the evolution of the view of private property in the West from roots in instrumental toleration). Human music exists for its own sake. I believe that it is impossible to be fully human without music. Music is necessary to human flourishing, even under idemal conditions. For me, the question is whether law is the same way. I think not. I think that music is something that humans do because we are humans. I think that law is something that humans do because we are fallen, sinful, and prone to self-destruction—we would be killing each other without law. It is easy to imagine music with no end other than itself. I do not even know what it would mean to ask whether human music "works." But I certainly can critique human law on whether it works. To me, all of this points to the instrumental nature of human law. Schutt strongly disagrees with this view of human law as temporal and instrumental.

[526] *See* SCHUTT, *supra* note 516, at 31–32.

something about human law that makes it more than a tool for manipulation of those under law's authority.[527] Schutt's interpretation of *Romans* 13 supports his relatively aggressive view of the role of the civil magistrate in enforcing natural law.

David M. Smolin and Kar Yong Lim have recently published a similar view of *Romans* 13. They begin by limiting Paul's seemingly universal command of submission to powers in verses one and two to the precise context into which Paul wrote.[528] Smolin and Lim then interpret the following verses as setting out "how godly ruling authorities should act."[529] This creates some tension since it seeks to limit Paul's opening command to the precise historical context while treating Paul's description of the ruling powers to whom submission is owed as transcending historical context. Smolin and Lim accomplish this by converting Paul's indicative description of the power as "the minister of God, a revenger to execute wrath upon him that doeth evil"[530] into the imperative: "They are to punish those who do wrong and commend those who do right."[531] Forging their limitation on Paul's command of submission to their conversion of Paul's description of powers as a prescription directed to all rulers yields a limited obligation to submit to good rulers: "what Paul seems to be advocating here is willing submission with the clearly implied assumption that this submission is only appropriate to a power that deserves such obedience, a power that rules justly."[532] Smolin and Lim believe that Paul's readers would have recognized that "the powers that be" of their day (Caesar) does not live up to God's standard for ruling powers set out in *Romans* 13.[533] Ironically, then, Paul's directions for good government in *Romans* 13:3–4 nullify the command of submission with which Paul starts in *Romans* 13:1. The apparent internal tension in the Smolin/Lim view of *Romans* 13 extends to their discussion of verse seven. Paul exhorts Roman Christians to pay the taxes due, even if those taxes are seen as "excessive and unjust."[534] But when it comes to rendering respect and honor to the

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[527] Schutt sees his view of the relationship between human law and natural law as based on the natural law thinking of St. Thomas Aquinas. *See* SCHUTT, *supra* note 516, at 28. I have elsewhere suggested that it is possible to take a fairly instrumental reading of Aquinas. *See* Louis W. Hensler III, *A Modest Reading of St. Thomas Aquinas on the Connection Between Natural Law and Human Law*, 43 CREIGHTON L. REV. 153, 167–73 (2009); *see also supra* note 525 (discussing how human law could be instrumental).

[528] Smolin & Lim, *supra* note 17, at 215–16.

[529] *Id.*

[530] *Romans* 13:4 (King James).

[531] Smolin & Lim, *supra* note 17, at 216.

[532] *Id.*

[533] *See id.* at 216–17.

[534] *Id.* at 217.

powers, the obligation is more strictly construed—only those who earn honor and respect by "honor[ing] their divinely appointed role" are "due" such respect.[535] Thus, while Paul's teaching in *Romans* 13 appears on the surface to be non-resistant to "the powers that be," it is actually "subversive" to those unjust powers.[536]

Professor Smolin tries to take what he calls "a properly minimalist reading of Romans 13:1–7,"[537] but trying to keep the idea that rulers are to serve as God's self-conscious agents for the punishment of evil and the praise of good while cabining that role in a way that would be acceptable to the contemporary West has proven to be extremely difficult at best. The only limit on such authority, once recognized, appears to be what Professor Smolin calls "prudence": "The church has long understood that there are many evils that in prudence do not come within the jurisdiction of the civil magistrate and many goods that the state is powerless to establish or even further."[538] How to exercise this "prudence" certainly is not spelled out in *Romans* 13. If the civil magistrate is to self-consciously punish evil and praise good, there is no logical limit to that jurisdiction.[539] It is possible for people informed by biblical principles to suggest standards for the jurisdiction of the civil magistrate—I have tried my hand at that task.[540] Professor Smolin likewise has previously tried to divine principles for dividing between moral law that the civil magistrate is authorized by God to enforce and that part that the magistrate is not authorized to enforce.[541] But such attempts frequently emerge from practical human reason and then sometimes are read back onto *Romans* 13. Those are not interpretations that emerge from the text of *Romans* 13. They are not true readings of *Romans* 13, minimalist or otherwise.

## CONCLUSION

The observant reader probably has discovered hints as to my own interpretation of *Romans* 13. I tend to think that Paul's statement in this paraenetic section of *Romans* is primarily about the believer's life in light of the sovereignty of God. Paul undoubtedly understood that there would be a tendency to rebel against or at least bristle at hostile government

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[535] *Id.* at 218.

[536] *Id.*

[537] *Id.* at 223.

[538] *Id.*

[539] *See* Elizabeth Mensch, *Christianity and the Roots of Liberalism*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 54, 66 (Michael W. McConnell et al. eds., 2001) (discussing Augustine's and Luther's views that the polity is "only a necessary . . . dike against chaos" and that there is "no conceptual basis for legal limits to a ruler's power").

[540] *See* Hensler, *A Modest Reading of St. Thomas Aquinas*, *supra* note 527, at 173–74.

[541] *See* David M. Smolin, *The Enforcement of Natural Law by the State: A Response to Professor Calhoun*, 16 U. DAYTON L. REV. 381, 397–402 (1991).

forces, and I think Paul was asserting that all things ultimately are under God's control. "The powers that be are ordained of God." Therefore, it is safe for the believer to accept those powers as a given and to submit to them. To resist would be to resist what God in His sovereign plan has permitted. While hostile rulers might naturally engender fear, the believer who does good need not fear, for the ruler's hostility always will be filtered through God's sovereign control. God will see that the believer who does good receives praise, either now or hereafter.

While Paul describes how God commonly uses human rulers as His servants for wrath, and *Romans* 13:1–7 commands submission to those "the powers that be," Paul says nothing to the powers that be. Thus, Paul's indicative description of how God uses human powers is not an imperative norm for the rulers themselves. I see the approach of many Christians from the Middle Ages forward, who have used *Romans* 13 either to justify or to condemn particular governing regimes (a practice that continues to this very day) to be almost entirely beside Paul's point. In this, I think my view is consonant with that of the non-resistant Anabaptists and with the Lutherans, particularly including Dietrich Bonhoeffer.

# CALLING THE COURT OF PUBLIC OPINION TO ORDER: A CRITICAL ANALYSIS OF *STATE OF FLORIDA V. GEORGE ZIMMERMAN*

## INTRODUCTION

Vigilante.[1] Wannabe cop.[2] Creepy-ass cracker.[3] These pejoratives are a small selection of a wide array of titles given to George Zimmerman, and they were repeated *ad nauseam* in the news media[4] until Zimmerman's acquittal of second-degree murder.[5] Although these words communicate concentrated vitriol toward Zimmerman, they are microcosms of the extent to which Zimmerman was impugned in the public eye. George Zimmerman will look over his shoulder for the rest of his life, having reentered a world where he is despised by many.[6] Zimmerman was tried and convicted in the court of public opinion long before a verdict was returned in the Circuit Court of Seminole County, Florida.

Zimmerman's uphill battle to secure justice was marked by obstacles such as the misleading characterization of his ethnicity as a "white Hispanic,"[7] unfounded accusations of racial profiling,[8] the doctoring of his

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1 Defendant's Motion in Limine Regarding the Use of Certain Inflammatory Terms at 2, State v. Zimmerman, No. 2012-001083-CFA (Fla. Cir. Ct. May 30, 2013) [hereinafter Motion in Limine Regarding Inflammatory Terms], *available at* http://www.gzdocs.com/documents/0613/limine_use_of_terms.pdf.

2 *Id.*

3 Lizette Alvarez, *At* Zimmerman *Trial, a Tale of Pursuit and Attack*, N.Y. TIMES, June 27, 2013, at A19.

4 The prejudicial characterization of Zimmerman in the media and the extent to which the public adopted a negative view of Zimmerman caused the defense to file a motion in an attempt to prevent the prosecutors from eliciting improper emotional responses from jurors. *See* Motion in Limine Regarding Inflammatory Terms, *supra* note 1.

5 Judgment of Not Guilty, State v. Zimmerman, No. 12-CF-1083-A (Fla. Cir. Ct. July 13, 2013), http://www.flcourts18.org/PDF/Press_Releases/Judgment_of_Not_Guilty_7_13_13.pdf; Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES, July 14, 2013, at A1.

6 Zimmerman's brother Robert described fear on the part of the defendant and his family that arose because of the trial and the fear did not end after Zimmerman was acquitted. Interview by Piers Morgan with Robert Zimmerman Jr., *CNN Breaking News* (CNN television broadcast July 13, 2013), *available at* http://transcripts.cnn.com/TRANSCRIPTS/1307/13/bn.01.html.

7 *CNN's "White Hispanic" Label for George Zimmerman Draws Fire*, HUFFINGTON POST (July 12, 2013, 5:59 PM), http://www.huffingtonpost.com/2013/07/12/cnn-white-hispanic_n_3588744.html.

8 *See, e.g.*, Valena Elizabeth Beety, *What the Brain Saw: The Case of Trayvon Martin and the Need for Eyewitness Identification Reform*, 90 DENV. U. L. REV. 331, 336 (2012) (arriving abruptly at the conclusion that "[Trayvon] Martin's race . . . likely influenced Zimmerman's identification of Martin as a criminal."); *see also* Motion in Limine Regarding Inflammatory Terms, *supra* note 1, at 3 ("It is, of course, highly improper to interject even a

statements by media outlets,[9] and the deceptive circulation of mugshot photographs of him.[10] As further fuel to the fire, the *Zimmerman* trial was referred to by some as the most polarizing legal controversy since the O.J. Simpson "trial of the century."[11]

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reference to, let alone an accusation of racism which is neither justified by the evidence nor relevant to the issues into any part of our judicial system. It is particularly reprehensible when this is done by a representative of the state in a criminal prosecution." (quoting Perez v. State, 689 So. 2d 306, 307 (Fla. Dist. Ct. App. 1997))).

[9] Zimmerman sued NBC for its willful promulgation of a news report in which an NBC affiliate spliced a 911 recording of Zimmerman's voice, making it appear that Zimmerman suspected Trayvon Martin of being a criminal because of his race. Complaint at 2–3, Zimmerman v. NBC Universal Media, No. 12CA6178-16-K, 2012 WL 6107926 (Fla. Cir. Ct. Dec. 6, 2012) [hereinafter Zimmerman Complaint]. Zimmerman was unsuccessful in his suit. *See* Zimmerman v. Allen, No. 12-CA-6178, 2014 WL 3731999, at *15 (Fla. Cir. Ct. June. 30, 2014) (granting summary judgment for NBC).

[10] *See* Martin A. Holland, Note, *Identity, Privacy and Crime: Privacy and Public Records in Florida*, 23 U. FLA. J.L. & PUB. POL'Y 235, 240–41 (2012) ("As [the Zimmerman-Martin incident] rapidly gained publicity, a 2005 booking photograph of George Zimmerman was circulated by many media outlets, often without referencing the fact that the photograph was 7 years old, or that the charges against Zimmerman had been dropped. In the 7-year-old mugshot, Zimmerman is 'an apparently heavyset figure with an imposing stare, pierced ear and facial hair, the orange collar of his jail uniform visible.' At the time of the shooting of Martin, Zimmerman was 28 years old, and more recent photos of a slimmer, 'beaming Zimmerman looking sharp in a jacket and tie' received far less attention, even though they would be a more accurate record of his appearance at the time of the shooting. Experts noted that the outdated mugshot photo could portray Zimmerman as more menacing, and that is an ingredient 'journalists will grab onto and present.'" (footnotes omitted)).

[11] *Cf.* Chris Jones, *Courtroom No Place for the Great American Narrative*, CHI. TRIB., July 20, 2013, at C1 ("[T]rials are lousy places to look for . . . broader inferences . . . . The reason for the long-standing popularity of trial coverage is obvious: they appear inherently dramatic. . . [Such] exposure means that trials like the *Zimmerman* [trial] become catalysts for all kinds of post-facto actions: speeches, protests, marches. They spark boycotts, as with Stevie Wonder's declaration that he will not play in Florida until the 'stand your ground' law of that state is changed. But to say that trials are imperfect loci for these national moments of navel-gazing is to understate their flaws.").

In the *Zimmerman* trial, as will be discussed below, Presiding Judge Debra Nelson maintained control over her courtroom despite her apparent lack of patience for the defense attorneys, and she prevented the proceedings from becoming a politicized "show trial," as described by Professor Allo:

> A trial becomes a 'show trial' only when it involves a matter of public concern or a public figure. In most cases, juridical exercises dubbed 'show trials' deal with matters that are irreducibly political and only incidentally legal. They become subjects of concern, because the stories and narratives they unburden are stories that the society desperately needs an answer to—one that strikes home with every politically informed citizen.

Awol K. Allo, *The "Show" in the "Show Trial": Contextualizing the Politicization of the Courtroom*, 15 BARRY L. REV. 41, 71 (2010) (cautioning against the use of the courtroom for purely coercive ideological ends and noting that show trials can be used to achieve both oppressive and emancipatory results).

Like Professor Alan Dershowitz's post-acquittal "tell-all" about the O.J. Simpson trial, Sections I and II of this Article will serve as a hypothetical appellate brief for *State v.*

The media coverage of the *Zimmerman* case might paint a picture in which the justice system favors whites and discriminates against African-Americans.[12] At the same time, one might see a trial spiraling downward.[13] The proceedings devolved from what should have been a simple debate over the existence of the elements in a murder case to a "call to justice"—a nationwide throwing of pent-up, racially motivated accusations at George Zimmerman to see what would stick.[14] Distinct and opposite positions on the trial and Zimmerman's innocence quickly formed.[15] The trial caused a notable rearranging of traditional political positions on crime and justice, too.

> In a sense, the world has been turned topsy-turvy. Progressive activists and scholars call for the application of police power to Zimmerman and the elimination of a defense-friendly law for all future murder defendants. Conservative commentators lobby for prosecutorial restraint and the scrupulous honoring of a murder defendant's legal rights. What could move the tough-on-crime party to support leniency? What could move state authority skeptics to champion broadening prosecutorial power?[16]

A unique and tragic set of facts caused such a dramatic role reversal.

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*Zimmerman*. *See generally* ALAN M. DERSHOWITZ, REASONABLE DOUBTS: THE CRIMINAL JUSTICE SYSTEM AND THE O.J. SIMPSON CASE 16 (1997) ("explain[ing] why even jurors who thought that Simpson 'did it' as a matter of fact could reasonably have found him not guilty as a matter of law—and of justice").

[12] *See* Tom Foreman, *Analysis: The Race Factor in George Zimmerman's Trial*, CNN (Jul. 15, 2013, 9:10 AM), http://www.cnn.com/2013/07/14/justice/zimmerman-race-factor/; *see also* Anita Bernstein, *What's Wrong with Stereotyping?*, 55 ARIZ. L. REV. 655, 690–92 (2013) (noting that violent conduct may be reasonable and comprehensible as self-defense without regard to the race of those involved in the encounter, yet arriving at the conclusion that "[k]illers are more likely to prevail when they are white or male rather than African American or female, because the actions of white persons and men are more likely to be perceived as orderly.").

[13] *See* Jones, *supra* note 11.

[14] Many commentators further contend that the *Zimmerman* trial was not just a case about proving the elements of second-degree murder, but rather, a case that functioned as a referendum on the use of racially biased notions of "fear-of-other" and "Black-as-criminal" as rationales for self-defense. *See, e.g.*, Tamara F. Lawson, *A Fresh Cut in an Old Wound–A Critical Analysis of the Trayvon Martin Killing: The Public Outcry, the Prosecutors' Discretion, and the Stand Your Ground Law*, 23 U. FLA. J.L. & PUB. POL'Y 271, 297, 300 (2012).

[15] *See, e.g.*, Alvarez & Buckley, *supra* note 5 (reporting immediate reactions to the *Zimmerman* trial verdict); Matt Gutman et al., *George Zimmerman's Donations Spike on His Return to Jail*, ABC NEWS (June 4, 2012), http://abcnews.go.com/US/george-zimmermans-donations-spike-return-jail/story?id=16490782#.T8z8ZZlYusB (describing the surge in donations to the George Zimmerman's defense fund after he was ordered to return to jail).

[16] Aya Gruber, *Leniency as a Miscarriage of Race and Gender Justice*, 76 ALB. L. REV. 1571, 1573 (2013) (footnotes omitted).

This Note will discuss the obstacles George Zimmerman faced and overcame in his effort to obtain justice.[17] Part I analyzes the procedural and evidentiary irregularities that occurred at the trial. Part II discusses relevant cases illustrative of the elements of the second-degree murder charge Zimmerman faced, as well as why both murder and the lesser included crime of manslaughter were negated by self-defense. Part III presents a Christian perspective on self-defense, and more specifically, on the actions taken by Zimmerman when he defended himself on February 26, 2012.[18] In addition to discussing how George Zimmerman is indisputably legally innocent in light of the facts of his case, this Note also presents perspectives on factual issues about the case that have been underreported by the media. This Note does not address the controversy surrounding Florida's "Stand Your Ground" law, in light of the veritable mountain of scholarship that has been produced on the subject.[19]

## I. *STATE V. ZIMMERMAN*: CASE FACTS

### *A. Prosecutor's Version*

Viewed in the light most favorable to the State of Florida, Trayvon Martin, an unarmed African-American boy,[20] was "profiled" by George Zimmerman on Sunday, February 26, 2012.[21] Martin, who had been

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[17] It is this author's intent to provide a dispassionate, apolitical legal analysis of this case while respecting the memory of Trayvon Martin.

[18] *See* Narrative Report from George Michael Zimmerman to Sanford Police, at 2–4 (Feb. 26, 2012) [hereinafter Zimmerman Statement], *available at* http://s3.documentcloud.org/documents/371127/george-zimmerman-written-statement.pdf.

[19] *See, e.g.*, Tamara Rice Lave, *Shoot to Kill: A Critical Look at Stand Your Ground Laws*, 67 U. MIAMI L. REV. 827 (2013).

At the time this Note was written, an effort to repeal Florida's Stand Your Ground law, FLA. STAT. ANN. § 776.013 (Westlaw through Ch. 254, 2014 2d Reg. Sess.), had been recently defeated in subcommittee. Bill Cotterell, *Florida Bid to Repeal "Stand Your Ground" Law Fails*, HUFFINGTON POST (Nov. 7, 2013, 10:54 PM), http://www.huffingtonpost.com/2013/11/08/stand-your-ground-repeal-fails_n_4237302.html.

[20] *See* Affidavit of Probable Cause—Second Degree Murder, at 1, State v. Zimmerman (Fla. Cir. Ct. Apr. 11, 2012) [hereinafter Affidavit of Probable Cause], http://s3.documentcloud.org/documents/336022/zimmerman-probable-cause-document.pdf; Zimmerman Complaint, *supra* note 9, at 1; Alvarez & Buckley, *supra* note 5.

[21] *See* Affidavit of Probable Cause, *supra* note 20, at 1. The accusation of profiling was a notably bare assertion but it had a substantial bearing on the *Zimmerman* case. *See infra* note 152 and accompanying text (noting that the relationship between the second-degree murder defendant and the victim is usually one that has been established for longer than a mere chance encounter; if it could be established that Zimmerman observed and maliciously profiled Martin for long enough, the requisite malice for second-degree murder may have been formed). Profiling, a fully legal, non-racial, and ordinary practice, is defined as "the activity of collecting important and useful details about someone." *Profiling Definition*, DICTIONARY.CAMBRIDGE.ORG, http://dictionary.cambridge.org/us/dictionary/business-english/profiling (last visited Nov. 14, 2014). We "profile" the person standing off

temporarily living in the same gated community as Zimmerman, the Retreat at Twin Lakes in the city of Sanford,[22] was returning home from 7-Eleven with his purchases.[23] Zimmerman saw Martin while driving through the neighborhood, assumed Martin was a criminal who did not belong in the gated community, and called the police.[24]

Zimmerman asked for an officer to respond to the scene because he thought Martin was acting suspicious.[25] The dispatcher told Zimmerman to wait for the police to arrive.[26] While waiting for an officer to arrive, Zimmerman made explicit references to people he thought had gotten away with break-ins in the neighborhood, saying that "these a[******], they always get away" and calling them "f[******] punks," all of which the dispatcher heard.[27]

Martin called a friend and told her that he was scared of being followed through the neighborhood for no reason by someone he didn't know.[28] Martin tried to run home, and Zimmerman followed under the false assumption that a potential criminal was going to get away.[29] The dispatcher became aware of Zimmerman's pursuit and told him to stop and wait for the police to arrive, but Zimmerman ignored instructions and continued to follow Martin.[30]

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down the hallway that we cannot see clearly, but think to be a friend of ours based upon the way they look and the way they walk. The police officer "profiles" the unknown driver weaving in and out of his lane before pulling him over, as well as the two people who have just exchanged items in the darkened parking lot. The reader has possibly even "profiled" this author based upon the title of this article.

22 Affidavit of Probable Cause, *supra* note 20, at 1.

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.* Zimmerman's comments to the dispatcher became the famous subject of malicious editing by NBC and its Florida affiliates. The audio splicing made Zimmerman out to have racially profiled Martin, and it included doctored statements such as "This guy looks like he's up to no good . . . . He looks black" and false reports that Zimmerman said "f****** coons" in reference to Martin. Zimmerman Complaint, *supra* note 9, at 2, 14. Zimmerman brought suit in Seminole County Circuit Court for defamation and intentional infliction of emotional distress. *Id.* The bulk of the manipulated editing of Zimmerman's statements ironically occurred on March 22, 2013, *id.* at 15, the same day that State Attorney for the Eighteenth Judicial Circuit Norm Wolfinger recused himself and Jacksonville State Attorney Angela Corey was appointed instead to prosecute George Zimmerman. *See* Fla. Exec. Order No. 12-72 (2012) [hereinafter Exec. Order 12-72], http://www.flgov.com/wp-content/uploads/orders/2012/12-72-martin_10-2.pdf.

28 Affidavit of Probable Cause, *supra* note 20, at 2.

29 *Id.*

30 *Id.*

Zimmerman confronted Martin, and a fight broke out.[31] Witnesses in the area described hearing an argument and calls for help.[32] Martin's mother identified the person calling for help as her son Trayvon.[33]

Zimmerman shot Martin in the chest and admitted to the shooting.[34] Upon arresting Zimmerman, police found a holstered gun inside his waistband.[35] A spent casing recovered at the scene was found to have been fired from Zimmerman's gun.[36] Finally, a gunshot wound was determined by a medical examiner to have been Trayvon Martin's cause of death.[37]

### *B. Defendant's Version*[38]

Viewed in the light most favorable to George Zimmerman, the neighborhood watch patrol that led to the tragic death of Trayvon Martin on February 26, 2012 was imminently necessary.[39] In response to growing concerns about recent break-ins, observation of suspicious persons, and robberies that had occurred in the Retreat at Twin Lakes community, a Neighborhood Watch program was sanctioned by the Sanford Police Department ("SPD").[40] Zimmerman, the community's Neighborhood Watch coordinator,[41] was in the middle of running an errand when he first observed Trayvon Martin.[42]

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31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

38 This version of facts combines emails and other documents compiled by the defense, including George Zimmerman's statement to police given shortly after the shooting incident.

39 *See* Email from George Zimmerman, Neighborhood Watch Patrol (Feb. 7, 2012, 2:45 PM), *available at* http://www.gzdocs.com/documents/0513/discovery_3/feb_7_email.pdf (describing a daytime robbery and encouraging residents to take appropriate security measures); Email from George Zimmerman, Neighborhood Watch Patrol (Feb. 20, 2012, 3:12 PM), *available at* http://www.gzdocs.com/documents/0513/discovery_3/feb_20_email.pdf (noting the apprehension of the suspected thief).

40 In 2011, Zimmerman voiced his concerns about a past incident involving the SPD in an email to Police Chief Bill Lee. Chief Lee responded with praise and thanks for Zimmerman's work as a neighborhood watch volunteer coordinator. *See* Email from Bill R. Lee, Jr., Chief of Police, City of Sanford, to George Zimmerman 1, 2 (Sept. 19, 2011, 1:05 PM) [hereinafter Lee-Zimmerman Emails], *available at* http://www.gzdocs.com/documents/0513/defense_discovery/general/2011-09-20_triplettj_email_re-dorivalw.pdf; *see also* Zimmerman Statement, *supra* note 18 (noting, in a statement given after the shooting, that neighbors formed the "Neighborhood Watch Program" in response to growing fears about the rising crime level in the Retreat at Twin Lakes).

41 Lee-Zimmerman Emails, *supra* note 40, at 2.

42 Zimmerman Statement, *supra* note 18, at 1.

While driving to the grocery store, Zimmerman saw Martin, a male between 5'11" and 6'2", walking casually in the rain and looking into houses.[43] Pursuant to SPD instructions given to him about suspicious persons,[44] Zimmerman called the SPD non-emergency number.[45] While Zimmerman related details about Martin to the dispatcher, Martin fled to a darkened area of the sidewalk.[46] As Zimmerman attempted to gain his bearings and give the dispatcher his exact location, Martin reappeared and began to circle Zimmerman's vehicle.[47] Zimmerman, who was still in his vehicle, could not hear whether Martin said anything while he circled.[48]

Martin disappeared again between two houses.[49] While Martin was out of sight, the dispatcher again asked Zimmerman for his location.[50] Zimmerman could not remember the name of the street, so he got out of his vehicle to look for a street sign, informing the dispatcher of his actions.[51] The dispatcher then asked Zimmerman for a description of the suspicious person and the direction he had headed.[52] Zimmerman told the dispatcher he was unable to do so based on his still-limited observations.[53] The dispatcher told Zimmerman not to follow Martin because an officer was on the way.[54] Zimmerman obeyed the dispatcher and headed back to his vehicle.[55]

Martin then emerged from the darkness and confronted Zimmerman, saying, "You got a problem."[56] Zimmerman replied, "No," and in response, Martin asserted, "You do now."[57] Zimmerman realized that the situation had escalated beyond mere suspicion of danger and into an immediate threat, so he attempted to dial 911, forgoing the SPD non-emergency number.[58] Martin punched him in the face, and Zimmerman fell to the ground on his back.[59] Martin then climbed on top of Zimmerman as

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43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.* at 1–2.
47 *Id.* at 2.
48 *Id.*
49 *Id.*
50 *Id.*
51 *Id.*
52 *Id.*
53 *Id.*
54 *Id.*
55 *Id.*
56 *Id.*
57 *Id.*
58 *Id.* at 3.
59 *Id.*

Zimmerman yelled for help repeatedly.[60] Martin told Zimmerman to "shut the f*** up,"[61] and as Zimmerman tried to sit up, Martin grabbed his head and slammed it into the concrete sidewalk several times.[62] Martin slammed Zimmerman's head back down onto the concrete sidewalk each time Zimmerman tried to sit up.[63]

Zimmerman tried to slide out from under Martin, who was still on top of him.[64] As he did so, Zimmerman continued to yell for help, prompting Martin to cover Zimmerman's mouth and nose in an attempt to stop the noise, and, in Zimmerman's opinion, his breathing.[65] Martin saw Zimmerman's gun and reached for it, saying, "You gonna die tonight, motherf*****."[66]

Zimmerman believed that Martin was about to act on the statement "you gonna die tonight, motherf*****."[67] In light of that deathly assurance, Zimmerman drew his gun and fired one shot into Martin's torso.[68] SPD soon arrived to disarm and detain Zimmerman.[69]

## II. PROCEDURAL IRREGULARITIES IN THE *ZIMMERMAN* CASE

Pretrial proceedings and the trial record in the *Zimmerman* case contained substantial irregularities. These perplexing issues were the subject of remedial strategies by the defense at trial, and they could have served as a basis for reversal on appeal.[70] Controversy and confusion plagued the case from the initial decision to charge Zimmerman to the trial.[71]

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60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.* at 3–4.

68 *Id.* at 4.

69 *Id.*

70 *See* FLA. STAT. ANN. § 924.33 (Westlaw through Ch. 255, 2014 Spec. "A" Sess.) (instituting Florida's standard for reversal on appeal).

71 *See* Elliott C. McLaughlin, *Ex-Sanford Police Chief: Zimmerman Probe "Taken Away From Us,"* CNN (July 11, 2013, 12:03 PM), http://www.cnn.com/2013/07/10/justice/sanford-bill-lee-exclusive/.

### *A. To Charge or Not to Charge?*

#### 1. Information or Grand Jury Indictment: A Balancing Test

On March 13, 2012, the SPD decided not to charge Zimmerman, citing a lack of probable cause to refute self-defense.[72] SPD handed the case over to the State Attorney for the Eighteenth Judicial Circuit, Norm Wolfinger.[73] Wolfinger announced that he would submit the Zimmerman-Martin matter to a Seminole County grand jury on April 10, 2012.[74] However, Wolfinger's recusal was suddenly announced in Governor Rick Scott's Executive Order 12-72 on March 22, 2012.[75] Before the grand jury convened, Jacksonville State Attorney Angela Corey was appointed to handle the case in Wolfinger's place,[76] and by April 11, the day after the grand jury would have convened under Wolfinger's supervision,[77] Corey charged Zimmerman by information with second-degree murder.[78]

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[72] *Id.* Sanford Chief of Police Bill Lee noted that while his lead investigator had recommended a manslaughter charge, the evidence before him could not overcome the facts supporting Zimmerman's self-defense claim. Lee further lamented that "[t]he police department needed to do a job, and there was some influence—outside influence and inside influence—that forced a change in the course of the normal criminal justice process . . . . [The] investigation [of the Zimmerman-Martin matter] was taken away from us. We weren't able to complete it." *Id.*; *see also Ex-Sanford Police Chief Tells Local 6 Why He Didn't Arrest George Zimmerman*, CLICK ORLANDO (July 10, 2013, 6:37 PM), http://www.clickorlando.com/news/exsanford-police-chief-tells-local-6-why-he-didnt-arrest-george-zimmerman/-/1637132/20923726/-/f0eymsz/-/index.html (stating that arresting Zimmerman based on the facts as they stood "would have subjected the city to possible litigation for unlawful arrest").

[73] *See* Press Release, Statement from State Attorney Norm Wolfinger (March 20, 2012) [hereinafter Wolfinger Statement], *available at* http://www.sa18.state.fl.us/press/id/313.

[74] *Id.*

[75] Exec. Order 12-72, *supra* note 27, at pmbl. Wolfinger had decided to allow the *Zimmerman* case to go to a grand jury, where many believed it unlikely that an indictment would be returned. Wolfinger Statement, *supra* note 73. His decision to use the grand jury was overruled by Executive Order 12-72, and a new State Attorney was assigned who would push charges through no matter the cost. *See* Exec. Order 12-72, *supra* note 27, at § 1. Scant explanation was given for Wolfinger's recusal. Although the reason of avoiding "any appearance of conflict of interest or impropriety" was given, the alleged conflict of interest and impropriety were never elaborated upon publicly. *Id.* at pmbl. The *Zimmerman* case effectively ended Wolfinger's career. In the whirlwind of controversy surrounding the *Zimmerman* case, Wolfinger decided not to pursue re-election after Corey finished her tenure. *See* Press Release, Retirement Announcement of State Attorney Norman R. Wolfinger (Apr. 20, 2012), *available at* http://mynews13.com/content/dam/news/static/cfnews13/documents/norm-wolfinger-election-announce.pdf.

[76] Exec. Order 12-72, *supra* note 27, at § 1.

[77] Wolfinger Statement, *supra* note 73.

[78] Information, State v. Zimmerman, No. 1712F04573, 2012 WL 1207410 (Fla. Cir. Ct. Apr. 11, 2012) (issuing capias for Zimmerman's arrest that contained the details of the information charged against him). Zimmerman was also likely overcharged with second-degree murder. *See* Alan Dershowitz, *On Prosecutor Angela Corey's Rant About My Criticism of Her*, HUFFINGTON POST (June 5, 2012, 4:38 PM), http://www.huffingtonpost.com/alan-

An examination of the Florida legislative committee notes on indictments and informations indicates that the decision to charge a person by information rather than by grand jury indictment, while within a Florida prosecutor's discretion, is disfavored when employed by prosecutors not elected in the jurisdiction.[79] The traditional use of informations allowed the elected prosecutor to swear under oath to the existence of probable cause for minor crimes, saving the time and expense of convening the grand jury.[80] After all, it would simply be impossible for Wolfinger to convene the grand jury for every crime committed in his jurisdiction. The Florida legislature accordingly implied that an *elected* State Attorney may bypass the grand jury and charge by information for any non-capital crime.[81]

In the *Zimmerman* case, however, Angela Corey was an appointed and unelected prosecutor with no allegiance or accountability to the people

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dershowitz/prosecutor-angela-corey-r_b_1571942.html; Bellamy v. Florida, 977 So. 2d 682, 684 (Fla. Dist. Ct. App. 2008) (holding that an "impulsive overreaction to an attack or injury" was insufficient to prove the second-degree murder prerequisites of ill will, spite, or hatred, reversing the defendant's conviction of second-degree murder, and remanding for the entry of a judgment of conviction for manslaughter).

[79] *See* FLA. R. CRIM. P. 3.140. The Committee Notes on the adoption of Rule 3.140 indicate a preference for initiating prosecution by grand jury indictment rather than by information: "While practicalities dictate that most non-capital felonies and misdemeanors will be tried by information or affidavit, if appropriate, even if an indictment is permissible as an alternative procedure, it is well to retain the grand jury's check on prosecutors in this area of otherwise practically unrestricted discretion." FLA. R. CRIM. P. 3.140 committee notes at (a)(2). Nonelected prosecutors should be especially wary. "[P]rosecution by information is not recommended because of the aforementioned doubt as to the authority of a nonelected prosecutor to use an information as an accusatorial writ." *Id.*

State Attorney Corey was not elected in the 18th Judicial Circuit of Florida, where the *Zimmerman* case unfolded. Corey was elected in the 4th Judicial Circuit, which embraces the Jacksonville area, and she effectively overrode the power of the Seminole County grand jury by making her own probable cause determination. *See* Bennett L. Gershman & Joel Cohen, *Charging George Zimmerman: Why Bypass the Grand Jury?*, HUFFINGTON POST (Apr. 24, 2012, 5:05 PM), http://www.huffingtonpost.com/bennett-l-gershman/george-zimmerman-grand-jury_b_1445714.html.

> [T]he prosecutor has chosen in a controversial case of such magnitude—even the president has spoken about this case—to use Florida's escape hatch [charging a crime by information], thereby foregoing a procedure designed by the Magna Carta to protect a defendant from unwarranted accusations. We do not suggest that George Zimmerman deserves more justice than "the next guy" in Florida who also likely won't be indicted by a grand jury; we are merely wondering why a procedure so ingrained in our law and culture as a protection of an accused—any accused—can be so easily bypassed.

*Id.*

[80] FLA. R. CRIM. P. 3.140; *see* Joan E. Jacoby, *The American Prosecutor in Historical Context*, 39 PROSECUTOR 28, 36 (2005) (explaining that use of informations to prosecute crime became prevalent in the 1920s because they were "less expensive and more efficient").

[81] *See* FLA. R. CRIM. P. 3.140 committee notes at (a)(1)–(2).

of Seminole County,[82] whose input she discarded when she cancelled the *Zimmerman* grand jury.[83] It remains unclear whether a grand jury would have returned an indictment.[84] Regardless of whether it was reasonable to charge second-degree murder—a crime with a maximum penalty of life imprisonment[85]—by information, the fuse beneath what seemed to be a simple yet tragic story of self-defense had been lit,[86] and the pressure on Corey to charge Zimmerman was immense.

> [T]he February 26, 2012, shooting death of Trayvon Martin demonstrates the immense pressures—both proper and improper—that weigh on prosecutors' discretion. In the weeks following Martin's death, there were racially charged debates scrutinizing Florida's so called "stand your ground" law, circumstances surrounding the shooting itself, and the ensuing police investigation. There was intense criticism of the local prosecutor's initial decision not to lay any charges against George Zimmerman, who claimed to have shot Martin in self-defense. In the forty-five day period between Martin's death and Zimmerman's April 11 arrest, not only did a special prosecutor replace the local prosecutor, but the local police chief temporarily stepped down. Martin's family, joined by activist groups, eventually claimed that a combination of public pressure, media exposure, and protests somehow played a role in Zimmerman's arrest.[87]

### 2. Sufficiency of the Probable Cause Affidavit

Public pressure undoubtedly played a role in Angela Corey's decision to quickly end and re-frame an investigation that conclusively pointed toward a legitimate act of self-defense.[88] The probable cause affidavit used

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[82] *See* Exec. Order 12-72, *supra* note 27.

[83] *See* Gershman & Cohen, *supra* note 79.

[84] *See, e.g.*, Doug Mataconis, *Trayvon Martin Case Will Not Go to Grand Jury*, OUTSIDE THE BELTWAY (Apr. 9, 2012), http://www.outsidethebeltway.com/trayvon-martin-case-will-not-go-to-grand-jury/ (noting that a grand jury may not have even returned an indictment against Zimmerman).

[85] FLA. STAT. ANN. § 782.04(2) (Westlaw through Ch. 255, 2014 Spec. "A" Sess.).

[86] *See* Paul Farhi, *How Martin Case Became Martin Story*, WASH. POST, Apr. 13, 2012, at C05.

[87] Charles E. MacLean & Stephen Wilks, *Keeping Arrows in the Quiver: Mapping the Contours of Prosecutorial Discretion*, 52 WASHBURN L.J. 59, 60–61 (2012) (footnotes omitted). *But see* Josh Levs, *Trayvon Martin Case Has a Tough, Controversial Prosecutor*, CNN (Apr. 11, 2012, 6:26 PM), http://www.cnn.com/2012/04/10/justice/florida-teen-shooting-prosecutor/ (detailing Corey's reputation for aggressive behavior, overcharging, and unsustainably increasing the jail population to the highest in Florida for jurisdictions like hers, as well as her controversial decision to prosecute a 12-year-old child as an adult for first-degree murder).

[88] *See* Lisa Lucas & Helen Kennedy, *George Zimmerman Charged: Trayvon Martin's Killer Will Be in Court Thursday to Face Second-Degree Murder Charges*, N.Y. DAILY NEWS (Apr. 11, 2012, 2:29 PM), http://www.nydailynews.com/news/national/george-zimmerman-face-charges-trayvon-martin-death-reports-article-1.1059897 (quoting Corey as saying, "We

to charge Zimmerman on April 11, 2012 was rife with rushed conclusions that were tenuously supported at best by the results of the investigation to date.[89]

On two occasions in the affidavit, the investigators swore under oath that the reason Zimmerman stalked Martin was because Zimmerman incorrectly thought Martin was a criminal.[90] No such evidence of criminal profiling had been discovered by the investigation to that point, and no evidence ever materialized to suggest that Zimmerman targeted Martin because he believed Martin was actively committing a crime.[91] The affidavit also contained misleading and irrelevant testimony from a witness who had been on the phone with Martin and described how Martin was afraid of Zimmerman.[92] Corey's affidavit also omitted evidence of Zimmerman's injuries, apparently in an attempt to put the best version of her case forward.[93]

The affidavit effectively alleged that Zimmerman developed the complete *mens rea* for second-degree murder, with its requisite malice, depravity of mind, and deliberate indifference for human life,[94] in the six

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did not come to this decision lightly. We do not prosecute by public pressure, nor by petition"; but later quoting Al Sharpton as saying, "they decided to review [Zimmerman's charges] based on public pressure, . . . Had there not been pressure, there would not have been a second look").

[89] *See* James Joyner, *Dershowitz: Zimmerman Arrest Affidavit "Irresponsible and Unethical,"* OUTSIDE THE BELTWAY (Apr. 13, 2012), http://www.outsidethebeltway.com/dershowitz-zimmerman-arrest-affidavit-irresponsible-and-unethical/.

[90] Affidavit of Probable Cause, *supra* note 20, at 1–2.

[91] *See* Mr. Zimmerman's Reply to State's Response to Defendant's Motion to Take Additional Deposition at 1–2, State v. Zimmerman, No. 2012-001083-CFA (Fla. Cir. Ct. Dec. 10, 2012), http://www.flcourts18.org/PDF/Press_Releases/12_10_12_Mr_Zimmermans_Reply_To_States_Response_to_Defendants_Motion_To_Take_Additional_Deposition.pdf.

[92] *See* Affidavit of Probable Cause, *supra* note 20, at 2.

[93] *See id.* "Before she submitted the probable cause affidavit, Corey was fully aware that Zimmerman had sustained serious injuries to the front and back of his head." Dershowitz, *supra* note 78. The affidavit "deliberately omitted all references to Zimmerman's injuries which were clearly visible in the photographs she and her investigators reviewed. . . . By omitting this crucial evidence, Corey deliberately misled the court." *Id.*

> She denied that she had any obligation to include in the affidavit truthful material that was favorable to the defense. She insisted that she is entitled to submit what, in effect, were half truths in an affidavit of probable cause, so long as she subsequently provides the defense with exculpatory evidence. She should go back to law school, where she will learn that it is never appropriate to submit an affidavit that contains a half truth, because a half truth is regarded by the law as a lie, and anyone who submits an affidavit swears to tell the truth, the whole truth and nothing but the truth.

*Id.*

[94] *See* FLA. STAT. ANN. § 782.04(2) (Westlaw through Ch. 255, 2014 Spec. "A" Sess.) (instituting Florida's second-degree murder statute); Instructions Read to Jury by the Honorable Debra S. Nelson, Circuit Judge at 6, State v. Zimmerman, No. 2012 CF 1083

or seven minutes between Zimmerman's first glimpse of Martin and the confrontation between the two.[95] In reality, Zimmerman was simply annoyed that yet another unknown person was snooping around his neighborhood.[96] It was later revealed that Zimmerman was wrong about whether Martin belonged in the Retreat at Twin Lakes,[97] but as the jury was instructed, the actuality of the danger faced by Zimmerman was not at issue—only whether it was objectively reasonable for Zimmerman to believe that someone unauthorized was prowling his neighborhood and might pose a danger to him.[98] The affiants also incorrectly swore that Zimmerman disobeyed the SPD dispatcher and continued to follow Martin, in direct contradiction of Zimmerman's statement to police.[99]

### *B. Prejudice in the Seminole County Circuit Court?*

No fewer than three different judges presided over the *Zimmerman* case.[100] Before Judge Debra Nelson was seated as the third and final presiding judge, Judge Jessica J. Recksiedler recused herself and Judge Kenneth R. Lester was removed by order of the 5th District Court of Appeal.[101] While in the defense's view, Judge Recksiedler may have been a relatively benign presence,[102] her replacement, Judge Kenneth R. Lester, was no such character.

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AXXX (Fla. Cir. Ct. July 12, 2013) [hereinafter Zimmerman Final Jury Instructions], *available at* http://www.flcourts18.org/PDF/Press_Releases/Zimmerman_Final_Jury_Instructions.pdf.

95 Frances Robles, *A Look at What Happened the Night Trayvon Martin Died*, TAMPA BAY TIMES (April 2, 2012, 10:51 AM), http://www.tampabay.com/news/publicsafety/crime/a-look-at-what-happened-the-night-trayvon-martin-died/1223083.

96 *See* Affidavit of Probable Cause, *supra* note 20, at 2.

97 *Id.* at 1.

98 *See* Zimmerman Final Jury Instructions, *supra* note 94, at 12.

99 *Compare* Affidavit of Probable Cause, *supra* note 20, at 2 (alleging that Zimmerman blatantly disregarded the dispatcher's instructions and continued to follow Martin), *with* Zimmerman Statement, *supra* note 18, at 2 (stating that he walked back to his car as soon as the dispatcher told him an officer was on the way).

100 *See* Order Granting Defendant's Verified Motion to Disqualify Trial Judge at 3, State v. Zimmerman, No. 12-CF-1083-A, 2012 WL 1425281 (Fla. Cir. Ct. Apr. 18, 2012); State v. Zimmerman, 114 So. 3d 1011, 1011 (Fla. Dist. Ct. App. 2012).

101 Order Granting Defendant's Verified Motion to Disqualify Trial Judge, *supra* note 100, at 2–3 (granting motion to disqualify the first judge, Hon. Jessica J. Recksiedler, because her husband was a law partner with a public expert commentator on the *Zimmerman* case, among other reasons); *Zimmerman*, 114 So. 3d at 1011 (reversing the denial of a motion to disqualify Judge Kenneth R. Lester, Jr. and ordering that a new trial judge be appointed to preside over the *Zimmerman* case).

102 *See* Joe Palazzolo, *Meet the Judge Who Drew George Zimmerman's Case*, WALL STREET J.L. BLOG (Apr. 12, 2012, 6:25 PM), http://blogs.wsj.com/law/2012/04/12/meet-the-judge-who-drew-george-zimmermans-case/.

### 1. Judge Kenneth R. Lester's Order Setting Bail

Judge Lester made several prejudicial statements about George Zimmerman in an order issued on July 5, 2012, in which he increased Zimmerman's bond from $150,000 to $1,000,000.[103] The substance of the judge's statements was reflected in a defense motion:

> On July 5, 2012, [the trial court] filed its Order Setting Bail. In said Order, the Court ma[d]e[] gratuitous, disparaging remarks about Mr. Zimmerman's character; advocate[d] for Mr. Zimmerman to be prosecuted for additional crimes; offer[ed] a personal opinion about the evidence for said prosecution; and continue[d] to hold over Mr. Zimmerman's head the threat of future contempt proceedings. In doing so, the Court has created a reasonable fear in Mr. Zimmerman that [it] is biased against him . . . [and that] he cannot receive a fair and impartial trial or hearing by [the trial court].[104]

Judge Lester's scathing eight-page order presented a thorough indictment of Zimmerman based almost entirely upon improper character evidence.[105] Judge Lester toed the line of impartiality, going so far as to suggest that probable cause existed to charge Zimmerman with another crime, if not fully crossing that line[106] and performing a prosecutorial function.[107] After a hearing, the 5th District Court of Appeal granted Zimmerman's petition for writ of prohibition against Judge Lester, albeit in "a close call."[108]

### 2. Demeanor of Judge Debra Nelson at Trial

Judge Nelson, known "as a tough-on-defendants judge" on even her best day,[109] was remarkably tough and impatient with Zimmerman's defense team throughout the trial. While ruling favorably on many of the State's motions, she showed little sympathy for Zimmerman's

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[103] *See* Order Setting Bail, at 2–3, 8, State v. Zimmerman, No. 12-CF-1083-A (Fla. Cir. Ct. July 5, 2012), http://www.flcourts18.org/PDF/Press_Releases/SKMBT_363-V12070510360.pdf.

[104] Verified Motion to Disqualify Trial Judge at 4, Zimmerman v. Florida, No. 2012-001083-CFA (Fla. Cir. Ct. July 13, 2012).

[105] *See* Order Setting Bail, *supra* note 103, at 2–3; FLA. STAT. ANN. § 90.404(1) (Westlaw through Ch. 254, 2014 2d Reg. Sess.).

[106] *But see Zimmerman*, 114 So. 3d at 1012 (Evander, J., dissenting) ("I do not believe the order 'crossed the line' so as to require the granting of [Zimmerman's] motion.").

[107] *See* Order Setting Bail, *supra* note 103, at 4 n.4, 7.

[108] *See Zimmerman*, 114 So. 3d at 1011.

[109] Yamiche Alcindor & Steph Solis, *Zimmerman Judge is No-Nonsense*, USA TODAY, July 5, 2013, at 5A.

underfunded,[110] overworked defense team.[111] As the 10:00 PM hour approached on July 10, 2013, attorney Don West was attempting to argue for the admissibility of evidence about Trayvon Martin that had been recently disclosed and possibly withheld.[112] Judge Nelson walked out of the courtroom in the middle of West's plea to rein in the frenetic pace of the proceedings.[113]

Judge Nelson later made headlines by forcing Zimmerman to address her and tell her whether he planned to testify, over strenuous and confused objections from the defense.[114] Despite assurances from law enforcement and Judge Nelson that he had the absolute right to remain silent, Zimmerman was forced to speak directly to the judge after attempting to allow his lawyers to respond to an interrogation-style line of questioning directed at him.[115] The Florida Rules of Criminal Procedure have long prohibited prosecutors from referencing the failure or refusal of the criminal defendant to testify,[116] and Florida appellate precedent makes it equally impermissible, if not much more prejudicial, for the presiding judge to comment on a criminal defendant's failure to testify on his own behalf.[117] Although the jury was not in the courtroom during the exchange between Judge Nelson and Zimmerman, the judge's tone toward the defense was condescending at best.[118] At worst, and more likely, it was illustrative of the Court's attitude toward Zimmerman and his lawyers throughout the trial, as it placed the Court in a place of dominance over the defendant.

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[110] *See* Jeff Weiner, *Zimmerman's Lawyers Say They're "Out of Money," Need $120K for Trial*, ORLANDO SENTINEL, May 30, 2013, at B3.

[111] *See Tempers Flare at Zimmerman Trial as Defense Attorneys Complain to Judge About Long Hours*, MIAMI HERALD (July 10, 2013, 2:58 AM), http://www.miamiherald.com/news/local/community/miami-dade/article1953140.html.

[112] *Id.*

[113] *Id.*

[114] Seni Tienabeso & Matt Gutman, *George Zimmerman Tells Judge He Won't Testify*, ABC NEWS (July 10, 2013), http://abcnews.go.com/US/george-zimmerman-tells-judge-testify/story?id=19626204.

[115] National Review, *Judge Confronts Zimmerman*, YOUTUBE (Jul. 10, 2013), http://www.youtube.com/watch?v=UgDuu6i8MtE.

[116] FLA. R. CRIM. P. 3.250 (prohibiting prosecutors from commenting about a defendant's failure to testify in court) (adopted 1968).

[117] McClain v. Florida, 353 So. 2d 1215, 1217–18 (Fla. Dist. Ct. App. 1977) (reversing conviction and ordering a new trial when, in the presence of the jury, the presiding judge commented on the defendant's failure to testify).

[118] *See* National Review, *Judge Confronts Zimmerman*, *supra* note 115.

### 3. Evidentiary Issues: Spoliation of *Brady* Material, Sanctions, and Rule 404

#### *a. Withholding of the Martin Cell Phone Evidence*

On May 23, 2013, in response to a round of notably late discovery that came very close to the beginning of the trial, the defense filed a motion for sanctions against the State, alleging that the prosecutors had withheld exculpatory evidence.[119] The motion of May 23 marked the second time the prosecutors had been accused of withholding *Brady* material[120] in the

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[119] Motion for Sanctions Against State Attorney's Office for Discovery Violations and Request for Judicial Inquiry Into Violations at 2–4, State v. Zimmerman, No. 2012-001083-CFA (Fla. Cir. Ct. May 23, 2013) [hereinafter Defendant's Motion for Judicial Inquiry], http://www.gzdocs.com/documents/0513/motion_for_sanctions.pdf. The defense's motion of May 23 was the last of a series of attempts to remedy irregularities in discovery caused by the prosecutors' conduct. *See* Defendant's Motion for Sanctions Against State Attorney's Office for Discovery Violations, State v. Zimmerman, No. 2012-001083-CFA (Fla. Cir. Ct. March 25, 2013) [hereinafter Defendant's First Motion for Sanctions], http://www.gzdocs.com/documents/0313/mot_for_sanctions_discovery.pdf (describing the allegedly willful concealment of the State's knowledge that one of its witnesses had lied in multiple different depositions, as well as the withholding of several FBI and Florida Department of Law Enforcement reports containing exculpatory information); Defendant's Motion for Sanctions Against State Attorney's Office for Payment of Attorney Fees and Costs at 2–4, State v. Zimmerman, No. 2012-001083-CFA (Fla. Cir. Ct. Mar. 26, 2013) [hereinafter Defendant's Motion for Payment of Attorney Fees], http://www.gzdocs.com/documents/0313/mot_for_sanctions_fees.pdf.

The defense motion of March 26, 2013 noted that the attorneys had incurred $4,555 in attorney fees and costs when the prosecution refused to allow a video deposition to proceed. Defendant's Motion for Payment of Attorney Fees, *supra* at 4. The deposition sought testimony from, among others, State Witness 8, *see id.* at Ex. A, known as "star witness" Rachel Jeantel, who turned out to be particularly detrimental to the State's case due to her proclivity for lying under oath, *see* Manuel Roig-Franzia, *Friend of Martin Offers Key Testimony*, WASH. POST, June 27, 2013, at A04.

[120] The value to the defendant of receiving full and timely disclosure of *Brady* material is immense. "The [Supreme] Court in *Brady v. Maryland* imposed on prosecutors the duty to disclose exculpatory evidence." Mark D. Villaverde, Note, *Structuring the Prosecutor's Duty to Search the Intelligence Community for* Brady *Material*, 88 CORNELL L. REV. 1471, 1482 (2003) (footnote omitted).

> Because the government has vastly superior investigative resources with which to discover information concerning alleged crimes, and because in most cases exculpatory information in the prosecution's possession will be unknown to defense counsel, one of the most valuable rights that a criminal defendant enjoys is his constitutional right to all evidence in the government's possession that is material either to his guilt or punishment.

*Id.* at 1481–82 (footnotes omitted).

Professor Gershman, however, notes his skepticism of the extent to which prosecutors actually fulfill the duty imposed upon them by *Brady*:

> *Brady's* announcement of a constitutional duty on prosecutors to disclose exculpatory evidence to defendants embodies, more powerfully than any other constitutional rule, the core of the prosecutor's ethical duty to seek justice rather

*Zimmerman* case.[121] This new gamut of evidence, which highlighted Martin's school truancy, drug use, and proclivity for fighting, was discovered by Ben Kruidbos, Angela Corey's Information Technology Director.[122] When reports Kruidbos generated about photos, cell phone data, and other evidence in the *Zimmerman* case were turned over to the defense in incomplete form, Kruidbos was concerned that he could be held liable for withholding evidence.[123] In a closely related yet allegedly non-retaliatory measure, Corey fired Kruidbos for reasons not linked to his exposure of evidence unfavorable to Trayvon Martin's memory.[124] Kruidbos later sued Corey for violating a Florida statute that prevents the termination of an employee who testifies pursuant to a subpoena.[125] The late disclosure of evidence about Martin caused strategic issues for the defense that spilled over to the trial.

### *b. Character Evidence in the* Zimmerman *Trial*

#### 1. Prosecution's Case-in-Chief

The trial prosecutors in the *Zimmerman* case were assistant State Attorneys on Angela Corey's staff, and their case theory involved the presentation of evidence about a criminal defendant, Zimmerman, which flirted with the traditional prohibition against the use of unfairly

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> than victory. Nevertheless, prosecutors over the years have not accorded *Brady* the respect it deserves. Prosecutors have violated its principles so often that it stands more as a landmark to prosecutorial indifference and abuse than a hallmark of justice.

Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 531 (2007) (footnote omitted). He states further that a prosecutor's *Brady* duty "is so malleable that it affords prosecutors an extremely broad opportunity to exercise discretion in ways that impede—rather than promote—the search for truth. Not surprisingly, violations of *Brady* are the most recurring and pervasive of all constitutional procedural violations." *Id.* at 533.

[121] *See* Defendant's Motion for Judicial Inquiry, *supra* note 119, at 4–5.

[122] Tom Watkins & Nancy Leung, *IT Director Who Raised Questions About* Zimmerman *Case Is Fired*, CNN (July 15, 2013, 10:16 AM), http://www.cnn.com/2013/07/13/justice/zimmerman-it-firing/; Rene Stutzman & Jeff Weiner, *New Evidence in* Zimmerman *Case: Trayvon Texted About Fighting, Smoking Marijuana*, ORLANDO SENTINEL (May 23, 2013), http://articles.orlandosentinel.com/2013-05-23/news/os-george-zimmerman-trial-trayvon-20130523_1_zimmerman-case-trayvon-martin-george-zimmerman.

[123] Watkins & Leung, *supra* note 122.

[124] *See* Letter from Cheryl R. Peek, Managing Dir., Fla. State Attorney's Office, to Ben Kruidbos, Dir. of Info. Tech., Fla. State Attorney's Office 1, 5 (July 11, 2013), *available at* http://i.cdn.turner.com/cnn/2013/pdf/7/13/kruidbos.ltr.pdf.

[125] Complaint for Damages at 1–2, Kruidbos v. Corey, No. 2013-CA-007407, 2013 WL 3948108 (Fla. Cir. Ct. Aug. 1, 2013) (claiming Corey violated FLA. STAT. ANN. § 92.57 (Westlaw through Ch. 255, 2014 Spec. "A" Sess.)).

prejudicial or misleading evidence.[126] Florida Evidence Code 90.404 allows that once the accused has properly brought into question the character of the victim for some trait pertinent to the defense posture, the prosecution may offer contradictory evidence to rebut that trait in the claimed victim.[127] Without Zimmerman having "opened the door" to his character or past acts, the prosecution was inexplicably allowed to introduce evidence of Zimmerman's past through witness testimony during its case-in-chief.[128] Evidence presented included Zimmerman's denied application for a job as a police officer and for a ride-along with the SPD, as well as his enrollment in courses on criminal justice and law enforcement.[129] All this evidence presumptively supported the State's uncharged, implicit, yet obvious contention that, in addition to being a murderer, George Zimmerman was guilty of impersonating a police officer.[130]

The prosecution's strategy appeared to be an attempt to impeach Zimmerman based on allegedly inconsistent statements Zimmerman made about his knowledge of Florida self-defense laws in an interview with Sean Hannity.[131] While the alleged inconsistencies may have been

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[126] *E.g.*, FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice . . . [or] misleading the jury . . . .").

[127] FLA. STAT. ANN. § 90.404 (Westlaw through Ch. 255, 2014 Spec. "A" Sess.).

[128] *See* Cara Buckley, *Zimmerman Studied "Stand Your Ground" in Class, Florida Court Is Told*, N.Y. TIMES, July 4, 2013, at A15; *Day 17: George Zimmerman Trial Part 2*, at 09:33-11:15, WFTV, http://www.wftv.com/videos/news/day-17-george-zimmerman-trial-part-2/v5nwG/ (last visited Nov. 14, 2014).

[129] *See Day 16: George Zimmerman Trial Part 11*, at 28:00-29:21, WFTV, http://www.wftv.com/videos/news/day-16-george-zimmerman-trial-part-11/v5kTR/ (last visited Nov. 14, 2014).

[130] *See id.*

[131] *See Day 16: George Zimmerman Trial Part 12*, at 00:00-01:50, WFTV, http://www.wftv.com/videos/news/day-16-george-zimmerman-trial-part-12/v5kX6/ (last visited Nov. 14, 2014). Assistant State Attorney Richard Mantei is quoted as mangling character evidence rules, blandly asserting that the fact that Zimmerman "applied to be a police officer before . . . wasn't some sort of passive thing," and neither was Zimmerman's tendency to speak in police jargon, nor the fact that he knew about the phrase "justifiable use of force," and therefore these were all facts "the jury ought to know." *See Judge Allows School Records in Zimmerman Trial*, FOX NEWS LATINO (July 3, 2013), http://latino.foxnews.com/latino/news/2013/07/03/judge-allows-school-records-in-zimmerman-trial/. Defense attorney Mark O'Mara responded by noting that character evidence about Trayvon Martin had been treated with a notably higher level of deference than the constitutionally protected defendant, Zimmerman:

> To the extent that [the State] is trying to put before this jury that [Zimmerman] went to community college seeking a legal studies degree is of no relevance to [the jury]; this event is supposed to have occurred within seven or eight minutes . . . . We have taken pains not to get into Trayvon Martin's school records and his past because we know that they carry a level of protection that they're supposed to . . . [the fact that Zimmerman] went to college and even that

merely admissible (not necessarily admissible *and* relevant) at their basest,[132] an incorrect ruling on their relevance was handed down by Judge Nelson when she admitted the records.[133] While Florida's Evidence Code 90.404 allows the use of evidence of a defendant's other acts to prove a material fact in issue, including preparation and knowledge,[134] the State offered no evidence to suggest that Zimmerman's college coursework and aspiration to be a police officer played a role in the sudden, random encounter with Martin years later.[135] Zimmerman's school records were not probative of a material fact in a second-degree murder case, and their admission was likely error.[136]

2. Defense Case-in-Chief: Overcoming the Obstacles of Spoliated Evidence

On July 3, 2013, Judge Nelson ruled that content obtained from Martin's cell phone was inadmissible, including photographs of guns, marijuana, and text messages about street fighting and beating up a homeless man.[137] Such evidence was highly relevant to Zimmerman's theory that Martin had a propensity for violence and was the first aggressor on February 26, 2012, and the majority of it was excluded.[138] Its exclusion also seemingly ran counter to Florida precedent:

> A homicide defendant is afforded wide latitude in the introduction of evidence supporting his self-defense theory. Where there is even the slightest evidence of an overt act by the victim which may be reasonably

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> [Zimmerman] wanted to drive along with the cops somehow is a negative thing—somehow suggests that it's bad that [Zimmerman] wanted to go to college. I don't see any relevance . . . .

*Day 16: George Zimmerman Trial Part 11*, *supra* note 129, at 28:00–29:21 (transcribed from video by author). Judge Nelson admitted the records as evidence of Zimmerman's knowledge of Stand Your Ground law in Florida and his desire to be involved with law enforcement. *See Day 17: George Zimmerman Trial Part 2*, at 16:50-17:15, WFTV, http://www.wftv.com/videos/news/day-17-george-zimmerman-trial-part-2/v5nwG/ (last visited Nov. 14, 2014).

[132] *See* FLA. STAT. ANN. § 90.803 (Westlaw through Ch. 254, 2014 2d Reg. Sess.) (creating Florida's hearsay exception for statements of a party opponent).

[133] *See* sources cited *supra* note 131 and accompanying text.

[134] FLA. STAT. ANN. § 90.404 (Westlaw through Ch. 255, 2014 Spec. "A" Sess.).

[135] The "knowledge-of-the-Stand-Your-Ground-law-and-desire-to-secure-gainful-employment-as-a-police-officer" element of second-degree murder has yet to be added to the Florida criminal statutes, but anything could happen in 2015.

[136] *See* sources cited *supra* note 131 and accompanying text; *infra* Part III.A.

[137] Order on State's Motions in Limine Heard on May 28, 2013, State v. Zimmerman, No. 12-CF-1083-A, 2013 WL 2729208 (Fla. Cir. Ct. June 5, 2013) (granting the State's motion in limine to prevent the defense from mentioning that Trayvon Martin had been previously suspended from school, communicated about, or previously used, marijuana, and possessed or wore a set of gold teeth, as well as Martin's school performance records and text messages about fighting).

[138] *See id.*

> regarded as placing the accused apparently in imminent danger of losing his life or sustaining great bodily harm, *all doubts as to the admissibility of evidence bearing on his theory of self-defense must be resolved in favor of the accused.*[139]

Evidence indicating Zimmerman's apprehension of Martin includes his statement that he thought Martin was on drugs.[140] When Martin, possibly high, later advanced threateningly at Zimmerman, Judge Nelson correctly allowed the defense to inform the jury that cannabis was found in Martin's system on the night of February 26, 2013.[141]

Unfavorable evidence rulings and shady dealings by opposing counsel were only a small part of the case. Zimmerman's main obstacle was dealing with a second-degree murder charge that never should have been brought against him.

## III. SECOND-DEGREE MURDER ANALYSIS

### *A. Elements of and Defenses to Second-Degree Murder in Florida*[142]

To obtain a conviction for second-degree murder in Florida, it must first be established that the victim is dead; second, the death of the victim must have been caused by the defendant's criminal act; and third, the act must have been "imminently dangerous to another and demonstrating a depraved mind without regard for human life."[143] During the *Zimmerman* trial, the debate mainly focused on whether the third element of second-degree murder was proven.[144]

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[139] Arias v. State, 20 So. 3d 980, 984 (Fla. Dist. Ct. App. 2009) (emphasis added) (quoting Warren v. State, 577 So. 2d 682, 684 (Fla. Dist. Ct. App. 1991)).

[140] *See* Isabelle Zehnder, *George Zimmerman's 911 Call Transcribed*, THE EXAMINER, (Mar. 24, 2012), http://www.examiner.com/article/george-zimmerman-s-911-call-transcribed (describing Zimmerman as saying, "[t]his guy [referring to Trayvon Martin] looks like he's up to no good or he's on drugs or something").

[141] Amanda Sloane & Graham Winch, *Judge Allows Evidence of Trayvon Martin's Marijuana Use*, CNN (July 9, 2013, 6:54 AM), http://www.cnn.com/2013/07/08/justice/zimmerman-trial/. Florida case law supports Judge Nelson's decision. *See Arias*, 20 So. 3d at 983–84 (admitting toxicology results when used to confirm the defendant's perception of the victim, whom he had never seen before, as appearing intoxicated and under the influence of cocaine).

[142] The *Zimmerman* jury was also instructed on the elements of and defenses to manslaughter, the defenses to which are the same as those for second-degree murder. Manslaughter will not be discussed in detail in this Note, *see* Zimmerman Final Jury Instructions, *supra* note 94, at 10–11.

[143] THE SUPREME COURT COMM. ON STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES, FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES 7.4 [hereinafter FLA. STANDARD JURY INSTRUCTIONS], http://www.floridasupremecourt.org/jury_instructions/chapters/entireversion/onlinejurryinstructions.pdf; *see* Zimmerman Final Jury Instructions, *supra* note 94, at 6; *see also* FLA. STAT. ANN. § 782.04(2) (Westlaw through Ch. 254, 2014 2d Reg. Sess.) (Florida's second-degree murder statute).

[144] *See Day 16: George Zimmerman Trial Part 11*, *supra* note 129, at 24:00–25:52.

Florida courts divide the third element of second-degree murder into three sub-elements. To be "imminently dangerous . . . and evinc[ing] a 'depraved mind'" without regard for human life, an act must be one that, first, "a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another"; second, "is done from ill will, hatred, spite, or an evil intent"; and third, "is of such a nature that the act itself indicates an indifference to human life."[145] Each "imminently dangerous/depraved mind" element must be proven by the State for an act to be classified as such.[146] Determining whether an act is imminently dangerous and demonstrative of a depraved mind is a case-by-case, totality-of-the-circumstances inquiry, and relevant considerations include "the relationship between the defendant and victim," "the relative harm-causing potential" of the two, and whether the defendant was sufficiently provoked.[147]

The affirmative defense of justifiable homicide by means of self-defense is also available in Florida.[148] A person may use deadly force in her defense without first retreating when resisting what she reasonably believes is an attempt to murder her or commit a felony against her.[149] Alternatively, Florida juries can find that if a defendant imperfectly self-defends by meeting some but not all of the elements of self-defense, a murder charge can be mitigated to manslaughter.[150] Also along mitigation

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[145] Chaffin v. State, 121 So. 3d 608, 613 (Fla. Dist. Ct. App. 2013) (quoting Wiley v. State, 60 So. 3d 588, 591 (Fla. Dist. Ct. App. 2011)); *see* Zimmerman Final Jury Instructions, *supra* note 94, at 6.

[146] Zimmerman Final Jury Instructions, *supra* note 94, at 6; *See Chaffin*, 121 So. 3d at 613.

[147] 16 FLA. JUR. 2D § 475 (2014). *See* Zimmerman Final Jury Instructions, *supra* note 94, at 12 (instructing the jury that they may consider "the relative physical abilities and capacities of George Zimmerman and Trayvon Martin").

[148] FLA. STAT. ANN. § 776.012 (Westlaw through Ch. 255, 2014 Spec. "A" Sess.); Zimmerman Final Jury Instructions, *supra* note 94, at 4, 9, 12–13; *see* FLA. STANDARD JURY INSTRUCTIONS 3.6(f), *supra* note 143.

[149] § 776.012; Zimmerman Final Jury Instructions, *supra* note 94, at 4, 9, 12–13.

[150] *See* Zimmerman Final Jury Instructions, *supra* note 94, at 8, 10–13. At common law,

> [i]f [a] defendant had acted in response to [provocation], a court would hold the defendant's loss of control reasonable per se—to justify a finding of heat of passion and the reduction of the crime to manslaughter—so long as the jury found that the defendant was subjectively enraged. . . . This standard ultimately would leave the question of the adequacy of provocation to the jury.
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> . . . .
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> The modern law of manslaughter incorporates a standard of reasonableness . . . Reasonable provocation, the key element, is "provocation which causes a reasonable man to lose his normal self-control; and, although a reasonable man who has thus lost control over himself would not kill, yet his homicidal response to the provocation is at least understandable."

lines, Florida courts hold that an impulsive overreaction to an attack or injury falls short of the ill will, hatred, spite, or evil intent required to prove the third element of second-degree murder.[151]

*B. Acts that Constitute Second-Degree Murder and Those that Don't*

Successful second-degree murder prosecutions in Florida often involve an existing negative relationship between the defendant and the victim.[152] In one case, the defendant went to the home of the victim's ex-wife to take the ex-wife and her daughter for a day at the beach.[153] The defendant and the victim had confronted each other violently in the past, and the defendant had started carrying a pistol for protection as a result.[154] When the defendant arrived at the home, he saw the victim arguing with the victim's ex-wife on the sidewalk.[155] The defendant was in his car about thirty feet away from the two as they argued.[156] The victim grabbed the ex-wife's arm and twisted it, at which point the defendant emerged from his car and threatened the victim with his pistol drawn.[157] The unarmed victim ran toward the defendant, and once the victim was eight to twelve feet away, the defendant shot him four times, killing him.[158]

In a succinct opinion, the District Court of Appeal held that a reasonably prudent person would not have believed it was necessary to kill.[159] The court further held that shooting an unarmed man four times while he stood eight to twelve feet away was sufficient evidence of a depraved mind to survive a motion for acquittal.[160]

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Laurie J. Taylor, Comment, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679, 1686–87 (1986) (footnotes omitted).

[151] Leasure v. State, 105 So. 3d 5, 17 (Fla. Dist. Ct. App. 2012). The idea that an impulsive overreaction does not constitute second-degree murder pervades Florida case law, further lending credence to the theory that Angela Corey overcharged Zimmerman. *See also* Poole v. State, 30 So. 3d 696, 698–99 (Fla. Dist. Ct. App. 2010) (holding that defendant's stabbing of a victim who lunged at him in close quarters was not sufficient to constitute second-degree murder but was an impulsive overreaction to the attack).

[152] *See, e.g.*, Soberon v. State, 545 So. 2d 490, 491–92 (Fla. Dist. Ct. App. 1989); Light v. State, 841 So. 2d 623, 626 (Fla. Dist. Ct. App. 2003) ("Although exceptions exist, the crime of second-degree murder is normally committed by a person who knows the victim and has had time to develop a level of enmity toward the victim.").

[153] *Soberon*, 545 So. 2d at 491.

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.* at 491–92.

[158] *Id.* at 492.

[159] *See id.*

[160] *See id.*

In another case, the defendant was charged with second-degree murder for killing one of his friends.[161] The District Court of Appeal found that the defendant hit the victim over the head with his pistol, causing the pistol to accidentally discharge and kill the victim.[162] The third element of second-degree murder was at issue, and the evidence was insufficient to support a finding of either a depraved mind or indifference to human life.[163]

### *C. George Zimmerman's Actions Did Not Constitute Second-Degree Murder*

Viewed through the eyes of the women of the jury,[164] Zimmerman's shooting of Trayvon Martin likely satisfied the first and second elements of second-degree murder.[165] The absence of proof of the third element, the requirement of a depraved mind, likely played a substantial role in determining the verdict of not guilty.[166] In line with Florida case law demonstrating lack of proof of the third element of second-degree murder, Zimmerman's lack of prior knowledge of Martin undermined the claim that he acted with a depraved mind.[167]

Lending credence to Zimmerman's self-defense argument, at least five of the six jurors believed that Zimmerman was the person screaming on the 911 recording of the incident.[168] The defense's expert in forensic pathology, Dr. Vincent DiMaio, additionally testified that Zimmerman had six separate injuries that were consistent with being punched and

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[161] Wiley v. State, 60 So. 3d 588, 589–90 (Fla. Dist. Ct. App. 2011).

[162] *Id.* at 591.

[163] *See id.* at 592. The defendant's second-degree murder conviction in *Wiley* was reversed; however, the defendant had also been convicted of third-degree murder, and he was resentenced on remand. *Id.*; *see also* Michael Pearson & Greg Botelho, *With Manslaughter an Option, Prosecution Uses Zimmerman's Words*, CNN (July 12, 2013, 2:49 AM), http://www.cnn.com/2013/07/11/justice/zimmerman-trial/ (detailing the *Zimmerman* prosecution's attempt to include third-degree murder based on child abuse as a lesser included crime).

[164] *See* Adam Harris Kurland, *Not the Last Word, but Likely the Last Prosecution: Understanding the U.S. Department of Justice's Evaluation of Whether to Authorize a Successive Federal Prosecution in the Trayvon Martin Killing*, 61 UCLA L. REV. DISC. 206, 219 (2013) (looking ahead to a potential federal prosecution of Zimmerman for civil rights violations, which ultimately did not occur, and describing the differences between a twelve-person federal jury and the Florida-standard six-person jury, which consisted of all females in the *Zimmerman* trial).

[165] *See* Zimmerman Final Jury Instructions, *supra* note 94, at 6; Dana Ford, *George Zimmerman Was "Justified" in Shooting Trayvon Martin, Juror Says*, CNN (July 17, 2013, 8:54 AM), http://www.cnn.com/2013/07/16/us/zimmerman-juror/.

[166] *See* Ford, *supra* note 165.

[167] *See supra* Part III.B.

[168] *See* Greg Richter, *Zimmerman Juror: Race Played No Role*, NEWSMAX (July 15, 2013, 8:44 PM), http://www.newsmax.com/newsfront/zimmerman-juror-race-trayvon/2013/07/15/id/515186.

having his head slammed into the concrete.[169] In truth, the injuries Zimmerman sustained to his head and nose greatly exceeded the statutory requirement of reasonable fear of great bodily harm.[170] DiMaio also testified that that the configuration of the gunshot wound was consistent with Zimmerman's statement that Martin was on top of Zimmerman.[171] Zimmerman even stated that he prayed that someone videotaped his encounter with Martin, an implicit assertion that a video of the incident would reveal no illegal behavior on his part.[172]

Viewed in the light most favorable to Zimmerman, an ordinary person would almost certainly not believe that getting out of one's car to read a street sign indicates with reasonable certainty an intention to kill or do serious bodily injury to another.[173] Even if there existed evidence to support the prosecution's claim that Zimmerman profiled and stalked Martin with the belief that Martin was a criminal, no evidence exists to support the contention that Zimmerman did so with the intent to assault or commit a crime against Martin.[174] More notably, and most importantly, the evidence presented by the defense created reasonable doubt about who was the aggressor.[175] However, if the jury believed that Zimmerman's actions constituted imperfect self-defense, the lesser-included crime of manslaughter may have fit the facts.[176] The prosecution even attempted to lobby the judge for an unprecedented "way out" of their gross overcharging of Zimmerman: an instruction on the lesser-included crime of third-degree murder based on child abuse.[177] The only evidence supporting the child abuse claim was the fact that Trayvon Martin was

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[169] *See Zimmerman Defense Likely Will Wrap Up Case Wednesday, Attorney Says*, FOX NEWS (July 9, 2013), http://www.foxnews.com/us/2013/07/09/11-calls-becoming-heart-zimmerman-trial/.

[170] *See* FLA. STAT. ANN. § 776.012 (Westlaw through Ch. 255, 2014 Spec. "A" Sess.).

[171] *Zimmerman Defense Likely Will Wrap Up Case Wednesday, Attorney Says*, *supra* note 169.

[172] *See* Arelis R. Hernández, *George Zimmerman Says Trayvon Martin Told Him "You Got Me" After Shooting*, ORLANDO SENTINEL (June 21, 2012, 12:16 PM) http://articles.orlandosentinel.com/2012-06-21/news/os-george-zimmerman-defense-documents-20120621_1_shooting-death-statements-defense.

[173] *See supra* notes 49–51 and accompanying text.

[174] *See supra* notes 41–69 and accompanying text.

[175] *See* Richter, *supra* note 168.

[176] *Cf.* Dorsey v. Florida, 74 So. 3d 521, 528 (Fla. Dist. Ct. App. 2011) (ordering new trial of second-degree murder defendant who was later convicted of manslaughter); Taylor, *supra* note 150, at 1686–87.

[177] *See* Pearson & Botelho, *supra* note 163; FLA. STAT. ANN. § 782.04(3)(h) (Westlaw through Ch. 255, Spec. "A" 2014 Sess.) (Florida's felony murder statute); FLA. STAT. ANN § 827.03(1)(a) (Westlaw through Ch. 254, 2014 2d Reg. Sess.) (Florida's aggravated child abuse statute).

under the age of eighteen, and Judge Nelson correctly declined to allow the jury to consider it.[178]

## IV. A PHILOSOPHICAL CHRISTIAN PERSPECTIVE ON *STATE V. ZIMMERMAN*

### *A. The Foundations of Self-Defense and the* Zimmerman *Case*

Philosophers, political theorists, and even theologians around the world have supported and upheld the right to self-defense.[179] George Zimmerman's actions in defending himself were not unprecedented in light of the near-universally held belief that a person is entitled to defend herself from threatened bodily harm.[180] However, in any situation in which someone has died, a more careful examination of the justification for self-defense is necessary.

German legal scholar and political philosopher Samuel Pufendorf's perspective on self-defense is perhaps most instructive in attempting to reconcile Zimmerman's actions. Pufendorf decried the idea that self-defense was an excuse by which enterprising "vigilantes" could take the law into their own hands and punish criminals.[181] Pufendorf acknowledged that although retreat in the face of danger is preferred over the use of deadly force, it is usually impossible.[182] Justice Oliver Wendell Holmes echoed that sentiment when he wrote that "[d]etached reflection cannot be demanded in the presence of an uplifted knife."[183]

Emmerich de Vattel, a Swiss diplomat who exerted significant influence on the philosophies of the American Founding Fathers, further argued that when law enforcement was nowhere to be found, the citizen must be able to repel a violent attacker.[184] Violent confrontation causes confusion and demands quick action, and Professor Robinson succinctly

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[178] *See* Pearson & Botelho, *supra* note 163.

[179] *See* David B. Kopel, *Evolving Christian Attitudes Towards Personal and National Self-Defense*, 45 CONN. L. REV. 1709, 1761–62 (2013); David B. Kopel et al., *The Human Right of Self-Defense*, 22 BYU. J. PUB. L. 43, 83–84 (2007); Shane Mcgee et al., *Adequate Attribution: A Framework for Developing a National Policy for Private Sector Use of Active Defense*, 8 J. BUS. L. & TECH. 1, 14 (2013); Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 235 (1982); Craig A. Stern, *Torah and Murder: The Cities of Refuge and Anglo-American Law*, 35 VAL. U. L. REV. 461, 482–85 (2001).

[180] *See* Kopel et al., *supra* note 179, at 44.

[181] *See id.* at 43, 84–85 (noting an alarming modern international trend away from recognizing a human right to self-defense and possession of defensive arms, but detailing scholars' preference for and defense of such rights throughout history).

[182] *Id.* at 83–84; *see also* McGee et al., *supra* note 179, at 14 (noting, as did Blackstone, that the inability of the "future process of law" to address the immediacy of a situation justifies opposing "one violence with another").

[183] Brown v. United States, 256 U.S. 335, 343 (1921).

[184] Kopel et al., *supra* note 179, at 90.

described the unfortunate and overwhelming circumstances inherent when one defends oneself: "self-defense provide[s] the necessary means of recognizing the coercive and confusing conditions inherent in self-defense situations: being forced to act while under attack."[185]

Acceptance of these traditional positions in favor of self-defense can be seen in the *Zimmerman* jury's response (in the form of an acquittal) to several coercive and confusing circumstances faced by Zimmerman: The "uplifted knife" of the blows Trayvon Martin dealt to Zimmerman, the absence of any citizen or police officer responding to Zimmerman's cries for help, and Zimmerman's confusion as to why Martin was running around, hiding from him, and circling his car in the pouring rain.[186] These difficult conditions lent legitimacy to Zimmerman's claim of self-defense, and they led to the only verdict that fit the facts: not guilty.

### *B. Did (Will) Zimmerman (Ever) Get His Just Deserts?*

Viewed in the light most favorable to the Creator of the defendant and the victim, there is no winner, loser, or positive outcome in the *Zimmerman* case. If George Zimmerman was acquitted despite malicious intent, then there was no justice for Trayvon Martin. However, if Zimmerman legitimately defended himself, then the legal system produced justice for him.[187]

Regardless of whether George Zimmerman was made to be a "scapegoat" or Trayvon Martin was "demonized," the real tragedy is that a young man, created in God's image,[188] was deprived of the opportunity to live his life to the full.[189] Notwithstanding the verdict, George Zimmerman's heart, intent, and motive can only be truly judged and fully known by him and by God.[190] George Zimmerman will have to give an account of his life before God,[191] including the true motive behind his actions on February 26, 2012.

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[185] Robinson, *supra* note 179, at 235.

[186] *See* Ford, *supra* note 165; *supra* notes 43–69 and accompanying text.

[187] *See* Benjamin V. Madison, III, *Color-Blind: Procedure's Quiet but Crucial Role in Achieving Racial Justice*, 78 UMKC L. REV. 617, 626–29 (2010) (discussing theological and biblical justifications for equality for all before the law, regardless of race, and especially the right of every person to receive justice).

[188] *Genesis* 1:27 (all references to the Bible herein are according to the New International Version); *see also Galatians* 3:28.

[189] *John* 10:10. Jesus spoke generally of the eternal salvation that would become available for those who professed Him as Savior, *Romans* 10:9, but the inference remains that there are still many good works to be done for the Kingdom by the person who works out their salvation on earth. *See Colossians* 3:1–17.

[190] *See 2 Corinthians* 5:10.

[191] *Romans* 14:10–12.

The legal perspective is not the final story in the *Zimmerman* case. The Bible, which is inerrant, "God-breathed and . . . useful for teaching, rebuking, correcting and training in righteousness,"[192] provides a proper frame of reference for matters of life and death such as those implicated by the *Zimmerman* case. Out of the wide variety of Mosaic laws, Old Testament teachings on murder are some that still carry weight in contemporary society.[193]

The Bible differentiates between the consequences of intentional and unintentional killings on several occasions.[194] Murder[195] and retaliation[196] are prohibited throughout the Bible, and Jesus advised the disciples to turn the other cheek and not seek revenge when evil was done to them.[197] Furthermore, one who struck a fatal blow was to be put to death.[198] However, killing a thief in the act at nighttime rendered the killer not guilty of bloodshed because the act was done in defense of his property.[199] If a fatal blow was struck unintentionally, God would allow the person who struck the blow to avoid punishment and seek refuge.[200]

Zimmerman's actions appear to parallel scenarios of justifiable killing contemplated both biblically and by the Florida legislature.[201] Although the jury indicated that it accepted Zimmerman's account of his actions, any analysis thereof is difficult, whether under a biblical or Floridian model, because of the abundance of circumstantial evidence in the case.

Zimmerman was clearly justified in responding to a threat against his life under the Florida self-defense statute.[202] Could a reasonable juror

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[192] *2 Timothy* 3:16.

[193] *See* Thomas C. Berg, *Religious Conservatives and the Death Penalty*, 9 WM. & MARY BILL RTS. J. 31, 38 n.35 (2000) ("Most theological proponents of the death penalty believe that many details of the Mosaic law were abrogated but the covenant with Noah was retained, thus . . . preserving [the death penalty's] legitimacy in principle for murder.").

[194] *See, e.g.*, *Exodus* 21:12–13. For a biblical discussion of the line between capital homicide and excusable self-defense that parallels the *Zimmerman* case, see generally Stern, *supra* note 179, at 482–85.

[195] *Deuteronomy* 5:17; *Exodus* 20:13; *see Matthew* 5:21 (teaching of Jesus in which He restates the Mosaic prohibition against murder).

[196] *See Romans* 12:19 ("Do not take revenge, my friends, but leave room for God's wrath, for it is written: 'It is mine to avenge; I will repay,' says the Lord.").

[197] *Luke* 6:27–29.

[198] *Exodus* 21:12–13 (accounting for a justifiable killing by noting that the fatal blow might be struck unintentionally).

[199] *See Exodus* 22:2–3; Kopel et al., *supra* note 179, at 106–07.

[200] *See Exodus* 21:12–13.

[201] *See, e.g.*, FLA. STAT. ANN. § 776.012 (Westlaw through Ch. 255, 2014 Spec. "A" Sess.); *supra* notes 199–200 and accompanying text; *infra* notes 203–06 and accompanying text.

[202] *See supra* Parts III.B, III.C.

deny that the statement "you gonna die tonight, motherf*****"[203] creates a fear of death in the target? The target of the threat should receive immunity from punishment for retaliating, if and when the threat is acted upon.[204]

An examination of the Bible's teachings about murder and violence also reveals that it is unlikely Zimmerman would have faced immediate punishment. The shooting of Trayvon Martin likely was an "unintentional fatal blow" contemplated by Exodus 21:12–13.[205] The distinction between self-defense and gratuitous killing is a difficult one to make, however. Pope John Paul II discussed the apparent inconsistency found when one kills in self-defense:

> [T]o kill a human being, in whom the image of God is present, is a particularly serious sin. *Only God is the master of life!* Yet . . . [t]here are in fact situations in which values proposed by God's Law seem to involve a genuine paradox. This happens . . . in the case of *legitimate defence*, in which the right to protect one's own life and the duty not to harm someone else's life are difficult to reconcile in practice. Certainly, the intrinsic value of life and the duty to love oneself no less than others are the basis of *a true right to self-defence*. . . . Unfortunately it happens that the need to render the aggressor incapable of causing harm sometimes involves taking his life. In this case, the fatal outcome is attributable to the aggressor whose action brought it about, even though he may not be morally responsible because of a lack of the use of reason.[206]

The idea that the victim may be responsible for his own death is not easily digestible. In the *Zimmerman* case, many Americans rejected that idea out of hand and instead searched for other sins for which they could convict the defendant—racism, vigilante-ism, and child abuse.

## CONCLUSION

The *Zimmerman* case was overhyped in light of facts that strongly indicated self-defense, rife with reversible error and questionable

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[203] *See* Zimmerman Statement, *supra* note 66, at 3.

[204] *See* § 776.012. Even less emphasis is placed upon the reasonableness of the apprehension of imminent harm or death in the Bible—one may kill an intruder ("thief") if the intruder is caught while breaking in, without the intruder having threatened the life or safety of the property owner. *See Exodus* 22:2–3.

[205] *See Exodus* 21:12–13 ("Anyone who strikes a man and kills him shall surely be put to death. However, if he does not do it intentionally, but God lets it happen, he is to flee to a place I will designate.").

[206] POPE JOHN PAUL II, *EVANGELIUM VITAE* ON THE VALUE AND INVIOLABILITY OF HUMAN LIFE 55–56 (1995), *available at* http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html; *see also* Ford, *supra* note 165 (quoting Juror B37 as stating that while Zimmerman was merely guilty of not using common sense, Martin played a major role in the incident because he was the aggressor).

behavior by the prosecution (and even the Court), and prejudged in the court of public opinion—but correctly decided. The case was not a referendum on race relations except in the minds of those who chose to make it so by ignoring the weaknesses of the prosecution's case. The beleaguered defense team was able to secure an acquittal despite shady dealings by the prosecution, substantial resistance from the Court, and no assurance of payment from Zimmerman. Although the case was unorthodox in the way it proceeded, *State v. Zimmerman* was an excellent example of how America's impartial justice system is meant to work: forgoing the circus of the court of public opinion for the honest analysis of concrete facts, thereby preserving the rights of the innocent.

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* With compliments to Mark O'Mara and Don West for trying one of the most intensely scrutinized criminal cases since *People v. Simpson*. Many thanks to Professors Duane, Stern, Hensler, and everyone else whose ear I bent for advice while writing this Note.

# THE HAZARDS OF GMOS: SCIENTIFIC REASONS WHY THEY SHOULD BE REGULATED, POLITICAL REASONS WHY THEY ARE NOT, AND LEGAL ANSWERS TO WHAT SHOULD BE DONE

## INTRODUCTION

"Contrary to what some might have us believe, there are indeed hazards associated with [genetically modified organisms]."[1] This statement, made by the Chair of the International Biosafety Advisory Committee,[2] is one of the many reasons why the current voluntary labeling status of genetically modified ("GM") foods in America is so disconcerting. Ever since the introduction of GM food products into the American market in 1996,[3] the Food and Drug Administration ("FDA") has taken a regulatory view that favors the big food industry and opposes traditional notions of food product safety. Despite the mounting evidence showing the hazardous nature of GM food products, the FDA continues to allow the widespread production and sale of GM food products to overtake the U.S. food market with minimal oversight and regulation.[4]

Genetically modified food products now make up a large majority of the foodstuffs in the American marketplace; seventy percent of processed foods contain GM products.[5] Nevertheless, potentially dangerous GM food products remain unlabeled on the shelves of American grocery stores.[6] And because the most widely grown GM crops such as corn, sugar beets, and soybeans are used as primary ingredients in most manufactured products, many food manufacturing companies vehemently oppose efforts

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1 Alan McHughen, *Welcome* to PROCEEDINGS OF THE SIXTH INTERNATIONAL SYMPOSIUM ON THE BIOSAFETY OF GENETICALLY MODIFIED ORGANISMS 1 (Clare Fairbairn, Graham Scoles & Alan McHughen eds., 2000).

2 *Id.*

3 Proposed Federal Actions to Update Field Test Requirements for Biotechnology Derived Plants and to Establish Early Food Safety Assessments for New Proteins Produced by Such Plants, 67 Fed. Reg. 50578, 50578 (proposed Aug. 2, 2002) [hereinafter Proposed Federal Actions].

4 *See* Statement of Policy: Foods Derived from New Plant Varieties, 57 Fed. Reg. 22984, 22984 (May 29, 1992) (reiterating that GM food products would be "regulated within the existing framework of the [Federal Food, Drug, and Cosmetic] [A]ct . . . utilizing an approach identical in principle to that applied to foods developed by traditional plant breeding"); JEFFREY M. SMITH, SEEDS OF DECEPTION: EXPOSING INDUSTRY AND GOVERNMENT LIES ABOUT THE SAFETY OF THE GENETICALLY ENGINEERED FOODS YOU'RE EATING 11 (2003) [hereinafter SEEDS OF DECEPTION]; David Alan Nauheim, Comment, *Food Labeling and the Consumer's Right to Know: Give the People What They Want*, 4 LIBERTY U. L. REV. 97, 105–06 (2009).

5 SEEDS OF DECEPTION, *supra* note 4, at 10.

6 *Id.* at 237.

to impose mandatory labeling laws and continue to spend millions of dollars each year on lobbying against food labeling at all levels of government.[7] For over a decade, attempts to pass federal laws requiring mandatory labeling of GM foods have continually failed in Congress.[8] Because more than ninety percent of consumers favor mandatory labeling of GM foods,[9] congressional action is clearly out of sync with public preference. Instead, extensive lobbying funded by large-scale food manufacturers and the farmers that produce their products have won the battles at the federal level, and they are now moving on to make sure these mandatory labeling laws are not enacted in individual states.[10]

Congress has repeatedly shown an interest in reducing the corruption that can result from corporate funding of lobbying on issues of great public interest.[11] For example, the Federal Election Campaign Act ("FECA") and the Bipartisan Campaign Reform Act of 2002 ("BCRA") imposed monetary limits on political contributions to federal election campaigns, and the Lobbying Disclosure Act ("LDA") requires lobbyists to report their income and expenses.[12] Equally important as protecting the integrity of the federal election process is ensuring the integrity of regulatory agencies that make decisions affecting the health and safety of the public. Therefore, legislation restricting political contributions on issues related to public health and safety should be enacted and would likely be upheld by American courts.

This Note exposes the hazards of GM food products and reviews some of the political and economic factors influencing the current voluntary status of GM food labeling in America. Part I reviews the current federal

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[7] JEFFREY M. SMITH, GENETIC ROULETTE: THE DOCUMENTED HEALTH RISKS OF GENETICALLY ENGINEERED FOODS 7 (2007) [hereinafter GENETIC ROULETTE]; SEEDS OF DECEPTION, *supra* note 4, at 245; *see infra* Part II.B.

[8] *See* Morgan Anderson Helme, Note, *Genetically Modified Food Fight: The FDA Should Step Up to the Regulatory Plate so States Do Not Cross the Constitutional Line*, 98 MINN. L. REV. 356, 358 & n.16 (2013).

[9] Emily Marden, *Risk and Regulation: U.S. Regulatory Policy on Genetically Modified Food and Agriculture*, 44 B.C. L. REV. 733, 760 (2003) (citing a 1997 survey); Allison Kopicki, *Strong Support for Labeling Modified Foods*, N.Y. TIMES (July 27, 2013), http://www.nytimes.com/2013/07/28/science/strong-support-for-labeling-modified-foods.html.

[10] *See* SEEDS OF DECEPTION, *supra* note 4, at 218–19 (describing the biotech industry's spending $5.4 million to defeat a 2002 Oregon voter initiative pushing for mandatory GM labeling); Meredith K. Schuh, Note, *California's Proposition 37: Will Its Failure Forecast the Fate of the GM Food Labeling Movement in the United States Once and for All?*, 6 KY. J. EQUINE, AGRIC., & NAT. RESOURCES L. 181, 189 & n.73 (2014); *see infra* Part II.B.

[11] *See infra* text accompanying notes 80–88.

[12] Federal Election Campaign Act, 2 U.S.C. §§ 431(19), 441 (2012); Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81–83 (2002); Nat'l Ass'n of Mfrs. v. Taylor, 582 F.3d 1, 7 (D.C. Cir. 2009); *see infra* text accompanying notes 80–88.

voluntary labeling laws for GM foods, examines scientific studies suggesting that genetically modified organisms ("GMOs") are harmful to human health, and concludes that Congress and the FDA are failing to fulfill their duty to the public by refusing to enact mandatory labeling laws for GM foods. Part II asserts that GM foods continue to circumvent proper regulatory standards, despite scientific evidence of their harm. This Part also discusses how this circumvention is largely due to the inappropriate influence of lobbyists funded by those with profit interests in the agricultural industry and by ties between lobbyists and government officials, which has resulted in the corruption of the proper legislative process. Part III proposes a solution to this inappropriate influence: new legislation limiting the amount of money any person or entity can pay to lobbying activities on issues implicating public health and safety. This legislation would help protect the integrity of regulatory agencies when they make decisions that affect the health and safety of the public, such as decisions on the labeling status of foods containing hazardous GMOs.

## I. THE HAZARD: GMOS ARE UNSAFE AND MERIT STRICTER REGULATIONS

### *A. Current GM Regulations*

The FDA is the agency responsible for ensuring the safety of all food products in the American market, and its authority comes from the Federal Food, Drug, and Cosmetic Act ("FDCA").[13] Although GM foods are not specifically mentioned in the FDCA, the FDA has stated that it will treat GM plants the same way it treats traditionally-bred plants.[14] That logic is based on the method by which a GM plant is created. Because the process is simply to insert a naturally occurring gene or bacteria into the DNA of a plant in which it does not naturally occur,[15] the FDA claims that there is no material difference between a GM food product and a traditional food product;[16] that position has been confirmed and permitted in court.[17] Additionally, because traditionally-bred plants are presumed

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[13] Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301, 393 (2012).

[14] Statement of Policy: Foods Derived from New Plant Varieties, 57 Fed. Reg. 22984, 22984 (May 29, 1992).

[15] *See, e.g.*, Carl R. Galant, Comment, *Labeling Limbo: Why Genetically Modified Foods Continue to Duck Mandatory Disclosure*, 42 HOUS. L. REV. 125, 131–32 (2005).

[16] Sally Noxon Vecchiarelli, Comment, *Mandatory Labeling of Genetically Engineered Food: Constitutionally, You Do Not Have a Right to Know*, 22 SAN JOAQUIN AGRIC. L. REV. 215, 216 (2013).

[17] *See* Alliance for Bio-Integrity v. Shalala, 116 F. Supp. 2d 166, 181 (D. D.C. 2000). In a 2000 case, a food manufacturer "was not arbitrary and capricious in its finding that genetically modified foods need not be labeled because they do not differ 'materially' from non-modified foods under 21 U.S.C. § 321(n)." Nauheim, *supra* note 4, at 120–21.

safe, GM plants are presumed safe as well.[18] This presumption allows GM seed developers to create new breeds of GM plants with little to no oversight or testing before the plants are used in food products that end up on grocery shelves across America.[19] Although the official FDA policy maintains that the label of the food must reveal all material facts about the food,[20] the FDA has decided that mandatory labeling of GM products is improper because it would mislead consumers to believe there is some difference between traditional and GM plants.[21] The result of labeling GM products on a voluntary basis is a standard that neglects to inform consumers about whether hazardous GM products are in their food.[22] Other regulations are far from satisfactory as the FDA shirks its responsibility to ensure product safety, allowing GM seed developers to decide for themselves whether it is necessary to conduct safety testing on their GM products.[23]

Unfortunately, that view of GM food stands in stark contrast to the FDA's typical precautionary approach for new products, which imposes higher standards of caution when regulating any food or pharmaceutical products that have the potential to impose health or environmental hazards.[24] Under the precautionary approach, any food additive that has been shown to cause cancer in laboratory animals would be banned from the marketplace, and any other new product that could even potentially harm the environment would be analyzed under a worst-case scenario scrutiny;[25] issues of scientific uncertainty, such as the safety of GM food products, should be analyzed the same way. The American Medical Association released a report in June of 2012 stating that, although there were no proven "'overt consequences on human health,'" it is still possible that GM foods could result in the development of allergies, horizontal gene transfer, and toxicity in humans.[26] Even the FDA's own scientists have expressed concern over the approach adopted by the agency regarding GM

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18 Draft Guidance for Industry: Voluntary Labeling Indicating Whether Foods Have or Have Not Been Developed Using Bioengineering, 66 Fed. Reg. 4839, 4839 (Jan. 18, 2001) [hereinafter Draft Guidance for Industry].

19 *See id.*; SEEDS OF DECEPTION, *supra* note 4, at 130 (explaining that GM food companies face no regulation because the government's policy on GM foods indicates that the government considers GM foods safe).

20 Draft Guidance for Industry, 66 Fed. Reg. at 4839.

21 *See id.* at 4840.

22 *Id.* at 4839; Nauheim, *supra* note 4, at 97–98.

23 *See* Draft Guidance for Industry, 66 Fed. Reg. at 4839.

24 Maria Gabriela Balboa, *Legal Framework to Secure the Benefits While Controlling the Risks of Genetically Modified Foods: A Comparison of the Cartagena Protocol and Three National Approaches*, 31 TEMPLE J. SCI., TECH. & ENVTL. L. 255, 265 (2012).

25 *Id.*

26 Vecchiarelli, *supra* note 16, at 219.

food safety.[27] Despite these disconcerting statements by the experts, the FDA continues to hold to minimal regulation and voluntary labeling standards for GMOs that are inconsistent with traditional concepts of caution in the public interest.[28]

Although the FDA claims to regulate the production of GM foods, the only point of contact between a GM seed developer and the FDA is on a voluntary basis[29] and offers no real accountability. Any GM seed developer who decides that his most recent experiment is ready to be sold as seed for crops that will eventually end up on Americans' plates is not required to have his product tested or even reviewed by the FDA.[30] Indeed, the FDA's oversight is limited merely to a "consultation process that *encourages* developers of genetically engineered plants to consult with [the] FDA before marketing their products."[31] The FDA goes on to explain the purpose of this process as if the existence of it, despite being purely voluntary, ensures the safety of GM foods:

> This process helps developers determine the necessary steps to ensure their food products are safe and lawful. The goal of the consultation process is to ensure that any safety or other regulatory issues related to a food product are resolved before commercial distribution. Foods from genetically engineered plants intended to be grown in the United States that have been evaluated by FDA through the consultation process have not gone on the market until the FDA's questions about the safety of such products have been resolved.[32]

To suppose that a *voluntary* consultation process is sufficient to evaluate potentially hazardous substances before they enter the food market is like playing Russian roulette with public health and safety, as such a process does not ensure the safety the FDA suggests. One exchange between the FDA and a GM seed developer approving a new GM corn seed shows that the consultation simply consisted of the developer's submission of *its own assessment* of the safety and nutrition of *its own* GM seed, to which the FDA gave its unreserved approval based on an unrealistic presumption of the study's reliability.[33] In its letter, the FDA stated that the seed

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[27] Jon R. Luoma, *Pandora's Pantry*, MOTHER JONES, Feb. 2000, at 53, 57–58.

[28] *See Questions & Answers on Food from Genetically Engineered Plants*, U.S. FDA, http://www.fda.gov/Food/FoodScienceResearch/Biotechnology/ucm346030.htm (last updated July 22, 2014) [hereinafter *Questions & Answers*].

[29] *Id.*

[30] *See id.*

[31] *Id.* (emphasis added).

[32] *Id.*

[33] Letter from Dennis M. Keefe, Dir., Office of Food Additive Safety for the Ctr. for Food Safety & Applied Nutrition, to Georges Freyssinet, CEO of Genective S.A. (May 7, 2013), *available at* http://www.fda.gov/Food/FoodScienceResearch/Biotechnology/Submissions/ucm357709.htm.

developer's GM corn was "not materially different in composition, safety, and other relevant parameters from corn-derived food" and that it "[did] not raise issues that would require premarket review or approval by [the] FDA"[34]—a typical boilerplate response. This cursory review process effectively allows GM food developers and manufacturers to bypass the oversight of the FDA. Thus, the FDA is shirking its regulatory responsibility as it is "essentially taking the biotech industry's word that [genetically engineered] food is not hazardous"[35] based on unfounded conjecture that GM plants are not materially different from traditional ones, despite scientific evidence suggesting otherwise.

### *B. The Overwhelming Evidence: What the FDA Ignores*

Many recent studies have shown not only material differences but also harmful differences between GM plants and their traditionally-bred counterparts.[36] A senior scientist at the Food and Environment Program of the Union of Concerned Scientists recently said that "[b]lanket statements about the safety or risks of biotechnology products are scientifically unjustified."[37] Because GM foods have only been in the marketplace since 1996,[38] significant long-term safety testing has not yet established the total safety of GM foods for human consumption.[39] The FDA claims that it "seek[s] to assure that new plant varieties do not have significantly higher levels of toxicants than present in other edible varieties of the same species."[40] However, the voluntary consultation process casts doubt on this claim, and many studies have shown the harmful effects that GM crops can cause.[41]

Recent studies have shown that one commonly used genetic modification method is likely injurious to human health.[42] In that method,

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[34] *Id.*

[35] Michele Simon & Andrew Kimbrell, *Why Center for Science in the Public Interest Is Wrong Not to Support Genetically Engineered Food Labeling*, CENTER FOR FOOD SAFETY (July 10, 2013), http://www.centerforfoodsafety.org/blog/2353/why-center-for-science-in-the-public-interest-is-wrong-not-to-support-genetically-engineered-food-labeling.

[36] *See* SEEDS OF DECEPTION, *supra* note 4, at 38.

[37] Margaret Mellon, *Transcript: Public Regulation of Biotechnology (or Not)*, 37 VT. L. REV. 1071, 1074 (2013).

[38] Proposed Federal Actions, 67 Fed. Reg. 50578, 50578 (proposed Aug. 2, 2002); *see also* Vecchiarelli, *supra* note 16, at 218–19 (citing Monsanto as the first company to develop GM crops and sell them to farmers, who used them to produce foodstuff that entered the marketplace by 1996).

[39] Mellon, *supra* note 37, at 1074.

[40] Statement of Policy: Foods Derived from New Plant Varieties, 57 Fed. Reg. 22984, 22987 (May 29, 1992).

[41] *See* SEEDS OF DECEPTION, *supra* note 4, at 11–13, 38.

[42] *See id.*; *infra* text accompanying notes 43–54.

GM crops are produced by inserting the naturally occurring soil bacterium Bacillus thuringiensis ("B.t.") into the genetic code of the plant, causing the plant to produce a protein that acts as a natural insecticide.[43] Because many traditional farmers have used this bacterium as an insecticide spray, many GM advocates claim that the change in method of administering B.t. is fully acceptable.[44] B.t.'s natural occurrence is one reasons the FDA presumes both that there can be no material difference between GM plants and natural plants and that this GM technology is safe; thus, the FDA requires no independent studies of the effects of the B.t. bacterium when used by GM technologies.[45]

Alarmingly, evidence shows that B.t. is more toxic when inserted into a plant's DNA using GM technology than when B.t. is used as a spray; "[i]t is estimated that the plants [injected with B.t.] produce 3,000–5,000 times the amount of toxin as the sprays, but it varies with plants."[46] Unlike plants with B.t. DNA injections, those that have only been sprayed are able to break down B.t. on their own, with the help of sunlight and weather, in a matter of days.[47] Even if that never happens, the residue can always be rinsed away by consumers.[48] By contrast, a plant whose DNA has been injected with B.t. toxin continually produces the toxin, which can neither be rinsed off nor worn off by weather.[49] Although B.t. in its natural form only releases its toxic insecticide properties when mixed with stomach acids of insects, this is not so when it is used in GM technology.[50] Because of the way the toxin is inserted into the plant's genes during the GM process, it is always active in the plant and is more likely to cause a negative response when ingested.[51]

Advocates for this GM method also assert that the B.t. toxin is quickly destroyed in the human stomach, and that even if this were not

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[43] Galant, *supra* note 15.

[44] *See EPA's Regulation of Bacillus thuringiensis (Bt) Crops*, U.S. EPA, http://www.epa.gov/pesticides/biopesticides/pips/regofbtcrops.htm (last updated Feb. 3, 2014) [hereinafter *EPA's Regulation*]; *Global Insect Resistance Management*, MONSANTO, http://www.monsanto.com/products/pages/insect-resistance-management.aspx (last visited Nov. 11, 2014).

[45] *See, e.g.*, Draft Guidance for Industry, 66 Fed. Reg. 4839, 4839 (Jan. 18, 2001); SEEDS OF DECEPTION, *supra* note 4, at 38 (discussing the lack of pre-market safety tests on GM foods in the United States); *EPA's Regulation, supra* note 44.

[46] GENETIC ROULETTE, *supra* note 7, at 97.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

the case, humans do not have receptors for the toxin in the first place.[52] However, those assertions are unsupported and, in fact, have been proven false: Manufacturers of the B.t. herbicide warn that allergy-like symptoms may occur as a result of its use, and some workers who sprayed the herbicide suffered nose, throat, eye, and respiratory irritation.[53] Other responses to the spray included antibody immune responses, infections, ulcers on the cornea, and, for a woman who was directly sprayed, even altered consciousness and seizures.[54] Because the voluntary consultation process in America does not require testing of the safety of these GM technologies,[55] the FDA's continual lack of oversight in this process is an ever-increasing concern.

Furthermore, a comparison of GM corn and non-GM corn shows a material difference in the make-up of the GM corn.[56] Roundup Ready corn, a type of GM corn, and a non-GM corn were grown on adjacent fields with the same soil conditions.[57] The comparison showed that Roundup Ready corn, which was treated with a typical glyphosate-based herbicide, contained 13 parts per million ("ppm") of glyphosate, which is toxic at merely 1 ppm; in contrast, the traditional corn contained no traces of glyphosate whatsoever.[58] Coincidentally, the EPA recently increased the legal limit for glyphosate in corn to 13 ppm.[59] The Roundup Ready corn also contained 200 ppm of formaldehyde, which was absent from the non-GM corn.[60] Although formaldehyde can come from normal plant metabolism, it is detoxified by the presence of other normal plant enzymes.[61] However, in plants treated with glyphosate-based herbicides, the glyphosate can break down into formaldehyde.[62] In fact, any Roundup Ready plant that is sprayed with a glyphosate-based herbicide has the

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[52] SEEDS OF DECEPTION, *supra* note 4, at 178; *Bacillus thuringiensis Cry3Bb1 Protein and the Genetic Material Necessary for its Production (Vector ZMIR13L) in Event MON863 Corn (006484) Fact Sheet*, U.S. EPA, http://www.epa.gov/pesticides/biopesticides/ingredients_keep/factsheets/factsheet_006484.htm (issued May 2005) (last updated Aug. 21, 2012).

[53] GENETIC ROULETTE, *supra* note 7, at 95.

[54] *Id.*

[55] *See Questions & Answers*, *supra* note 28.

[56] *See infra* text accompanying notes 57–66.

[57] Mae-Wan Ho, *"Stunning" Difference of GM from Non-GM Corn*, PERMACULTURE RES. INST. (Apr. 22, 2013), http://permaculturenews.org/2013/04/22/stunning-difference-of-gm-from-non-gm-corn/.

[58] *Id.*

[59] Glyphosate; Pesticide Tolerance, 76 Fed. Reg. 27268, 27270 (proposed May 11, 2011) (codified at 40 C.F.R. pt. 180).

[60] Ho, *supra* note 57.

[61] *Id.*

[62] *See id.*

potential to produce formaldehyde that would not exist in a normal, healthy plant.[63] Formaldehyde is "a toxic compound that . . . has been classified as a mutagen and suspected carcinogen."[64] It is also a neurotoxin that has been shown to affect certain brain proteins in the same way as Alzheimer's disease and lead to neurotic cell death.[65] The independence of the study adds to its validity; farmers themselves performed the study instead of relying on a study sponsored by the biotech companies.[66]

This Note does not discuss many other factors indicating the hazardous nature of GM food products. The process of inserting genes naturally found in one plant into another plant that would never naturally crossbreed with the first plant could result in mutations that, though currently unknown, are harmful to humans.[67] The environment could also be harmed; if an herbicide-resistant GM plant intermingled with a weed, it could create a kind of invincible "super-weed."[68] In fact, organic crops have already been contaminated due to pollen migration and cross-pollination with their GM counterparts.[69] This problem presents the frightening potential to destroy the natural biodiversity of our foods and wipe out traditional plant species altogether.[70] In some cases, cross-pollination has also led to inequitable economic hardship on traditional plant farmers who have been exposed to litigation when their plants inadvertently become contaminated with rogue GM seeds.[71] Antibiotic resistance in humans is another potential issue because GM technology uses bacteria with naturally-occurring antibiotic resistance genes that may increase during the GM process and thereby decrease the effectiveness of medicinal antibiotics when humans need them most.[72]

Based on these studies, assertions by the FDA and biotech companies that GM plants are not materially different from their traditional counterparts are blatantly untrue; these differences should, by themselves, be enough at the very least to require mandatory labeling of GM foods, if not a total ban until further research is done. Considering the

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63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.*

67 Nauheim, *supra* note 4.

68 *Id.* at 106.

69 *Id.*; *see* SEEDS OF DECEPTION, *supra* note 4, at 68.

70 Nauheim, *supra* note 4, at 106.

71 *See* Organic Seed Growers & Trade Ass'n v. Monsanto Co., 718 F.3d 1350, 1352–53, 1355–56 (Fed. Cir. 2013) (describing Monsanto's "history of aggressive assertion of its transgenic seed patents against other growers and sellers (144 suits and 700 settlements) . . . .").

72 *See* SEEDS OF DECEPTION, *supra* note 4, at 59–60.

prevalence of GM plant products in many of the foods that Americans eat on a daily basis,[73] such data should not be taken lightly.

## II. THE PROBLEM: DEREGULATION THROUGH PROFIT-MOTIVATED LOBBYING

Often, the primary fight between conflicting interest groups occurs within the framework of lobbying. The detrimental effect of this highly politicized forum is evident in the current debate over GM food product labeling in America. The FDA has wide latitude in making its decisions, especially for those decisions requiring scientific judgments.[74] And because regulatory agencies like the FDA are independent bodies not subject to the same checks and balances as the three branches of the federal government,[75] their decisions are largely autonomous. Wide decision-making latitude, along with the political pressure imposed by lobbyists, creates the perfect storm for the possibility of corruption among regulatory agencies.

It has been over a decade since the FDA revised its policy toward GM food products.[76] However, based on the studies cited above, mandatory labeling and more stringent testing of food products containing GM plants should have been enacted long ago.[77] This discrepancy between theory and practice is due largely to the successful lobbying of pro-GM groups backed by the finances of corporations that use GM crops in their food products.[78] Because of the overwhelming influence of these lobbyists, those with profit-motives contrary to public interest have driven the regulatory status of hazardous GM foods, and mandatory labeling laws and other regulations that would typically be enacted by agencies like the FDA have been thwarted.[79] Despite strong opposition, the issue persists and has led to the nearly inexorable prevalence of hazardous GM food products in the

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[73] *Id.* at 10, 267. Some of the most notable GM plant products are corn-based food products such as "cereals, tortillas, tacos, corn chips, corn flour, [and] corn grits . . . ." Simon & Kimbrell, *supra* note 35.

[74] Nauheim, *supra* note 4, at 119.

[75] *See* Vale Krenik, Note, *"No One Can Serve Two Masters": A Separation of Powers Solution for Conflicts of Interest Within the Department of Health and Human Services*, 12 TEX. WESLEYAN L. REV. 585, 587, 620–21; Susan M. McDonough, *The Fourth Power? Administrative Searches vs. the Fourth Amendment*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 195, 197–98 (1993) (asserting that the very existence of administrative agencies is unconstitutional because of the consolidation of legislative, executive, and judicial power in one place).

[76] *See FDA's Role in Regulating Safety of GE Foods*, U.S. FDA (May 2013), http://www.fda.gov/downloads/ForConsumers/ConsumerUpdates/UCM352193.pdf (citing the FDA's draft guidance on GM foods released in January 2001).

[77] *See supra* Part I.B.

[78] *See infra* Part II.B.

[79] *See supra* text accompanying notes 8–10; *see infra* Part I.A.

American market, creating a public health and safety issue that cannot be ignored. The root of the problem is the unchecked lobbying power wielded by those more interested in increasing profits than ensuring public safety. Because of the significant influence wielded by lobbyists over federal policymakers, lobbying is an important issue to consider when analyzing the current state of GM food product laws in America.

### *A. Inappropriate Influence: Current Lobbying Legislation*

The federal government has been regulating lobbying activities since 1946, when it enacted the Federal Regulation of Lobbying Act ("FRLA").[80] In 1995, when it was clear that the FRLA no longer accomplished its purpose, every member of Congress voted to replace it with the Lobbying Disclosure Act ("LDA").[81] The LDA recognized that a "responsible representative Government requires public awareness of the efforts of paid lobbyists to influence the public decisionmaking process in both the legislative and executive branches of the Federal Government"[82] and that "the effective public disclosure of the identity and extent of the efforts of paid lobbyists to influence Federal officials in the conduct of Government actions will increase public confidence in the integrity of Government."[83] As a result, Congress expanded the definition of lobbying and broadened enforcement provisions of the relevant legislation.[84] Under the LDA, lobbyists must register with both the Senate and the House forty-five days before making lobbying contacts.[85] The lobbyists must also disclose information regarding their client and/or employers as well as the specific topics on which they intend to lobby.[86] Furthermore, all monetary contributions and expenses that the lobbyist received or incurred must be periodically reported.[87] The House Judiciary Committee further demonstrated its dedication to securing the transparency of lobbying activities by enacting another provision that requires lobbyists to disclose any other organization (other than their own clients) that contributes over $10,000 to the lobbyists on a semiannual basis and who "in whole or in major part plans, supervises, or controls" the lobbyists' activities.[88]

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80 Nat'l Ass'n of Mfrs. v. Taylor, 582 F.3d 1, 6 (D.C. Cir. 2009).

81 *Id.* & n.1.

82 2 U.S.C. § 1601(1) (2012).

83 *Id.* § 1601(3).

84 *Nat'l Ass'n of Mfrs.*, 582 F.3d at 6–7.

85 *Id.* at 7.

86 *Id.*

87 *Id.*

88 *Id.* (quoting Lobbying Disclosure Act of 1995 § 4(b)(3), Pub. L. No. 104-65, 109 Stat. at 696 (codified as amended at 2 U.S.C. § 1603(b)(3) (1995))).

In 2007, Congress responded to multiple lobbying-related scandals by amending the LDA with further provisions, embodied in the Honest Leadership and Open Government Act ("HLOGA"), to "close loopholes in current law."[89] The HLOGA was an important amendment that included a heightened requirement for disclosures of non-client organizations who gave financially to the lobbyists; Congress raised the standard from requiring disclosure of any organization that plans, supervises, or controls the lobbying activities "in whole or in major part" to requiring disclosure of any organization that "actively participates" in such activities.[90] In its "Purpose and Summary" for the HLOGA, the Committee on the Judiciary noted:

> Federal lobbying is a multi-billion dollar industry, and spending to influence Members of Congress and Executive Branch officials has continued to increase over the last decade. While the Lobbying Disclosure Act was intended to promote transparency and accountability in the Federal lobbying industry, it falls far short of a complete solution. Its shortcomings were highlighted during the 109th Congress by the conviction of a high-profile lobbyist, as well as a number of highly publicized incidents involving and the provision of privately-funded travel, free meals, and lavish entertainment by lobbyists to Members of Congress, congressional staff, and some Executive Branch officials in exchange for favorable treatment for clients with specific interests before the Government.[91]

Although the Judiciary Committee cited mostly to issues regarding the use of financial resources to exploit the favor of federal policymakers, the ensuing legislation of the HLOGA only addressed the issue "by requiring more rigorous disclosure of lobbying-related activities and heightened enforcement of lobbying laws and regulations."[92] The inappropriate influence of lobbyists was also an issue for the committee,[93] but the HLOGA nonetheless fails to address it. Lobbyists' unrestricted financing continues to create and promote the inappropriate influence that Congress was trying to prevent through the HLOGA and creates a high potential for unjust policymaking on important issues affecting public health and safety. Further legislation is necessary to constrain the inappropriate influence of lobbyists on policymakers.

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89 *Id.* (internal quotation marks omitted); Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, § 203, 121 Stat. 735 (codified as amended at 2 U.S.C. § 1604(d) (2012)).

90 *Nat'l Ass'n of Mfrs.*, 582 F.3d at 8 (internal quotation marks omitted).

91 H.R. REP. NO. 110-161, pt. 1, at 9 (2007).

92 *Id.*

93 *Id.* at 10.

### *B. Lobbying for Voluntary Labeling Standards*

Despite the overwhelming evidence, the fight for mandatory labeling of GM food products is still unresolved at the federal level. Evidence of the lobbying activities surrounding GM food product regulation in America illustrates the powerful effect that lobbying can have, even when other interests involved are infinitely more important. When two interest groups compete against each other for the policy each group prefers, "the resulting policy can be more extreme and less efficient" than it should be.[94] The current regulatory policy for GM food products aptly illustrates that concept. Extensive lobbying of government agencies by pro-GMO groups funded by the food industry has resulted in inappropriate influence of lobbying and led to frivolous regulatory standards in opposition to public safety interests.

Regulatory agencies are not immune to inappropriate private sector influence over the safety issues with which they have been entrusted. In 2009, the FDA used a fast-track approval process to approve a controversial medical device without conducting the clinical trials necessary to establish a full review of the product's safety.[95] Similar to the FDA's current policy that GM food products are presumed safe because their modified genes occur in traditional plants,[96] the fast-track process for the new medicinal device did not require clinical trials because the product was similar to existing products.[97] One doctor with knowledge about the device even opined that the FDA might have "stacked" the advisory committee that considered the device to get the decision it wanted.[98] This decision is an alarming illustration of how easily "political and industry pressure can influence [the] scientific conclusions"[99] of governmental agencies.

The threat of this inappropriate influence on policymaking is compounded because many of those lobbying against stricter regulation of GM food products are doing so based on profit interests rather than public health and safety interests. For instance, the Grocery Manufacturer's Association ("GMA") is the largest trade group for food producers, and one

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[94] Yoav Wachsman & Jie Zhou, *A Model of Cournot Competition with Lobbying*, 11 J. BUS. & ECON. RES. 251, 252 (2013).

[95] Alicia Mundy, *Political Lobbying Drove FDA Process*, WALL ST. J. Mar. 6, 2009, 12:01 AM, http://online.wsj.com/articles/SB123629954783946701 (case sensitive URL).

[96] *See* Draft Guidance for Industry, 66 Fed. Reg. 4839, 4839 (Jan. 18, 2001); *see supra* text accompanying notes 14–21.

[97] Mundy, *supra* note 95.

[98] *Id.* (quoting Dr. Jay Mabrey, chief of orthopedic surgery at Baylor University Medical Center in Dallas and chairman of the FDA advisory committee that considered the device).

[99] *Id.*

of its significant purposes is to lobby on behalf of its members.[100] Members of GMA include large-scale food manufacturers such as Pepsi, Kellogg's, General Mills, and even the leading biotechnology developer, Monsanto.[101] If legislation required mandatory labeling of GMOs, all of these companies would be forced to label most, if not all, of their products as containing GMOs. Because a company's profits rely heavily on a positive public perception of their products—and mandatory labeling could potentially destroy this positive perception—these companies pour millions of dollars into lobbying against mandatory GM labeling each year.[102] In Europe, where the labeling of GM foods is strictly enforced, many companies produce all GMO-free products, suggesting that labeling laws are a significant factor influencing the prevalence of GM food products.[103] While European legislation focuses on public safety and prevents harm to consumers, American legislation has taken the opposite approach by allowing those with profit interests to puppeteer the legislative process with little regard for public interests.

The lobbying efforts of GMA and other political action committees ("PACs") against mandatory labeling laws have been vastly successful at the federal level for over a decade. Between November 16, 1999, and December 2, 2011, congressmen made multiple attempts to enact the Genetically Engineered Food Right to Know Act, a proposed federal law that would have required all foods containing GM products to be labeled before entering the marketplace.[104] Each of these attempts failed in the House of Representatives,[105] in spite of polls from both 1997 and 2013 reflecting that ninety-three percent of American consumers prefer GM food products to be labeled.[106] One of the most likely reasons for the legislation's failure is the successful lobbying efforts of the food manufacturing industry. In 2012, GMA spent $3 million to lobby at the federal level for the continued deregulation and use of GM products,

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[100] Response in Support of Certiorari Review at iii, Am. Fuel & Petrochemical Mfrs. v. EPA, 133 S. Ct. 2881 (2013) (No. 12-1229), 2013 U.S. S. Ct. Briefs LEXIS 2117 at *1; Grocery Manufacturers Association, *Benefits of Membership*, GMAONLINE.ORG, http://www.gmaonline.org/file-manager/Membership/Benefits%20of%20Membership_2012.pdf; Michele Simon, *Are Junk Food Corporations Hiding Behind Lobbyists to Stop GE Food Labeling in Washington State?*, CENTER FOR FOOD SAFETY (Sept. 17, 2013), http://www.centerforfoodsafety.org/blog/2572/are-junk-food-corporations-hiding-behind-lobbyists-to-stop-ge-food-labeling-in-washington-state?key=71655651.

[101] Response in Support of Certiorari Review, *supra* note 100; Simon, *supra* note 100.

[102] *See infra* text accompanying notes 107–09.

[103] *Labels for GMO Foods Are a Bad Idea*, SCI. AM., Aug. 20, 2013, http://www.scientificamerican.com/article/labels-for-gmo-foods-are-a-bad-idea/.

[104] *See* Helme, *supra* note 8.

[105] *Id.*

[106] Marden, *supra* note 9; Kopicki, *supra* note 9.

among other things.[107] This statistic does not include the separate payments made by the individual members of GMA such as Monsanto, whose payments to lobbyists totaled approximately $5.97 million in 2012 alone.[108]

Taken together, these facts suggest that the funds given to these lobbying groups have a great effect on the outcome of legislation, whether the funds are used to lobby government officials or the voters themselves. As one author aptly stated, "[f]ood agencies' failure to adopt a precautionary standard begs the question as to whether the rule furthers the interests of corporations, lobbyists, and biotech companies rather than the public's interests."[109] With this kind of lopsided lobbying on such an important issue, a solution seems increasingly illusive to those aware of the true hazards of GM food.

### *C. The Revolving Door and Over-Representation of Corporate Interests*

Another glaring issue with the integrity of American GM food policy is what has become known as the "revolving door" among members of the FDA, the food industry, and lobbyists. Perhaps one of the most alarming examples is Michael Taylor, who became the FDA deputy commissioner for foods in 2010 after serving as vice president for public policy with Monsanto,[110] a very prominent GM seed development company.[111] Several other officials have worked for both Monsanto and the government,

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[107] Simon, *supra* note 100; *see* Grocery Mfrs. Ass'n Lobbying Report, First Quarter 2012 (Apr. 20, 2012), *available at* http://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=f3a6638d-259a-4fda-8da8-a3d642e61129&filingTypeID=51; Grocery Mfrs. Ass'n Lobbying Report, Second Quarter 2012 (July 18, 2012), *available at* http://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=4913ec35-73d7-41dd-a05c-f544072fbc03&filingTypeID=60; Grocery Mfrs. Ass'n Lobbying Report, Third Quarter 2012 (Oct. 19, 2012), *available at* http://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=dd332bd3-ab56-4c53-8723-e26652177a17&filingTypeID=69; Grocery Mfrs. Ass'n Lobbying Report, Fourth Quarter 2012 (Jan. 22, 2013), *available at* http://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=34c3ab1e-efaa-4442-abbd-03fc3c4c62aa&filingTypeID=78.

[108] *See Monsanto Co: Lobbyists Representing Monsanto Co, 2012*, OPENSECRETS.ORG, http://www.opensecrets.org/lobby/clientlbs.php?id=D000000055&year=2012 (last visited Nov. 11, 2014).

[109] Michèle Alexandre, *Justice Kagan's Presidential Administration and Bioengineered Foods: Making the Case for Congressional Guidance as a Check to Presidential Policy Setting*, 46 IND. L. REV. 265, 272 (2013).

[110] *Meet Michael R. Taylor, J.D., Deputy Commissioner for Foods and Veterinary Medicine*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/aboutfda/centersoffices/officeoffoods/ucm196721.htm (last updated July 7, 2014).

[111] Carey Gillam, *U.S. GMO Labeling Foes Triple Spending in First Half of This Year Over 2013*, REUTERS (Sept. 3, 2014, 3:44 PM), http://www.reuters.com/article/2014/09/03/us-usa-gmo-labeling-idUSKBN0GY09O20140903; *What We Do*, MONSANTO, http://www.monsanto.com/products/pages/default.aspx (last visited Nov. 11, 2014).

including other regulatory agencies like the Environmental Protection Agency ("EPA").[112] But the influence does not stop there. Based on a study done by the Center for Responsive Politics, twenty-nine of GMA's thirty-five lobbyists in 2013 previously held government jobs,[113] making them highly influential within the political sphere.

Furthermore, some of the food industry's most successful "lobbyists" are not even registered to lobby; this is a blatant violation of the LDA.[114] In some instances, prominent lobbyists[115] or lobbying groups[116] failed to disclose their lobbying activity, illustrating the ease with which the food industry can leave its mark on FDA policy-making and regulation, despite existing laws aimed at limiting this influence. Not all people who push an agenda are registered, and, when they are, public disclosure is minimal.[117]

There is also alarming evidence of the over-involvement of industry representatives and underrepresentation of consumer interests in the regulatory determination process. United States policymakers have a history of allowing the over-representation of farmer and food manufacturer interests when determining agricultural policy. During the 2006 Congressional Hearings on the topic, seventeen witnesses testified before the House Agricultural Committee, all of whom represented farm lobby groups.[118] Furthermore, the memoranda from meetings of the FDA's Center for Food Safety and Applied Nutrition ("CFSAN") showed that industry representatives were present at meetings four times more often than those representing consumer interests.[119] Over a period of two years, representatives of the food industry were present at seventy-eight percent of CFSAN meetings, but representatives of consumer interests were

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[112] Hunter Lewis, *Monsanto's Friends in High Places*, LUDWIG VON MISES INST., (Nov. 9, 2013), http://mises.org/daily/6580/Monsantos-Friends-in-High-Places (listing former Monsanto employees who later worked for the EPA and FDA).

[113] Simon, *supra* note 100.

[114] *See* Nancy Watzman, *Rulemaking in the Dark: Little Disclosure When Big Food Lobbies the FDA*, SUNLIGHT FOUND. BLOG (Sept. 26, 2013, 7:14 AM), http://reporting.sunlightfoundation.com/2013/Rulemaking_in_the_dark_FDA/; *see supra* text accompanying notes 84–90.

[115] Watzman, *supra* note 114; Marjorie Yano & Katie Reardon, *What Went Wrong? Lobbyist Guilty of Misdemeanors for Filing False Disclosure Forms*, BRICKER & ECKLER ATT'YS AT L. (Apr. 17, 2014), http://www.bricker.com/publications-and-resources/publications-and-resources-details.aspx?Publicationid=2845.

[116] Brad Shannon, *Judge Rejects Call to Freeze Anti-I-522 Cash—Group in Support of Labeling GMO Foods Claims Grocery Association Had Not Registered as Political Committee Before Soliciting Funds*, OLYMPIAN, Oct. 24, 2013, at 5A.

[117] Watzman, *supra* note 114.

[118] *Committee and Farm Groups Talk Ag Policy*, HOUSE COMMITTEE ON AGRIC. (Sept. 20, 2006), https://agriculture.house.gov/press-release/committee-and-farm-groups-talk-ag-policy.

[119] Watzman, *supra* note 114.

present at only eighteen percent.[120] With the FDA in charge of developing many of the details regarding regulatory law, the ease with which lobbyists can attend meetings and push private agendas is pushing the limits of propriety in an industry closely connected with public health and safety.

## III. THE SOLUTION: NEW LOBBYING REGULATIONS

The legislative process is a delicate one that is meant, first and foremost, to ensure the safety of the public through regulations decided with careful deliberation and fair representation of the population. Regulatory agencies such as the FDA play an essential role in this process, but they are largely independent, unaccountable to the public, and free from the checks and balances of our federal system of government.[121] The ability of these agencies to make an objective and impartial assessment of the issues they decide is crucial to enacting regulations that protect public interests. However, large payments made to lobbyists by those with profit motives threaten the impartiality of these bodies and actually jeopardize public health and safety.

Current legislation does not effectively address the bias issue created by those payments because it leaves the financial aspect of lobbying untouched, in effect leaving the public without fair representation against those with profit motives in the pending legislation.[122] Although the HLOGA requires disclosure about who makes lobbying contributions and how much,[123] it does not effectively deter the inappropriate influence of lobbying on specific public safety issues because it does not limit the amount of contributions lobbyists can make. Therefore, legislators should take further action to ensure independent agency decisions are protected from prejudicial outside influences that are often against the public interest.

While lobbying is a natural part of the democratic political process, it should not be involved—or should be vastly limited—in decisions that affect public health and safety. Because the most likely explanation attributes this fault in legislation to the successful lobbying of companies and PACs that represent corporate, rather than public, interests, the best response is to enact lobbying laws that will restrict lobbying activities and contributions on issues that affect public health and safety. Legislation to that effect must do more than require disclosure of lobbyist payments and

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120 *Id.*

121 *See supra* notes 74–75 and accompanying text.

122 *See supra* Part II.A.

123 Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, § 203, 121 Stat. 735, 743 (codified as amended at 2 U.S.C. § 1604(d) (2012)).

activities; it should also vastly limit the payment amounts made to lobbyists on these issues—or perhaps prohibit lobbying on those issues altogether. Such limitations will serve the current lobbying legislation's intended purpose of deterring the inappropriate influence that lobbyists wield over the political process[124] by limiting the influence of those with profit motives contrary to public interests.

In the area of GM food product regulations, lobbyist contribution limits will help ensure that the FDA is unbiased in its scientific review of GM food products by taking away the potential for opposing profit interests to overpower scientific evidence of GM product hazards. As it stands, the unchecked financing of lobbyists has led to over a decade of inappropriate influence over GM food regulations in America,[125] resulting in policies that elevate the profit interests of the food and agriculture industries above the safety of the American public. Because lobbyists have a prominent influence on the pro-industry regulatory policies set by the FDA, such legislation would further ensure the proper representation of public interests regarding public health and safety.

Although the First Amendment typically protects political contributions as a type of political speech, they are not immune to restriction.[126] Some restrictions on financial contributions to federal election campaigns, for example, have been struck down as unconstitutional,[127] while others have been upheld.[128] A restriction on a person or corporation's First Amendment right to political speech is valid if it can withstand the strict scrutiny test, which requires that the restriction be narrowly tailored to effectively accomplish a compelling governmental interest.[129] Because protecting public health and safety is a compelling governmental interest,[130] laws restricting lobbying activities or contributions on issues involving that interest will be valid if they are narrowly tailored to accomplish that interest. Scientific evidence about the health and safety hazards posed by GM foods exists; therefore, public health and safety interests are implicated. Because evidence suggests that constant profit-motivated GMO lobbying and political pressure stopped the FDA from enacting legislation likely to protect public health and

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[124] *See supra* Part II.A.

[125] *See supra* text accompanying notes 100–07.

[126] *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1440–41 (2014).

[127] *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876, 888, 896, 917 (2010).

[128] *See, e.g.*, Cao v. FEC (*In re* Cao), 619 F.3d 410, 413–14 (5th Cir. 2010).

[129] *Citizens United*, 130 S. Ct. at 898; *see also* Nat'l Ass'n of Mfrs. v. Taylor, 582 F.3d 1, 11 (D.C. Cir. 2009).

[130] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 310 (1978); Buchwald v. Univ. of N.M. Sch. of Med., 159 F.3d 487, 498 (10th Cir. 1998); Westchester Day Sch. v. Vill. of Mamaroneck, 417 F. Supp. 2d 477, 550 (S.D.N.Y 2006).

safety interests,[131] a law restricting the amounts that private corporations can give to lobbying activities on public safety issues, such as the GMO labeling issue, would be sufficiently narrowly tailored to serve that government interest.

In upholding legislation requiring disclosure of lobbying activities, the Supreme Court recognized the importance of ensuring the voice of the public is heard above the political pressures that often hinder the legislative process:

> [T]he American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate [political] pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal.[132]

The Supreme Court recognized that Congress has "a vital national interest" in accessing the disclosures of lobbying activities in order to help legislators better understand the pressures that lobbyists exert.[133] Thus, it follows that an even more vital interest arises when those pressures are so strong that Congress, or other regulatory bodies like the FDA, continually reject both scientific studies and public consensus on an issue, especially one that affects public health and safety.

The Supreme Court held that only government interests in preventing corruption and its appearance are sufficient to uphold restrictions on amounts given to campaign finances.[134] Although this test has traditionally been applied only to restrictions on payments to election campaigns, the test also should be applied to laws restricting lobbying contributions when they have the potential to corrupt the authorities trusted with the responsibility to enact laws that affect public safety. As previously discussed, this is certainly the case for the FDA's policy on GM food products.[135]

Large food manufacturing corporations make massive contributions to GMO lobbying activities.[136] Although the government cannot impose restrictions on contributions based solely on the corporate identity of the speaker,[137] the independent expenditures of a corporate body combined with campaign contributions may still raise a question of corruption.[138]

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131 *See supra* Part II.B–C.

132 United States v. Harriss, 347 U.S. 612, 625 (1954).

133 *Id.* at 625–26.

134 FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 496–97 (1984).

135 *See supra* Part II.B.

136 Gillam, *supra* note 111; Simon, *supra* note 100.

137 Citizens United v. FEC, 130 S. Ct. 876, 883 (2010).

138 Ala. Democratic Conference v. Broussard, 541 F. App'x 931, 935 (11th Cir. 2013); Stop This Insanity, Inc. v. FEC, 902 F. Supp. 2d 23, 43–44 (D.D.C. 2012).

Thus, a court may not, as a matter of law, invalidate contribution limits on an entity when that entity makes both contributions to the campaign itself and is using independent expenditures to advocate for the same candidate.[139] When extended to the lobbying issue, this reasoning indicates that restrictions on financial contributions by large corporations could be valid. Many corporations, both in the biotechnology business and in food manufacturing, have historically made payments to GM lobbying groups that oppose GMO regulations[140] while simultaneously spending money to lobby independently against the same regulations.[141] To maintain the integrity of the legislative process, a corporation that gives large contributions to a PAC that lobbies against GMO regulations should be subject to a monetary cap for that issue. In addition, the possibility of corruption within these corporate companies is heightened when viewed in light of the close ties between government agencies and companies like Monsanto, providing even more reason to impose contribution limits on such a delicate and important issue. Policymaking on public health and safety issues should not be open to control by those with adverse profit interests.

## CONCLUSION

The current legislation on lobbying activities is ineffective in deterring the inappropriate influence lobbyists exert on the process for determining proper standards for safety regulations, especially regulations of GM foods. Although the FDA has regulatory authority over GM products, the current regulations are not sufficient to fulfill a proper precautionary approach to ensure the safety of these foods. Despite multiple scientific studies showing a material difference between traditional crops and GM crops, mandatory labeling standards and heightened testing standards for GM products have yet to be enacted. Overwhelming evidence on the issue suggests that corporate lobbying is a primary factor influencing the FDA's stagnant and unjustified position on GM foods. To effectively release the FDA and other regulatory government agencies from the inappropriate influence of lobbyists, Congress should enact new regulations to limit monetary contributions to any lobbying

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[139] FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 465 (2001); *Ala. Democratic Conference*, 541 F. App'x at 935.

[140] Christina Salerno, *Grocery Manufacturers Association Discloses Donors to Anti-GMO Label Effort*, CAPITOL REC. (Oct. 18, 2013), http://capitolrecord.tvw.org/2013/10/grocery-manufacturers-association-discloses-contributors-to-anti-gmo-label-effort/#.UwjPvRdV0I.

[141] *See, e.g.*, Brad Shannon, *Olympia Judge Rejects Lawsuit vs. No on 522; Fines "Moms for Labeling" Group $10,000*, OLYMPIAN (Oct. 4, 2013), http://www.courts.wa.gov/content/PublicUpload/eclips/2013%2010%2007%20Olympia%20judge%20rejects%20lawsuit%20vs%20No%20on%20522.pdf; Simon, *supra* note 100.

activities on an issue that could reasonably have an effect on public health and safety.

Notwithstanding current legislation, which is meant to ensure transparency in the lobbying industry and require more frequent disclosures of lobbyist activities,[142] the inappropriate influence that lobbyists maintain over the legislative process remains a prominent factor determining the regulatory status of GM foods in America. While the Federal Election Campaign Act limits campaign contributions individuals and political committees may give to candidates running for federal office,[143] no similar limit is set on contributions to PACs lobbying in other areas of significant public interest regarding health and safety. Due to the strong potential for corruption within the regulating bodies and a long history of regulatory agencies' slowness to respond to public consensus, the best way to ameliorate this inequitable position toward GM food products is to enact lobbying contribution restrictions to enable public opinion to be heard more clearly and equitably. With gross underrepresentation of the public's interests in agency decision-making, the GMO debate in America has swayed in favor of corporate interests, and it has left a serious safety hazard largely unregulated. When overwhelming scientific evidence and the popular opinion of American consumers are consistently and systematically ignored in favor of policies driven by profit-motivated lobbying, legislators must intervene to protect public interests.

*Krystle B. Blanchard*[*]

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[142] H.R. REP. NO. 110-161, pt. 1, at 9–10 (2007); *see also* Brian W. Schoeneman, *The Scarlet L: Have Recent Developments in Lobbying Regulation Gone Too Far?*, 60 CATH. U. L. REV. 505, 516–17 (2011).

[143] Federal Election Campaign Act of 1971, 2 U.S.C. § 441a(a)(1)(A), (2)(A) (2012) (transferred to 52 U.S.C.A. § 30116(a)(1)(A), (2)(A) (West, Westlaw through Pub. L. No. 113-163 2014)).

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# NATURAL BORN SHENANIGANS: HOW THE BIRTHER MOVEMENT EXACERBATED CONFUSION OVER THE CONSTITUTION'S NATURAL BORN CITIZEN REQUIREMENT

## INTRODUCTION

The campaign for the U.S. presidency in 2008 was marked by several high-profile media controversies,[1] but perhaps none so persistent[2] (nor high-profile)[3] as the dispute over eventual President Barack Obama's place of birth. A vocal group known as "birthers" seized on Obama's father's Kenyan nationality to claim (or alternatively insinuate) that, contrary to his claim of birth in Hawaii, Obama was born in Kenya.[4] According to birthers, Obama was ineligible to serve in the presidency by operation of the constitutional requirement that the President be a natural born citizen.[5] Birthers battled a mainstream academy and press

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[1] *See, e.g.*, Jim Rutenberg et al., *For McCain, Self-Confidence on Ethics Poses Its Own Risk*, N.Y. TIMES, Feb. 21, 2008, at A1 (alleging a lobbyist's improper influence on candidate John McCain); Michael Dobbs, *Obama's "Weatherman" Connection*, WASH. POST (Feb. 19, 2008, 6:00 AM), http://blog.washingtonpost.com/fact-checker/2008/02/obamas_weatherman_connection.html (evaluating controversial claims about a personal connection between Obama and domestic terrorist William Ayers); Alex Mooney & Peter Hamby, *Clinton: Wright Would Not Have Been My Pastor*, CNN (Mar. 25, 2008, 5:35 PM), http://www.cnn.com/2008/POLITICS/03/25/clinton.wright/ (case sensitive URL) (detailing candidate Hillary Clinton's reaction to a controversy surrounding statements made by Barack Obama's pastor, Jeremiah Wright).

[2] Some challenges to Obama's eligibility for the presidency based on his birthplace were still being litigated as this Note was being published. *See, e.g.*, Petition for Writ of Mandamus, Voeltz v. Obama, No. 14-145 (U.S. Aug. 7, 2014), *mandamus denied*, *In re* Voeltz, No. 14-145, 2014 WL 3899255 (Oct. 14, 2014), *see Docket Search Page for In re* Voeltz, *No. 14-145*, SUPREME CT. U.S., http://www.supremecourt.gov/search.aspx?filename=/docketfiles/14-145.htm (last visited Nov. 11, 2014).

[3] *See, e.g.*, Michael D. Shear, *Want a Copy of Obama's Birth Certificate?*, N.Y. TIMES (May 18, 2011, 3:26 PM), http://thecaucus.blogs.nytimes.com/2011/05/18/want-a-copy-of-obamas-birth-certificate-2/ (describing the Obama campaign's humorous response to birthers' demands for Obama's birth certificate in selling coffee mugs and other merchandise emblazoned with an image of Obama's birth certificate).

[4] *See, e.g.*, Jerome R. Corsi, *Did Obama's Grandmother Say He Was Born in Kenya?* WND (Aug. 24, 2009, 9:16 PM), http://www.wnd.com/2009/08/107524/. Corsi is a birther stalwart, and his work appears to have informed much of the litigation discussed in this Note. *See generally* JEROME R. CORSI, WHERE'S THE BIRTH CERTIFICATE? (2011) (discussing in detail the birther argument against Obama's eligibility for the presidency).

[5] U.S. CONST. art. II, § 1, cl. 4; *e.g.*, CORSI, *supra* note 4, at v.

unsympathetic to their views[6] and potentially problematic productions by Obama,[7] and theorists continue to champion their cause today.[8]

Whatever its merits, the birther movement's persistent advocacy against Obama's eligibility in the face of hard facts[9] may have actually helped to downplay and discredit a distinct, more legally credible challenge to the candidate's status as a natural born citizen. Leo Donofrio,[10] then an attorney in New Jersey, researched the historic understanding of "natural born citizen" as a term of art and found that it had a set, broadly-understood meaning at the drafting of the Constitution[11] which was very different from the meaning it has taken in modern times.[12] Employing an original-meaning textual framework, Donofrio contended that under Article II, Section 1 of the Constitution, both Obama and Republican candidate John McCain were ineligible to hold the presidency.[13]

A deluge of claims following variations on the "born in Kenya" formula hit state and federal courts throughout 2008,[14] and Donofrio

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[6] *See* Kate Zernike, *Conspiracies Are Us*, N.Y. TIMES, May 1, 2011, at WK1; Dana Milbank, *The Tinfoil-Hat Brigade Fails in Challenge to Obama's Eligibility*, WASH. POST (Dec. 9, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/12/08/AR2008120803446.html (case sensitive URL); *see also* Rhodes v. MacDonald, 670 F. Supp. 2d 1363, 1375 (M.D. Ga. 2009) (summarizing birther plaintiff's evidence as "an affidavit from someone who allegedly paid off a government official to rummage through the files at a Kenyan hospital to obtain what counsel contends is the President's 'authentic' birth certificate").

[7] Michael D. Shear, *Citing "Silliness," Obama Shows Birth Certificate*, N.Y. TIMES, Apr. 28, 2011, at A1 (describing the Obama campaign's release of Obama's long-demanded long-form birth certificate in the buildup to the 2012 election).

[8] *See, e.g.*, Jerome R. Corsi, *Healthcare.gov Can't Verify Obama's Identity*, WND (Dec. 24, 2013, 6:44 PM), http://www.wnd.com/2013/12/why-couldnt-healthcare-gov-validate-obamas-identity/ (repeating many birther claims alleging identity irregularities connected to Obama, while stopping short of actually repeating their usual conclusion that Obama is ineligible to serve as President).

[9] *See* Shear, *supra* note 7 (reporting that Obama's birth certificate confirms that he was born in Hawaii).

[10] Donofrio is admittedly a colorful figure who has since left the practice of law, and he has his detractors in the blogosphere. *See* Leo Donofrio, *I'm Not Who You Think I Am . . .*, NAT. BORN CITIZEN (May 24, 2011, 11:52 AM), http://naturalborncitizen.wordpress.com/2011/05/24/im-not-who-you-think-i-am/; *We're All Blood Brothers*, NAT. BORN CITIZEN (Mar. 13, 2012, 11:46 PM), http://naturalborncitizen.wordpress.com/2012/03/13/were-all-blood-brothers/. Donofrio's detractors err when they make *ad hominem* attacks on his positions; this Note seeks to analyze the arguments forwarded by Donofrio, not his personality. Such an analysis would be irrelevant to a proper understanding of the natural born citizen requirement.

[11] *See infra* Part I.

[12] *See infra* Part II.

[13] *See infra* Part V.

[14] *See infra* Part IV.

seemed unable to distinguish his lawsuit from coverage of the rolling tide of thoroughly discredited birther claims.[15] Ultimately Donofrio's core arguments only received examination in dicta in a single state court opinion.[16]

Despite the President's successful election and reelection,[17] confusion over the natural born citizen requirement (and attendant controversy) has not subsided so much as it has migrated to a new target. Recently, speculation that Republican Senator Ted Cruz might run for the presidency generated a whole new birther movement.[18] The birthers speaking against Cruz's eligibility include old-guard birthers like Donald Trump, as well as relative newcomers such as Alan Grayson.[19] Similar controversies have beset Presidents and candidates alike, including Chester Arthur and George Romney.[20] A neutral, detached observer might conclude that some ambiguity exists as to the proper application of the natural born citizen rule.[21] And, claims to the contrary notwithstanding,[22] such an observer would be correct. The perennial controversy spawned by this particular uncertainty in the law is unhealthy to our elections and government in ways too numerous and speculative for this Note to address.[23] Convincing resolution of the question would take at least one

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15 *See* text accompanying notes 159–73173.

16 *See* Ankeny v. Governor of Ind., 916 N.E.2d 678, 685–89 (Ind. Ct. App. 2009).

17 Adam Nagourney, *Obama*, N.Y. TIMES, Nov. 5, 2008, at A1; Jeff Zeleny & Jim Rutenberg, *Obama's Night*, N.Y. TIMES, Nov. 7, 2012, at A1.

18 Ben Jacobs, *Here Come the Democratic Birthers*, DAILY BEAST (Feb. 24, 2014), http://www.thedailybeast.com/articles/2014/02/24/here-come-the-democratic-birthers.html.

19 *See id.*; David Freedlander, *Donald Trump Is Still a Birther*, DAILY BEAST (May 30, 2014), http://www.thedailybeast.com/articles/2014/05/30/donald-trump-is-still-a-birther.html.

20 THOMAS C. REEVES, GENTLEMAN BOSS: THE LIFE OF CHESTER ALAN ARTHUR 202–03 (1975); Mark Hosenball, *Romney's Birth Certificate Evokes His Father's Controversy*, REUTERS (May 29, 2012, 7:30 PM), http://www.reuters.com/article/2012/05/29/us-usa-campaign-romney-birth-certificate-idUSBRE84S1GF20120529.

21 *See generally* William T. Han, *Beyond Presidential Eligibility: The Natural Born Citizen Clause as a Source of Birthright Citizenship*, 58 DRAKE L. REV. 457 (2010) (identifying three existing approaches to understanding and applying the natural born citizen clause while proposing an additional approach).

22 *See* JACK MASKELL, CONG. RESEARCH SERV., R42097, QUALIFICATIONS FOR PRESIDENT AND THE "NATURAL BORN" CITIZENSHIP ELIGIBILITY REQUIREMENT 3 (2011) (asserting that legal scholarship, historic opinion, and case law agree that the natural born citizen clause only requires that one become a citizen at or by birth).

23 *See, e.g.*, Sarah Helene Duggin & Mary Beth Collins, *"Natural Born" in the USA: The Striking Unfairness and Dangerous Ambiguity of the Constitution's Presidential Qualifications Clause and Why We Need to Fix It*, 85 B.U. L. REV. 53, 143–44 (2005) (noting the challenges that the Supreme Court would face both politically and practically if the Court was forced to determine that a sitting President were constitutionally ineligible for the office).

procedural hot potato off the table for future elections, allowing candidates to focus more on issues and less on birth certificates.

This Note does not seek to justify its reliance on original public-meaning textualism for constitutional analysis, nor does it rehearse the debates suggested by the very mention of the phrase. Rather, beginning with what may be a naïve conviction that the original public meanings attached by the Framers to the contents of our Constitution should control today,[24] this Note examines the natural born citizen requirement and related controversies. Part I examines the requirement's inclusion in Article II of the Constitution and establishes that the requirement's wording was actually a term of art as the Framers understood it. Part II discusses the requirement's interaction with Amendment XIV and the advent of birthright citizenship. Part III recounts the original birther conspiracy theory and focuses on a challenge to Chester Arthur's eligibility for the presidency in the election of 1880. Part IV summarizes some of the suits brought by prominent birthers. Part V discusses in greater detail the suits in which Donofrio was involved. Part VI examines possible solutions to the current state of the requirement. This Note argues throughout that an original public meaning textual approach is the proper way to interpret the constitutional requirement that the President be a natural born citizen.

## I. THE FRAMERS ON NATURAL BORN CITIZENSHIP

Although we have fairly extensive records of many of the key debates and negotiations that took place at the Constitutional Convention in the summer of 1787,[25] relatively little exists to shed light on the natural born citizen requirement of Article II, Section 1.[26] An early draft of the Constitution submitted by the Committee on Detail contained a requirement that the President be a mere citizen,[27] but the Committee of Eleven changed the requirement to "natural born citizen" after George

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[24] Under this approach, adaptations in the Constitution are best accomplished through the amendment process. *See* Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627, 1633–34 (2013).

[25] *See, e.g.*, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., Subscribers' Ed. 1911).

[26] *See* Han, *supra* note 21, at 463 ("Hardly any discussion on the [natural born citizen] Clause took place at Philadelphia [during the Constitutional Convention].").

[27] 1 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 256–57 (1891); Han, *supra* note 21, at 463 ("The Committee on Detail initially submitted without comment a recommendation that the President be a citizen and be a resident for twenty-one years.").

Washington (and probably other delegates) received a suggestion to that effect from John Jay.[28] The letter read, in relevant part:

> Permit me to hint, whether it would not be wise & seasonable to provide a a [sic] strong check to the admission of Foreigners into the administration of our national Government; and to declare expresly [sic] that the Command in chief of the american [sic] army shall not be given to, nor devolve on, any but a natural born Citizen.[29]

The full Convention apparently accepted the change without controversy.[30] It comes as little surprise that a nation of rebels which had just fought a war to free itself from a foreign power would seek to protect itself from foreign entities using the election process to reestablish power over the nation.[31] At any rate, the requirement, uncontroversial as it was, seems to have been an attempt to prevent foreign interests from usurping the highest executive office.[32] Without addressing the natural born citizen requirement directly, Alexander Hamilton wrote about foreign influence in the presidency in Federalist 68:

> Nothing was more to be desired, than that every practicable obstacle should be opposed to cabal, intrigue, and corruption.—These most deadly adversaries of republican government, might naturally have been expected to make their approaches from more than one quarter, but chiefly from the desire in foreign Powers to gain an improper ascendant in our councils. How could they better gratify this, than by raising a creature of their own to the Chief Magistracy of the Union? But the Convention have guarded against all danger of this sort, with the most provident and judicious attention.[33]

One early commentator, Judge St. George Tucker, wrote of the requirement that it was "a happy means of security against foreign influence, which, where-ever it is capable of being exerted, is to be dreaded more than the plague."[34]

But what exactly did "natural born citizen" mean? Some modern commentators seem to think that what the Framers meant by the phrase

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[28] Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 MD. L. REV. 1, 5 (1968).

[29] Letter from John Jay to His Excellency General Washington (July 25, 1787), *in* 4 U.S. DEPT. OF STATE, DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 237 (1905) [hereinafter Letter from John Jay to General Washington].

[30] Han, *supra* note 21, at 463.

[31] *See* Jack P. Greene, *The American Revolution*, 105 AM. HIST. REV. 93, 100 (2000); Letter from John Jay to General Washington, *supra* note 29.

[32] *See* Letter from John Jay to General Washington, *supra* note 29.

[33] THE FEDERALIST NO. 68, at 374 (Alexander Hamilton) (E.H. Scott ed., 1898).

[34] 1 GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. at 323 (1803).

is not easily or clearly discernible.[35] These commentators often treat the absence of a definition for the term within the Constitution as a license to choose one's preferred definition from a smorgasbord of historical and plain-language indicators.[36] Such commentators are apparently in good company, as the Supreme Court said as much in *Minor v. Happersett*,[37] a case in which a female plaintiff sued for the right to vote under the Privileges and Immunities Clause of Amendment XIV.[38] In the Court's opinion, Chief Justice Morrison Waite wrote, "[t]he Constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that."[39] Chief Justice Waite proceeded to consult British common law from the time of the founding to elucidate this question, and ultimately settled on a definition which largely comported with an originalist understanding.[40] However, while Chief Justice Waite's quote could be used as a license to ignore rather than consult valuable historical sources, such an approach distorts the holding in *Minor* as well as the requirement itself. Even Chief Justice Waite (and every commentator that has followed his initial approach in *Minor*) missed an important contemporary source which provides the needed insight to unwind and settle the question of the natural born citizen requirement's original public meaning: Emmerich de Vattel's 1758 treatise entitled *The Law of Nations*, which was apparently influential on the Framers' views of international and citizenship law.

It would be difficult to overstate the influence of Vattel's treatise on the Framers. Benjamin Franklin said of the treatise in 1775 that it "ha[d] been continually in the hands of the members of our Congress [then] sitting."[41] A copy of the treatise was in George Washington's now-infamous

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[35] *See, e.g.*, Jill A. Pryor, Note, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 YALE L.J. 881, 881–82 (1988).

[36] *See generally* Han, *supra* note 21 (reviewing existing approaches to the natural born citizen analysis and suggesting a new approach based largely on policy considerations).

[37] 88 U.S. (21 Wall.) 162 (1874).

[38] *Id.* at 165.

[39] *Id.* at 167; Howard Jay Graham, *The Waite Court and the Fourteenth Amendment*, 17 VAND. L. REV. 525, 525 (1964).

[40] *Minor*, 88 U.S. at 167–68.

[41] Letter from Benjamin Franklin to Charles William Frederick Dumas (Dec. 19, 1775), *in* 2 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 64 (Francis Wharton ed.1889); *see also* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 462 n.12 (1978) ("In 1775, Benjamin Franklin acknowledged receipt of three copies of a new edition, in French, of Vattel's Law of Nations and remarked that the book 'has been continually in the hands of the members of our Congress now sitting.'").

collection of overdue library books, discovered in 2010.[42] Vattel was the most widely cited international jurist in the fifty years following the Revolutionary War,[43] and his treatise continues to be cited by Supreme Court opinions in the modern day, cropping up as recently as Justice Scalia's opinion in *District of Columbia v. Heller*.[44] It was written in French and later translated to English.[45]

All this is purely academic unless Vattel speaks unequivocally to the meaning of natural born citizenship. Fortunately, Vattel's treatment of the topic is unequivocal, unambiguous and clear: "[t]he natives, or *natural-born citizens, are those born in the country, of parents who are citizens*."[46] Vattel's treatment of the term leaves little to be desired by way of a definition. Natural born citizens are those born in the country of parents who are citizens. Vattel provides a condensed discussion of why natural born citizenship works this way:

> The society is supposed to desire this, in consequence of what it owes to its own preservation; and it is presumed, as matter of course, that each citizen, on entering into society, reserves to his children the right of becoming members of it. The country of the fathers is therefore that of the children; and these become true citizens merely by their tacit consent. We shall soon see whether, on their coming to the years of discretion, they may renounce their right, and what they owe to the society in which they were born. I say, that, in order to be of the country,

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[42] *George Washington's 221-Year Overdue Library Book: A Timeline*, WEEK (May 21, 2010), http://theweek.com/article/index/203282/george-washingtons-221-year-overdue-library-book-a-timeline. While humorous, this fact is also important to show Washington's personal familiarity with Vattel's work and his understanding of natural born citizenship, since Washington was the principal recipient of John Jay's letter suggesting the inclusion of the term as a presidential requirement, and thus the catalyst by which the term found its way into the Constitution. *See supra* notes 27–30 and accompanying text.

[43] *U.S. Steel Corp.*, 434 U.S. at 462 n.12.

[44] 554 U.S. 570, 587 n.10 (2008).

[45] Emmerich de Vattel, The Law of Nations: or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns (Joseph Chitty & Edward D. Ingraham eds., 1883). It has been reported that earlier anonymous translations contain the original French indigenes in place of "natural born citizen" and that the 1797 translation used by Chitty was the first to translate the word to English. *See* Dr. Conspiracy, *Citizenship Denialist Hoax Exposed!*, OBAMA CONSPIRACY THEORIES (May 6, 2009), http://www.obamaconspiracy.org/2009/05/de-vattel-revisited/. It went through a number of editions in its own right as a textbook. Franklin's copies were in the original French, but it is unclear what versions the Congressmen he referred to in his quote above were using. *See* supra note 41 and accompanying text. Although no English translation of Vattel existing in 1787 contains the exact phrase "natural born citizen," the parlance of the 1797 version shows that translating indigenes to English would yield that result during that time in history. *See* Mario Apuzzo, *The Framers Used Emer de Vattel, Not William Blackstone to Define a "Natural Born Citizen,"* NAT. BORN CITIZEN (Nov. 2, 2010, 2:08 AM), http://puzo1.blogspot.com/2010/11/framers-used-emer-de-vattel-not-william.html.

[46] VATTEL, *supra* note 45, at 101 (emphasis added).

> it is necessary that a person be born of a father who is a citizen; for, if [h]e is born there of a foreigner, it will be only the place of his birth, and not his country.[47]

Vattel points out here that a country's citizens must pass citizenship to their children as a matter of self-preservation. This fact sets up a presumption that parents pass citizenship on to their children, which is confirmed by the children's tacit acceptance and rebutted by renunciation upon reaching the age of their discretion. He explains that the father (and above mentions both parents) must be a citizen, because if this is not true, the country will only be the child's birthplace, and not his country. This rationale seems especially apposite to the question of presidential safeguards against foreign influence, since the little we have to go on suggests that the Framers desired to ensure any President would have undivided loyalty to the United States.[48]

Contrary to the popular impulse toward a historically uninformed view of the term "natural born citizen," a cursory reading of Vattel coupled with an understanding of its significance to the Framers suggests that the requirement is not a novel term invented by the Framers, but rather a term of art with a fixed meaning which would have been known to scholars and statesmen of the day. Indeed, this understanding seems to comport with what one would expect of a group of learned men convening to lay out a framework for government—the Framers did not invent terms when invention was improper.[49] They used accepted, established terms to convey meanings in ways that would not be subject to later arbitrary revision.[50]

Although parallel clauses in the Constitution dealing with federal representative and senator qualifications required mere citizenship for a set number of years,[51] the Framers raised the bar for the presidency to require natural born citizenship.[52] This requirement was engineered to prevent foreign influence from taking over the executive branch;[53] why would these careful drafters employ a term for a raised requirement that means little more than the distinct term they used for the requirement for

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47 *Id.*

48 *See* Letter from John Jay to General Washington, *supra* note 29.

49 *See* United States v. Sprague, 282 U.S. 716, 731 (1931) ("The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary . . . meaning . . . .").

50 *See* Letter from James Madison to Mr. Ingersoll, (June 25, 1831) *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 184 (1865); Daniel Webster, Convention at Andover, *in* 2 THE WORKS OF DANIEL WEBSTER 164 (1851).

51 U.S. CONST. art. I, §§ 2, cl. 2, 3, cl. 3.

52 U.S. CONST. art. II, § 1, cl. 4.

53 *See* Letter from John Jay to General Washington, *supra* note 29.

congressional office? This interpretation of the work of the Constitutional Convention makes little sense. It is far more likely that if "natural born citizen" was a term of art, the Framers intended the meaning attached to that term of art. Vattel's treatise supplies that meaning: to be a natural born citizen, one must be born (1) to two citizen parents (2) in the country.[54] And by all appearances, that meaning would have been familiar to the Framers who employed the term defined by it.[55]

## II. THE FOURTEENTH AMENDMENT'S IMPACT ON THE NATURAL BORN CITIZEN REQUIREMENT

Some have made the case that even if the Constitution relied on an understanding of natural born citizenship reminiscent of that delineated by Vattel, this understanding was abrogated by Amendment XIV's grant of citizenship to "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof."[56] This phrase and a body of case law following it have given rise to what is known as *jus soli*, or birthright citizenship, which is the practice of bestowing citizenship on persons born in the territory of the United States regardless of the citizenship of either parent.[57] Birthright citizenship poses a logical problem for Vattel's definition of natural born citizenship. A natural born citizen is a person born to two citizen parents within American territory, whereas a person born to anyone within American territory is a citizen.[58] It is easy to conflate the terms, especially for an analyst proceeding without the benefit of Vattel's definition. It would be easy to conclude that if a person is a citizen by virtue of birth on American soil, any rules about parental citizenship attached to arcane presidential qualifications are invalid.[59] This revolution in citizenship law complicates a proper understanding of natural born citizenship; without Vattel's definition of "natural born citizen" as a term of art, it is unclear how a citizen by birth on American

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[54] *See* VATTEL, *supra* note 45, at 101.

[55] *See supra* notes 41–43 and accompanying text.

[56] U.S. CONST. amend. XIV, § 1. Abdul Karim Hassan, a Guyana-born naturalized U.S. citizen, argued unsuccessfully as part of his 2012 presidential candidacy that the natural born citizen requirement was an unconstitutional national-origin-based form of discrimination that had been abrogated by Amendment XIV. Hassan v. Colorado, 870 F. Supp. 2d 1192, 1194–95 (D. Colo. 2012).

[57] *See* Elizabeth Wydra, *Birthright Citizenship: A Constitutional Guarantee*, AM. CONST. SOC'Y FOR L. & POL'Y, 2 (May 2009) ("The Reconstruction Framers' intent to grant citizenship to all those born on U.S. soil, regardless of race, origin, or status, was turned into the powerfully plain language of Section 1 of the Fourteenth Amendment.").

[58] *Compare* VATTEL, *supra* note 45, at 101, *with* Wydra, *supra* note 57.

[59] *See Hassan*, 870 F. Supp. 2d at 1201 (discussing Hassan's misplaced reliance on the Absurdity Doctrine and Amendment XIV to invalidate the natural born citizen requirement).

soil or territory differs from a natural born citizen. Indeed, without a definition of "natural born citizen" as a term of art, birthright citizenship obviates any real distinction between natural born citizens and children born to aliens on American soil. This merging of classifications ignores the self-evident risk for split national allegiances in the children of nonresident aliens. It was that very risk of dual allegiances that the Founders sought to guard against by the elevated "natural born citizen" requirement.[60] Indeed, the interplay between birthright citizenship and natural born citizenship is most significant in the confusion it may generate. Despite the pathos it may generate, there is no glaring logical or legal problem with allowing an individual to become a citizen but preventing her from becoming President based on the danger of split national loyalties.[61] Without a full understanding of the term "natural born citizen," though, the reasons for the distinction (and the will to maintain it) may be lost in the practice of birthright citizenship and its facial comportment with a lay understanding of the terms "natural born" and "citizen."[62] Therefore, Vattel's definition and its vitality to the Framers are extremely important in a world in which one becomes a citizen by mere birthplace.

Even without Vattel's insight into the natural born citizen requirement, there are problems with the view that the Fourteenth Amendment changed the meaning of "natural born citizen." The most glaring is that the historical context of the Amendment's ratification suggests that it was not intended to change natural born citizenship, but rather to clarify the citizenship status of millions of newly freed slaves who would have been denied citizenship based on the dreadful decision *Dred Scott v. Sandford*.[63] An additional wrinkle may arise depending on whether one views "natural born citizen" as a single term of art or two terms, "natural born" and "citizen." Those contending for an original public meaning textual approach to the question may point to Vattel's definition of a single term and attach that definition to the term's use in

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60 *See* Letter from John Jay to General Washington, *supra* note 29.

61 *See Hassan*, 870 F. Supp. 2d at 1201.

62 *See* Pryor, *supra* note 35, at 889, 895 (asserting that a conclusive definition of the natural born citizen clause cannot be discerned from a study of the Framers' intent and later proposing that the clause only requires that the President be a citizen at birth).

63 *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 393 (1857) ("A free negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a 'citizen' within the meaning of the Constitution of the United States."), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

the Constitution.[64] Those arguing for a more progressive understanding of the requirement argue that "natural born" means born in the U.S. and that "citizen" was so affected by Amendment XIV that the presidential requirement was effectively rewritten.[65]

The drafters of the Amendment may have provided an independent argument against an interpretation informed by birthright citizenship, if not against the very existence of birthright citizenship. Significant evidence from Congressional hearings on the Amendment before its presentation to the states for ratification indicates that the phrase "subject to the jurisdiction thereof" contains an implication of exclusivity, and that it may better be stated "subject *only* to the jurisdiction thereof."[66] The drafters of the Amendment included the phrase to limit the Amendment's application to freed slaves who had been born and lived all their lives in the United States, as opposed to creating a citizenship entitlement for any child with the good fortune to have his mother in the country at the time of his birth.[67] The latter interpretation seems a tortured and contrived application of the words of Amendment XIV when read in the historical context of their drafting.[68] At any rate, a hypothetical rejection of Amendment XIV-based birthright citizenship certainly resolves the difficulty its current understanding causes for natural born citizenship.[69]

## III. CHESTER ARTHUR'S CONTENTIOUS CAMPAIGN FOR VICE PRESIDENT

While preparing his lawsuits and amicus briefs in 2008 and 2009, Leo Donofrio performed significant research on the natural born citizen controversy surrounding Chester Arthur and discovered that Arthur was the subject of a controversy eerily reminiscent of that faced by Barack Obama.[70] Arthur was a Republican candidate for Vice President, running

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[64] *Cf.* Petition for Writ of Certiorari at 23–26, Hollister v. Soetoro, 131 S. Ct. 1017 (2011) (No. 10–678) (discussing the influence of Vattel's concepts in the framing of the Constitution).

[65] *See* Pryor, *supra* note 35, at 892–95.

[66] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2893–2895 (1866).

[67] *Id.* at 598, 1776.

[68] *See id.*

[69] *See* Duggin & Collins, *supra* note 23, at 89 (introducing the unresolved definitional difficulties that relying on Amendment XIV-based birthright citizenship poses for those seeking the office of President).

[70] *See* Leo C. Donofrio, *Historical Breakthrough—Proof: Chester Arthur Concealed He Was a British Subject at Birth*, NAT. BORN CITIZEN (Dec. 6, 2008, 9:08 PM), http://naturalborncitizen.wordpress.com/2008/12/06/urgent-historical-breakthrough-proof-chester-arthur-concealed-he-was-a-british-subject-at-birth/.

on a ticket with James A. Garfield in 1880.[71] He later ascended the presidency when Garfield was shot by a deranged Arthur supporter.[72] Arthur was a fascinating character in many respects, but perhaps the most intriguing was the controversy surrounding his candidacy.

Democrat opponents circulated a pamphlet alleging that Arthur had been born in either Ireland or Canada and was a British subject, not a natural born citizen of the United States.[73] Since the Constitution had by then been amended to require vice presidential candidates to meet its presidential qualifications, Garfield opponents apparently hoped to cast doubt on the ticket by arguing against Arthur's eligibility.[74]

Arthur's detractors were not without reason to suspect his eligibility. Arthur's father was an Irish-Canadian who had immigrated to the United States after marrying Arthur's mother.[75] She had allegedly spent some time in Canada around Chester's birth.[76] Arthur's opponents picked up on what they viewed as low-hanging fruit. In fact, Arthur was born in Vermont, a fact which hurt his opponents' credibility.[77] It turned out that they were asking the wrong question.

There are two components to Vattel's definition of "natural born citizen"—the birthplace and the citizenship of each parent.[78] Arthur's detractors attacked his birthplace but ignored his parents' citizenship.[79] His mother was an American citizen at his birth, but according to Donofrio, his father was a subject of the British crown until young Chester was nearly fourteen years old.[80] Under the law according to Vattel, Arthur was a British subject through his father,[81] and not a natural born citizen

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71 ZACHARY KARABELL, CHESTER ALAN ARTHUR 40–42 (Arthur M. Schlesinger, Jr. ed., 2004).

72 BENSON J. LOSSING, A BIOGRAPHY OF JAMES A. GARFIELD: LATE PRESIDENT OF THE UNITED STATES 629, 638, 652–653 (1882).

73 REEVES, *supra* note 20, at 202–03.

74 Amendment XII provides, "But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States." U.S. CONST. amend. XII; *see* A. P. HINMAN, HOW A BRITISH SUBJECT BECAME PRESIDENT OF THE UNITED STATES 3 (1884).

75 REEVES, *supra* note 20, at 4.

76 *Id.* at 203.

77 GEORGE FREDERICK HOWE, CHESTER A. ARTHUR: A QUARTER-CENTURY OF MACHINE POLITICS 5–6 (Frederick Ungar Publishing Co. 2d ed. 1957).

78 *See* VATTEL, *supra* note 45, at 101.

79 *See* REEVES, *supra* note 20, at 202–03.

80 *See* Donofrio, *supra* note 70.

81 *See* VATTEL, *supra* note 45, at 101 ("I say, that, in order to be of the country, it is necessary that a person be born of a father who is a citizen; for, if [h]e is born there of a foreigner, it will be only the place of his birth, and not his country.").

in the parlance of the Framers.[82] Arthur's opponents were correct about his status, but for the wrong reason. And because they never addressed the two-parent rule,[83] the opportunity was lost to address the original meaning of the natural born citizen requirement.

Arthur's acts as President included the appointment of Horace Gray to the Supreme Court.[84] It is ironic (or perhaps not) that Gray went on to write the Court's opinion in *United States v. Wong Kim Ark*,[85] the seminal case that established Amendment XIV birthright citizenship and was later relied upon by a state appellate court in rejecting Vattel's two-parent rule in a case challenging Barack Obama's eligibility.[86] Arthur lived and died an extremely secretive man and had most of his personal papers burned toward the end of his life.[87] Without venturing into conspiracy theories, it is clear that Arthur's detractors neglected thorough constitutional arguments and instead championed a sensational account of Arthur's birthplace;[88] while Vattel's definition might have had its vitality restored by a responsible conversation, it was instead largely lost to the sands of time as a result. At the same time, since the citizenship status of Arthur's father never materialized into an issue, Arthur's presidency does not provide precedent for the proposition that the two-parent rule is without merit. In fact, if the two-parent rule were to find new vitality in the present day, Arthur would be viewed as the first constitutionally unqualified usurper to the presidency.[89]

## IV. THE BIRTHER LAWSUITS

The birther movement spawned litigation challenging Barack Obama's eligibility for the presidency at a dizzying pace in the months immediately surrounding the 2008 election.[90] Most of it was filed by a

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82 *See id.*

83 *See generally* HINMAN, *supra* note 74.

84 John Malcolm Smith, *Mr. Justice Horace Gray of the United States Supreme Court*, 6 S.D. L. REV. 221, 221 (1961).

85 169 U.S. 649 (1898).

86 *See* Ankeny v. Governor of Ind., 916 N.E.2d 678, 686 (Ind. Ct. App. 2009); Duggin & Collins, *supra* note 2323, at 80.

87 REEVES, *supra* note 20, at 417–18.

88 *See* HOWE, *supra* note 77.

89 *See* Donofrio, *supra* note 70.

90 The anti-birther website whatsyourevidence.com maintained a "Birther Scorecard," a spreadsheet of all birther litigation challenging Obama's eligibility on natural born citizen grounds through January 2014. *Birther Scorecard*, WHAT'S YOUR EVIDENCE, http://tesibria.typepad.com/whats_your_evidence/BIRTHER%20CASE%20LIST.pdf (last updated Jan. 10, 2014). The resource lists 226 cases filed, over 90 appeals to intermediate appellate tribunals, and over 25 appeals to the Supreme Court. *Id.* Although the spreadsheet

handful of litigants.[91] A few lawsuits also sought to invalidate Obama's candidacy in the 2012 election.[92] The most significant common thread connecting the suits was the argument that President Obama was born in Kenya and was therefore ineligible under the natural born citizen requirement.[93] Some of the attorneys handling the cases were strong figures, but some occasionally prosecuted their suits in ways that might give the average practitioner nightmares.[94] In the author's opinion, their suits probably generated much more public attention than legal thought.[95] Taken together with constant public derision of their claims,[96] they demonstrate how difficult association with the birther group could be. Below are summaries of just a handful of the more significant filings, organized by the attorneys that filed and litigated them.[97]

### *A. Phillip J. Berg*[98]

On August 21, 2008, Attorney Phil Berg, appearing *pro se*, filed suit in the U.S. District Court for the Eastern District of Pennsylvania against

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is an informal resource and is no longer maintained, it helps to map the cases and give an idea of the controversy's grand scope.

[91] *See id.*

[92] *E.g.*, Sibley v. Obama, 866 F. Supp. 2d 17, 19 (D.D.C. 2012).

[93] *See, e.g.*, Barnett v. Obama, No. SACV 09–0082 DOC (ANx), 2009 WL 3861788, at *1 (C.D. Cal. Oct. 29, 2009); Berg v. Obama, 574 F. Supp. 2d 509, 513 (E.D. Pa. 2008).

[94] One attorney's particularly bad submission to the New York Supreme Court received a scathing judicial response: "Plaintiff STRUNK's complaint is a rambling, forty-five page variation on 'birther' cases, containing 150 prolix paragraphs, in at times a stream of consciousness." Strunk v. N.Y. State Bd. of Elections (*Strunk I*), No. 6500/11, slip op. at 1 (N.Y. Sup. Ct. Apr. 11, 2012).

[95] Below are summaries of some of the judicial reactions to the birther suits. *See infra* Part IV.A–C.

[96] Public derision is certainly no reason to discount the validity of a claim, but it may influence the success of an individual who unwillingly associates with a movement, as Donofrio probably did. *See, e.g.*, Glenn Kessler, *More "Birther" Nonsense from Donald Trump and Sarah Palin*, WASH. POST (Apr. 12, 2011, 6:00 AM), http://www.washingtonpost.com/blogs/fact-checker/post/the-donald-has-a-memory-lapse/2011/04/14/AFrme2MD_blog.html (case sensitive URL); Nick Wing, *Colin Powell: "Birther Nonsense" Is "Killing the Base" of the GOP*, HUFFINGTON POST (Jan. 21, 2013, 12:07 PM), http://www.huffingtonpost.com/2013/01/21/colin-powell-birther_n_2520578.html.

[97] This selection is intended to show some of the most high-profile claims and claimants, not to provide anything like a representative sample of the consistency or quality of birther claims as a whole.

[98] Phillip J. Berg is a well-known Pennsylvania attorney and self-described "lifelong Democrat." Phillip J. Berg, *Berg Asks Tea Party Individuals to Join with Him at the Obama Birth Certificate/Eligibility/ObamaCare Rally in Washington on Saturday, October 23, 2010*, OBAMACRIMES.COM (Sept. 14, 2010), www.obamacrimes.com. Berg gained some notoriety when he filed a RICO civil suit against President Bush and various government officials and agencies for allegedly engineering the attacks of September 11, 2001. *See* Rodriguez v. Bush, 367 F. Supp. 2d 765 (E.D. Pa. 2005).

Barack Obama (as well as a string of alleged aliases), the Democratic National Committee, the Federal Election Commission, and several additional defendants, seeking a declaratory judgment that Obama was constitutionally ineligible to sit for the presidency and an injunction against his inclusion on ballots.[99] Berg's complaint alleged that Obama was born in Kenya and was not a natural born citizen.[100] He included an alternative claim that regardless of Obama's citizenship at birth, Kenyan or U.S., it had been renounced during his time living in Indonesia with his mother[101] and that having lost his citizenship under the Immigration and Nationality Act, Obama was barred by the natural born citizen requirement.[102] Berg sought to establish standing by using his affiliation with the Democratic Party and the harm that would result to his interests as a "Democratic American[ ]" to show that he was the victim of a particularized (as opposed to generalized) injury and that he was thus not barred by the injury-in-fact criterion for standing.[103] In addition to declaratory judgment and injunctive relief,[104] Berg sought relief under 42 U.S.C. §§ 1983, 1985, and 1986 civil rights claims,[105] a Federal Election Campaign Act claim,[106] several Freedom of Information Act claims,[107] and promissory estoppel based on his donations to the Democratic National Committee in return for a number of promises contained in the party's national platform, and the harm that would result to his interest in those promises from an ineligible Democratic candidate being presented to voters.[108]

The District Court dismissed all of Berg's claims on standing in a lengthy opinion which also addressed many of the merits (or lack thereof) in Berg's arguments.[109] Berg appealed to the Third Circuit, which affirmed the opinion below.[110] That opinion contained a scathing analysis of the heart of Berg's claims:

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99 Berg v. Obama, 574 F. Supp. 2d 509, 512 (E.D. Pa. 2008).

100 *Id.* at 513.

101 *Id.*

102 *Id.* at 529–30; *see* 8 U.S.C. § 1481 (2012).

103 *Berg*, 574 F. Supp. 2d at 519.

104 *Id.* at 512.

105 *Id.* at 521. Section 1983 creates a cause of action for the violation of constitutional rights. 42 U.S.C. § 1983 (2012). Section 1985 is a conspiracy claim. § 1985. Section 1986 is a claim for neglecting to prevent a conspiracy. § 1986.

106 *Berg*, 574 F. Supp. 2d at 524.

107 *Id.* at 526.

108 *Id.* at 528.

109 *Id.* at 521–30.

110 Berg v. Obama, 586 F.3d 234, 242 (3d Cir. 2009).

> Berg's wish that the Democratic primary voters had chosen a different presidential candidate, and his dissatisfaction that they apparently did not credit the evidence he tendered, do not state a legal harm. Similarly, Berg's angst that the presence on the ballot of an ineligible candidate might lessen the chances that an eligible candidate might win was a non-cognizable derivative harm.[111]

The Supreme Court declined without comment to hear Berg's appeal from the Third Circuit's decision after multiple submissions and resubmissions from Berg.[112]

### *B. Orly Taitz*[113]

Orly Taitz has tenaciously prosecuted the birther cause in a number of lawsuits,[114] in which she alleges that Obama was born in Kenya.[115] A few examples are related below.

In *Keyes v. Bowen*,[116] Taitz represented 2008 third-party presidential candidate Alan Keyes and filed suit against California's Secretary of State for failure to verify Obama's eligibility before placing him on the ballot.[117] Despite a stronger showing of individualized harm due to the fact that Keyes was a presidential candidate, the trial court dismissed the suit and the California Court of Appeal affirmed the dismissal.[118] The Court of Appeal found that the plaintiffs failed to identify a statutory duty on the part of the secretary of state to verify a candidate's constitutional eligibility.[119] Both the California Supreme Court and the U.S. Supreme Court declined without comment to hear the case.[120]

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[111] *Id.* at 240.

[112] *See Docket Search Page for* Berg v. Obama, *No. 08-570*, SUPREME CT. U.S., http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/08-570.htm (last visited Nov. 11, 2014).

[113] Dr. Taitz is an California attorney who is perhaps an unlikely champion of the natural born citizen requirement due to her own status as a naturalized citizen, originally from Moldova in the former USSR. Martin Wisckol, *Crusader Against Obama Won't Bend*, ORANGE COUNTY REG., Oct. 25, 2009, at Special 3A. She is also a dentist and successful businesswoman. *Id.*

[114] *Id.*

[115] *See id.*

[116] 117 Cal. Rptr. 3d 207 (Ct. App. 2010).

[117] *Id.* at 209; *see* Spencer Kornhaber, *Meet Orly Taitz, Queen Bee of People Obsessed with Barack Obama's Birth Certificate*, ORANGE COUNTY WKLY. (June 18, 2009), http://www.ocweekly.com/2009-06-18/news/orly-taitz/ (reporting that Orly Taitz was one of the attorneys that filed suit in *Keyes*).

[118] *Keyes*, 117 Cal. Rptr. 3d at 209, 216.

[119] *Id.* at 216.

[120] 117 Cal. Rptr. 3d 207 (Ct. App. 2010), *review denied*, No. S188724, 2011 Cal. LEXIS 1094 (2011), *cert. denied*, 132 S. Ct. 99 (2011).

In *Lightfoot v. Bowen*,[121] Taitz represented another 2008 presidential candidate, this time Libertarian Gail Lightfoot.[122] The suit began as an emergency petition filed with the California Supreme Court and sought to prevent certification of California's election results.[123] It was submitted to the U.S. Supreme Court and denied once before being resubmitted and subsequently denied again.[124]

In *Barnett v. Obama*,[125] Taitz represented a group of forty-four plaintiffs that included several state legislators, military personnel, and candidates Alan Keyes and Wiley Drake.[126] It sought injunctive and declaratory relief against the recently sworn Obama, Secretary of State Clinton, Secretary of Defense Gates, Vice President Biden, and First Lady Michelle Obama[127] to prevent them from carrying out a number of governmental functions.[128] The suit also sought a number of FOIA disclosures[129] and a request that the court remove Obama from office and order a new election.[130] Judge Carter held that all the plaintiffs except the presidential candidates failed the particularized injury aspect of the standing inquiry,[131] but assumed *arguendo* that the presidential candidates met that prong and proceeded to the redressability prong.[132] Judge Carter then determined that each of the various forms of remedy sought was inappropriate and dismissed the suit.[133] He devoted a scathing section of the opinion to Taitz's conduct.[134] In it, he chided Taitz for favoring rhetoric over cogent legal argument, for encouraging her supporters to contact the court in an attempt to influence its decision, for moving to recuse a magistrate judge in response to his requiring Taitz to

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[121] Lightfoot v. Bowen, No. S168690, 2008 Cal. LEXIS 13985 (Dec. 5, 2008), *stay denied*, 555 U.S. 1151 (2009).

[122] Dan Fletcher, *Orly Taitz*, TIME (Aug. 10, 2009), http://content.time.com/time/nation/article/0,8599,1915285,00.html.

[123] *Lightfoot*, 2008 Cal. LEXIS 13985; Fletcher, *supra* note 122.

[124] *See Docket Search Page for* Lightfoot v. Bowen, *No. 08A524*, SUPREME CT. U.S., http://www.supremecourt.gov/search.aspx?filename=/docketfiles/08a524.htm (last visited Nov. 11, 2014).

[125] No. SACV 09-0082 DOC (ANx), 2009 WL 3861788 (C.D. Cal. 2009).

[126] *Id.* at *1, *3.

[127] *Id.* at *1. In the order, Judge Carter included a footnote opining, "[t]he inclusion of the First Lady in this lawsuit, considering she holds no constitutional office, is baffling." *Id.* at *12 n.2.

[128] *Id.* at *1.

[129] *Id.* at *2.

[130] *Id.* at *1.

[131] *Id.* at *10.

[132] *Id.*

[133] *Id.* at *16–20.

[134] *See id.* at *18–19.

comply with the local rules, and for failing to effect service on defendants for over seven months after filing.[135] Most gravely, Judge Carter expressed that "the Court . . . received several sworn affidavits that Taitz asked potential witnesses that she planned to call before th[e] Court to perjure themselves."[136] Judge Carter expressed great concern that "Taitz may have suborned perjury through witnesses she intended to bring before [the] Court."[137]

In *Rhodes v. MacDonald*,[138] Taitz represented an officer in the U.S. Army challenging the validity of her deployment orders to Iraq because they were issued by President Obama, a constitutionally ineligible Commander-in-Chief because of his alleged birth outside the United States.[139] This was the second time Taitz's client had filed this particular claim in a federal district court[140] and the second time Taitz had filed a claim challenging deployment orders to an overseas combat zone based on birther claims in the Middle District of Georgia.[141] In an opinion thick with exasperation, Judge Land rejected the claim, labeling it "spurious" and "frivolous."[142] He was unimpressed with Taitz's complaint:

> [I]mplying that the President is either a wandering nomad or a prolific identity fraud crook, she alleges that the President *"might* have used as many as 149 addresses and 39 social security numbers prior to assuming the office of President." Acknowledging the existence of a document that shows the President was born in Hawaii, Plaintiff alleges that the document "cannot be verified as genuine, and should be *presumed* fraudulent." In further support of her claim, Plaintiff relies upon "the general opinion in the rest of the world" that "Barack Hussein Obama has, in essence, slipped through the guardrails to become President." Moreover, as though the "general opinion in the rest of the world" were not enough, Plaintiff alleges in her Complaint that according to an "AOL poll 85% of Americans believe that Obama was not vetted, needs to be vetted and his vital records need to be produced." Finally, in a remarkable shifting of the traditional legal burden of proof, Plaintiff unashamedly alleges that Defendant has the burden to prove his "natural born" status. Thus, Plaintiff's counsel, who champions herself as a defender of liberty and freedom, seeks to use the power of

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135 *Id.*

136 *Id.* at *19.

137 *Id.*

138 No. 4:09-CV-106 (CDL), 2009 WL 2997605 (M.D. Ga. 2009).

139 *Id.* at *1.

140 *Id.* (noting that "Plaintiff previously filed the present action in the United States District Court for the Western District of Texas").

141 *Id.* at *1 n.2 ("This Court dismissed an earlier action filed by Plaintiff's counsel on behalf of a military reservist based upon that plaintiff's lack of standing.").

142 *Id.* at *6.

> the judiciary to compel a citizen, albeit the President of the United States, to "prove his innocence" to "charges" that are based upon conjecture and speculation. Any middle school civics student would readily recognize the irony of abandoning fundamental principles upon which our Country was founded in order to purportedly "protect and preserve" those very principles.[143]

Judge Land dismissed the claim on abstention grounds and issued a warning that "the filing of any future actions in this Court, which are similarly frivolous, shall subject counsel to sanctions."[144] Taitz responded by moving for reconsideration of the dismissal, "repeat[ing] her political diatribe against the President, complain[ing] that she did not have time to address dismissal of the action (although she sought expedited consideration), [and] accus[ing] [Judge Land] of treason."[145] Judge Land responded by issuing an order to show cause why he should not impose sanctions on Taitz in the amount of $10,000.[146] Taitz responded with a motion to recuse Judge Land based on naked allegations of misconduct and bias.[147] Judge Land's opinion on this motion was thorough and incendiary. With respect to Taitz's response to the show cause order, Judge Land wrote that it "[was] breathtaking in its arrogance and border[ed] on delusional. She expresse[d] no contrition or regret regarding her misconduct. To the contrary, she continue[d] her baseless attacks on the Court."[148] Judge Land imposed sanctions on Taitz in the amount of $20,000, double what he had threatened in the show cause order.[149]

In *Taitz v. Obama*,[150] Taitz filed seeking a writ of *quo warranto* against President Obama to determine his eligibility for office,[151] as well as additional claims, including one that the Affordable Care Act was unconstitutional because Obama's signature on the bill was ineffective due to his ineligibility.[152] The court dismissed the complaint on standing and other grounds, stating that "[t]his is one of several such suits filed by Ms. Taitz in her quixotic attempt to prove that President Obama is not a

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143 *Id.* at *3 (citations omitted).

144 *Id.* at *1, *5.

145 Rhodes v. MacDonald, No. 4:09-CV-106 (CDL), 2009 WL 3111834, at *1 (M.D. Ga. 2009).

146 *Id.* at *3.

147 *See* Motion to Recuse the Honorable Clay D. Land Pursuant to 28 U.S.C. §§ 144 and 455(a) at 1–2, Rhodes v. MacDonald, 670 F. Supp. 2d 1363 (M.D. Ga. 2009) (No. 4:09-CV-106 (CDL)).

148 *Rhodes*, 670 F. Supp. 2d at 1379–80.

149 *Id.* at 1384.

150 707 F. Supp. 2d 1 (D.D.C. 2010).

151 *Id.* at 3.

152 *Id.* at 6.

natural born citizen as required by [the] Constitution. This Court is not willing to go tilting at windmills with her."[153]

### C. Christopher Earl Strunk

Strunk was another serial birther litigant who gained notoriety in 2013 for becoming liable for $177,700 in fees and sanctions in a frivolous lawsuit criticizing Obama's eligibility.[154] His claims were standard birther-movement fare, but his persistence impressed Judge Schack, particularly since a year earlier, the same judge had described Strunk's conduct in terms reserved for only the most vexatious litigants: "If the complaint in this action was a movie script, it would be entitled *The Manchurian Candidate Meets [t]he Da Vinci Code*."[155] He went on:

> Plaintiff STRUNK's complaint is a rambling, forty-five page variation on "birther" cases, containing 150 prolix paragraphs, in at times a stream of consciousness. Plaintiff's central allegation is that defendants President OBAMA and Senator McCAIN, despite not being "natural born" citizens of the United States according to plaintiff's interpretation of Article II, Section 1, Clause 5 of the U.S. Constitution, engaged with the assistance of other defendants in an extensive conspiracy, on behalf of the Roman Catholic Church to defraud the American people and usurp control of the Presidency in 2008. Most of plaintiff STRUNK's complaint is a lengthy, vitriolic, baseless diatribe against defendants, but most especially against the Vatican, the Roman Catholic Church, and particularly the Society of Jesus (the Jesuit Order).[156]

Strunk was enjoined from refiling future litigation following variations on his claims, and all were dismissed with prejudice.[157]

## V. VATTEL REDISCOVERED: DONOFRIO'S ARGUMENT

Meanwhile, following his original textualist arguments as related above, Leo Donofrio filed suit seeking to remove Obama and McCain from

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[153] *Id.* at 3 (citation omitted).

[154] *See* Strunk v. N.Y. State Bd. of Elections (*Strunk II*), No. 6500/11, 2013 WL 1285886, at *9–10 (N.Y. Sup. Ct. 2013); *see also* Oren Yaniv, *Brooklyn Judge Slams Birther Lawsuit as "Fanciful, Delusional and Irrational" and Orders Theorist to Pay $177G*, N.Y. DAILY NEWS (Apr. 3, 2013, 12:54 AM), http://www.nydailynews.com/news/national/brooklyn-judge-slams-birther-case-orders-theorist-pay-177g-article-1.1306268 ("Strunk was ordered to pay $167,707 in attorney fees plus a $10,000 sanction for the 2011 lawsuit that named Obama, New York's Board of Elections and a list of others as defendants.").

[155] Strunk v. N.Y. State Bd. of Elections (*Strunk I*), No. 6500/11, 2012 WL 1205117, at *1 (N.Y. Sup. Ct. 2012).

[156] *Id.* at *1. Like some other birther litigators, Strunk also improperly cited the Constitution's natural born citizen clause as Article II, Section 1, Clause 5; it is found in Clause 4. *See* Ankeny v. Governor of Ind., 916 N.E.2d 678, 684 n.9 (Ind. Ct. App. 2009).

[157] *Strunk I*, 2012 WL 1205117, at *19.

New Jersey's ballot and participated in at least one other action challenging Obama's eligibility.[158]

Donofrio's own case, *Donofrio v. Wells*,[159] was an unsuccessful suit against Nina Mitchell Wells in her capacity as New Jersey Secretary of State to remove McCain and Obama from the ballot.[160] Donofrio argued that McCain was ineligible because he was born in the Panama Canal Zone when persons similarly situated were not considered citizens under applicable U.S. law (but that their citizenship later attached retroactively by statute).[161] He also asserted that Obama was ineligible for the presidency based on his father's Kenyan nationality and British citizenship at the time of Obama's birth.[162] The suit was dismissed without reaching its merits, and the Supreme Court declined to hear an appeal.[163]

Donofrio prepared an application for certiorari to the Supreme Court in pro se litigant Cort Wrotnowski's appeal[164] from the dismissal of his suit against Connecticut's Secretary of State, *Wrotnowski v. Bysiewicz*.[165]

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[158] Application for Emergency Stay at 2–3, Donofrio v. Wells, 555 U.S. 1067 (2008) (No. 08A407). As discussed below, Donofrio aided Cort Wrotnowski in his Connecticut lawsuit after the Connecticut Supreme Court dismissed Wrotnowski's complaint. *See Wrotnowski v. Bysiewicz*, 958 A.2d 709 (Conn. 2008); *see infra* notes 164–68 and accompanying text.

[159] 555 U.S. 1067 (2008).

[160] *See id.*; Application for Emergency Stay, *supra* note 158, at 2–3.

[161] *See* Application for Emergency Stay, *supra* note 158, at 13–15.

[162] *See id.* at 17–18 (asserting that Obama was born to a Kenyan father); Leo Donofrio, Kansas City Star—*Just Like MSNBC—Gets the Donofrio SCOTUS Story Wrong, Very Wrong*, NAT. BORN CITIZEN (Dec. 3, 2008, 2:11 PM), http://naturalborncitizen.wordpress.com/2008/12/03/kansas-city-star-just-like-msnbc-gets-the-donofrio-scotus-story-wrong-very-wrong/ (asserting that, no matter where he was born, Obama was a British citizen at birth).

[163] *Donofrio*, 555 U.S. 1067; *see* Application for Emergency Stay, *supra* note 158, at 6–7 (noting that the New Jersey Appellate Division judge determined that Donofrio's claim was filed too late to be considered on the merits); *see also* Leo Donofrio, *SCOTUS Has No Original Jurisdiction to Issue a Writ of* Quo Warranto *re Obama; Legal Presumption in Favor of Natural Born Citizen Clause and Effect*, NAT. BORN CITIZEN (Mar. 16, 2009, 1:38 PM), http://naturalborncitizen.wordpress.com/2009/03/16/scotus-has-no-original-jurisdiction-to-issue-writs-of-quo-warranto-legal-presumption-in-favor-of-natural-born-citizen-clause-and-effect/ (asserting that once President Obama was sworn in as President, the Supreme Court became powerless to enforce the natural born citizen clause, and as such, Donofrio's lawsuit became moot).

[164] Leo C. Donofrio & Cort Wrotnowski, *Wrotnowski Application Referred to Full Court by Justice Scalia—Distributed for Conference on Dec 12—Supplemental Brief to be Submitted Tomorrow*, NAT. BORN CITIZEN (Dec. 8, 2008, 7:20 PM), http://naturalborncitizen.wordpress.com/2008/12/08/wrotnowski-application-referred-to-full-court-by-justice-scalia-distributed-for-conference-on-dec-12-supplemental-brief-to-be-submitted-tomorrow/; *Docket Search Page for* Wrotnowski v. Bysiewicz, *No. 08A469*, SUPREME CT. U.S., http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/08a469.htm (last visited Nov. 11, 2014).

[165] 958 A.2d 709 (Conn. 2008).

Wrotnowski's initial suit was grounded in insinuations of Kenyan birth and demanded verification of Obama's eligibility by disclosure of health department or hospital records,[166] but Donofrio's application to the Supreme Court proceeded based on Obama's U.K. citizenship at birth and resulting failure to meet originalist understandings of the natural born citizen requirement.[167] The Supreme Court declined without comment to hear *Wrotnowski*.[168]

Considering arguments similar to those forwarded by Donofrio in the *Wrotnowski* application, the Indiana Court of Appeals relied on its interpretation of Amendment XIV and Supreme Court precedent to offer a summary rejection of originalist arguments based around Vattel in dicta.[169] Donofrio criticized the *Ankeny* ruling in a lengthy article explaining how its reasoning was defective, principally in its interpretation of the interplay between important pieces of Supreme Court precedent.[170] Beyond *Ankeny*'s dicta, Donofrio's originalist argument never received serious judicial consideration, and birther arguments characterized the body of natural born citizen clause challenges.

This disposition was probably appropriate. Despite the merits of his approach to the issue and the superiority of his research and arguments compared with those initiated and pursued by birthers, Donofrio's standing still suffered from the fact that his claimed injury was the generalized injury applicable to any voter.[171] And even if he had somehow been able to get past standing, the political question doctrine would have been a significant hurdle.[172] The proper forum for resolution of the natural

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[166] *See id.* at 711.

[167] *See* Donofrio & Wrotnowski, *supra* note 164.

[168] Wrotnowski v. Bysiewicz, 555 U.S. 1083 (2008).

[169] *Compare* Application for Emergency Stay, *supra* note 158, at 18–19 (explaining Donofrio's originalist arguments regarding President Obama's Kenyan-born father), *and* Donofrio & Wrotnowski, *supra* note 164 (explaining that Donofrio helped Wrotnowski in filing and drafting the application to the Supreme Court, arguing the same issue he had argued in his own case), *with* Ankeny v. Governor of Ind., 916 N.E.2d 678, 684–89 (Ind. Ct. App. 2009) (discussing Donofrio's arguments based on a historical treatise and congressional debates). Though the dicta is lengthy, it contains long block quotes and little serious analysis of the merits of the arguments of which it disposed. *See Ankeny*, 916 N.E.2d at 684–89.

[170] Leo C. Donofrio, *US Supreme Court Precedent States that Obama Is Not Eligible to Be President*, NAT. BORN CITIZEN (June 21, 2011, 4:36 PM), http://naturalborncitizen.wordpress.com/2011/06/21/us-supreme-court-precedent-states-that-obama-is-not-eligible-to-be-president/.

[171] *See* Application for Emergency Stay, *supra* note 158, at 19–20.

[172] *See* Baker v. Carr, 369 U.S. 186, 217–18 (1962) (defining the political question doctrine test); Daniel P. Tokaji, Commentary, *The Justiciability of Eligibility: May Courts Decide Who Can Be President?*, 107 MICH. L. REV. FIRST IMPRESSIONS 31, 35–39 (2008),

born citizen requirement may well be the courts, but probably not through the vehicle of a direct challenge to a candidate.[173] However, including his claims in coverage with those of the oft-ridiculed birthers without explaining their important distinctions could reasonably be expected to denigrate Donofrio's arguments in the public eye, and if this was so, it may have prevented a serious, valuable public discussion of the natural born citizen requirement's original meaning and its application in the present day.

## VI. A SOLUTION GROUNDED IN THE CONSTITUTION

Ultimately, both Chester Arthur and Barack Obama served as President, for better or worse, and nothing will change that. But the fact that they may have done so in violation of an explicit constitutional requirement[174] should not be ignored or dismissed. The Constitution is our bedrock statutory law.[175] It is both foundational and supreme in its force and application.[176] Its measures to prevent individuals with split national loyalties ascending the presidency are perhaps more appropriate now than ever before as globalization increases and globalist intrigue follows.[177] The regard paid the natural born citizen requirement does not reflect the gravity of the risks it was designed to counter.[178] Róger Calero, a Nicaraguan by birth and a lawful resident (but not naturalized citizen) of the United States,[179] was allowed on the ballot in five states during the 2008 presidential election.[180] This clear flouting of the requirement and

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*available at* http://www.michiganlawreview.org/articles/the-justiciability-of-eligibility-may-courts-decide-who-can-be-president.

[173] As has been demonstrated, these are typically impossible for voters to bring because they lack standing, and this tactic is probably inadvisable for candidates desirous of avoiding bad publicity. A possible solution is discussed below. *See infra* Part VI.

[174] *See* U.S. CONST. art. II § 1, cl. 4.

[175] U.S. CONST. art. VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land . . . .").

[176] *See id.*

[177] *See* Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1121–23 (2000) (discussing the recent trend of U.S. Supreme Court Justices and other American judges holding summits with their international counterparts).

[178] *See* Pryor, *supra* note 35, at 890 (describing the tension between the Framers' desire to encourage immigration and their fear of foreigners taking power).

[179] *Róger Calero, SWP Candidate for President*, MILITANT, Jan. 14, 2008, *available at* http://www.themilitant.com/2008/7202/720253.html ("Born in Nicaragua, Calero has lived in the United States since 1985, when his family moved to Los Angeles. He joined the socialist movement there in 1993. . . . In December 2002 Calero was arrested by federal immigration cops . . . . The U.S. Immigration and Naturalization Service jailed Calero in Houston for 10 days and began deportation proceedings against him.").

[180] FED. ELECTION COMM'N, 2008 OFFICIAL PRESIDENTIAL GENERAL ELECTION RESULTS 1 (Jan. 22, 2009), *available at* http://www.fec.gov/pubrec/fe2008/

acquiescence by the states complicit in his candidacy demonstrate a near total lack of enforcement in some quarters.

A compelling case can be made that "natural born citizen" is a term of art which excludes Chester Arthur,[181] Barack Obama,[182] Arnold Schwarzenegger,[183] Ted Cruz,[184] and many other candidates who may be very well qualified in every other way. We should not ignore this conflict. We should not allow it to be defined away contrary to the letter and spirit of the Constitution.

The states, which are afforded reasonable latitude in regulating elections,[185] should enact safeguards to prevent constitutionally unqualified candidates from being placed on their respective ballots. States seeking guidance on the natural born citizen issue should consult Vattel's treatise for a clear originalist lodestar.[186] His definition provides continuity with the Framers and shores up a vital safeguard that has eroded in recent decades.[187] Its bright line rule abandons ambiguity in favor of an easily discerned rule which is not onerous on citizens and honors the purpose of the requirement while working toward its fulfillment.

The Arizona legislature passed a bill based in birther sentiment that would have required the production of birth certificates to election

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2008presgeresults.pdf. The results reflect that Calero received non-write-in votes in Delaware, Minnesota, New Jersey, New York, and Vermont. *Id.*

[181] *See supra* Part III.

[182] *See supra* Part V.

[183] *See* Chris Gentilviso, *Arnold Schwarzenegger 2016? Former Governor Mulls Rule Change Push to Run for President: REPORT*, HUFFINGTON POST (Oct. 19, 2013, 10:37 AM), http://www.huffingtonpost.com/2013/10/19/arnold-schwarzenegger-2016_n_4128022.html.

[184] *See* Saeed Ahmed, *It's Official: Ted Cruz a Citizen of the U.S.—and the U.S. Only*, CNN (June 11, 2014, 7:54 AM), http://www.cnn.com/2014/06/11/politics/ted-cruz-canada-citizenship/.

[185] *See* Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. To achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends. Nevertheless, the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." (citation omitted) (internal quotation marks omitted)).

[186] *See* VATTEL, *supra* note 45, at 101.

[187] *See* FEDERAL ELECTION COMM'N, *supra* note 180 (evidencing the disregard for the natural born citizen eligibility requirement that some states have displayed by including a clearly ineligible candidate on the presidential ballot).

authorities for ballot access, but Jan Brewer vetoed the bill.[188] The episode reiterates how states may address issues of candidate qualification and how poisonous reaction to the birther movement has made discussion of the natural born citizen requirement. It is not enough just to enact a kneejerk requirement; it must be grounded in good constitutional scholarship and accurately reflect the protections contained in the document.[189] The Arizona bill met neither prong.[190] States must do better to ensure their efforts are prudent and well-considered.

Even if only a few states wish to enforce the constitutional requirement, their efforts will be valuable. The status quo, with Schwarzenegger pushing to invalidate the requirement[191] and Calero simply ignoring it,[192] underscores the truism that some is better than none. Some enforcement is needed, and absent federal action (which seems unlikely),[193] the states are best suited to address that need.

And even if states were to pass solid originalist enforcement measures for the natural born citizen requirement only to have them struck down by the courts, at least the body of law would be settled. This silver lining seems more significant when one considers the length of time and volume of litigation which has been expended without resolving the meaning of this unique provision of the Constitution.

## CONCLUSION

The tension at the heart of the historical public meaning of "natural born citizen," while much lower profile than the sensationalism of the low points of the birther movement, is much more durable. Popular coverage of and reaction to the birther movement misrepresented the natural born citizen clause, and it became easy for observers to dismiss all such challenges out of hand.[194] But lurking between the sensational coverage of the more ineptly handled birther suits and the ambiguities in the text of

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[188] H.B. 2177, 50th Leg., 1st Reg. Sess. (Ariz. 2011); Letter from Janice K. Brewer, Governor, State of Arizona, to Kirk Adams, Speaker of the House, Arizona House of Representatives (Apr. 18, 2011), *available at* http://azgovernor.gov/dms/upload/PR_041811_HB2177VetoLetter.doc.pdf (vetoing H.B. 2177).

[189] U.S. CONST. art. II, § 1, cl. 4.

[190] *See* Ariz. H.B. 2177.

[191] *See* Gentilviso, *supra* note 183.

[192] *See* Róger Calero, *supra* note 179.

[193] Any public support of the birther movement receives significant flak, to which federal legislators are likely unwilling to subject themselves. *See* Rachel Rose Hartman, *Obama Ridicules Trump at Correspondents' Dinner, Mocks "Birther" Crusade*, YAHOO NEWS (May 1, 2011, 12:38 A.M.), http://news.yahoo.com/blogs/ticket/obama-ridicules-trump-correspondents-dinner-mocks-birther-crusade-043803862.html.

[194] *See* Donofrio, *supra* note 162.

the provision is a real controversy.[195] It is unlikely to fade with time because it is based not on individual men and their voting preferences,[196] but on a historical understanding of a carefully contemplated and duly ratified provision of the Constitution.[197] It is not aimed at excluding any individual candidate or party, but on protecting the nation and its most powerful executive office from foreign influence by excluding a class of candidates who carry a higher risk of split national loyalties.[198] This cuts equally against Barack Obama and Ted Cruz—it is not a partisan issue, but a constitutional one. Whatever the final resolution of the controversy, we should settle it soon. It is not for the health of our Constitution that we continue to misconstrue or ignore its provisions. National politicians will not deal with the problem, as political fortunes counsel otherwise.[199] Besides, it is not candidates or the federal government, but the states, which are the primary arbiters of presidential ballot access.[200] The courts show an understandable reluctance to declare candidates ineligible, especially considering that virtually no potential litigant against any given presidential candidate possesses standing to challenge him or her.[201] Additionally, for the courts to navigate a solution to any candidacy problem, they would have to navigate the political question doctrine—an unlikely feat, given the guidance considered above.[202]

This problem is ripe for state action, and with Vattel's guidance, it is one that states can address with confidence. The question would likely still land in the Supreme Court if states chose to enforce the historical constitutional requirement, but the question would be whether states have construed that requirement properly rather than whether Candidate Z can run for the office. This encourages settling a contentious issue which

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[195] *See generally* Duggin & Collins, *supra* note 23.

[196] Though vociferous devotees to the rule seem to intensify in number and activity during election seasons, the rule itself cuts equally against any political ideology. This is demonstrated by a new birther movement rising in response to Republican Ted Cruz's possible candidacy for president. *See* Aaron Blake, *No, Ted Cruz "Birthers" Are Not the Same as Obama Birthers*, WASH. POST (Aug. 19, 2013), http://www.washingtonpost.com/blogs/the-fix/wp/2013/08/19/no-ted-cruz-birthers-are-not-the-same-as-obama-birthers/.

[197] U.S. CONST. art. II, § 1, cl. 4.

[198] *See* Letter from John Jay to General Washington, *supra* note 29.

[199] *See* Hartman, *supra* note 193 (displaying the bad publicity that associating with the birther movement brings).

[200] *See* Anderson v. Celebrezze, 460 U.S. 780, 788 (1983).

[201] *See* Barnett v. Obama, No. SACV 09-0082 DOC (ANx), 2009 WL 3861788, at *3–10 (C.D. Cal. 2009).

[202] *See* Tokaji, *supra* note 172.

may be in law (but has not been in practice) one of first impression in a legislative forum.[203] The states are best suited to accomplish this.

Under the status quo, citizens are afforded a right under the Constitution without an available judicial remedy, because the harm from violation of the statute will almost always be generalized. This controversy has been lurking since Chester Arthur ascended to the presidency at the end of the nineteenth century, and it flared up again recently when President Obama was a candidate in 2008. It is time to settle the question and provide stability and clarity to this area of our election law.

*John Ira Jones IV*[*]

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[203] *See supra* notes 188–90 and accompanying text. Because Governor Brewer vetoed Arizona H.B. 2177, the legislative action had no chance to be challenged in a court of law, and this issue remains one of first impression.

[*] J.D. Candidate, Regent University School of Law, 2015. Special thanks to my wife, Hayley, for her love, support, and patience as I worked through this process. Had it not been for her, I imagine this piece would have been buried under about three feet of Kansas snow, a broken-down van, a pregnancy, and several dozen Christmas presents. Thanks also to my precious children, Elizabeth, Johnny, David, Jeremiah, Abigail, and Caleb, for their encouragement, love, and inspiration. And thank you to *Regent University Law Review* and to the editorial team that put so much excellent work into refining this Note.

# TAXING FEDERALISM: ANALYZING REVENUE RULING 2013-17 IN LIGHT OF *WINDSOR*'S FEDERALISM LANGUAGE

## INTRODUCTION

It is hard to overstate the effect that *United States v. Windsor*[1] will have on the American legal system.[2] Abrogating the definitional purpose[3] of the federal Defense of Marriage Act[4] ("DOMA") had immediate effect on "over 1,000 federal statutes and a myriad of federal regulations."[5] Although President Obama promised that the Court's decision would be implemented "swiftly and smoothly,"[6] the tentative reasoning[7] with which the majority struck down DOMA left much uncertainty as to the long-term consequences of the Court's landmark ruling.[8] Many legal battles loom on the horizon regarding the ability to define marriage in America.[9]

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1 133 S. Ct. 2675 (2013).

2 *See, e.g.*, Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty, Not "Argle Bargle": The Inevitability of Marriage Equality After* Windsor, 23 TUL. J.L. & SEXUALITY 17, 21 (2014) ("From this immediate and sweeping implementation of *Windsor*'s holding across the country, it is apparent that the import of the decision cannot be overstated.").

3 "[The Defense of Marriage Act] amends the Dictionary Act in Title 1, § 7, of the United States Code to provide a federal definition of 'marriage' and 'spouse.'" *Windsor*, 133 S. Ct. at 2682–83.

4 Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified in scattered sections of 1 U.S.C. & 28 U.S.C. (2012)). *Windsor* took issue only with section 3 of DOMA, 133 S. Ct. at 2683, which provides:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7 (2012). Section 2 of DOMA, which allowed states to deny the existence of same-sex marriages entered into in another state, was unaffected by the *Windsor* ruling. *Windsor*, 133 S. Ct. at 2682–83 ("Section 2 . . . has not been challenged . . . .").

5 *Windsor*, 133 S. Ct. at 2688.

6 Presidential Statement on the United States Supreme Court Ruling on the Defense of Marriage Act, 2013 DAILY COMP. PRES. DOC. 459 (June 26, 2013).

7 "The particular constitutional guarantee in *Windsor* is hard to identify amidst the various rationales. Indeed, the muddled nature of the majority opinion—rest[s] at times on the federal balance, equal protection, or due process . . . ." Neomi Rao, *The Trouble with Dignity and Rights of Recognition*, 99 VA. L. REV. ONLINE 29, 31 (2013).

8 Susannah W. Pollvogt, Windsor, *Animus, and the Future of Marriage Equality*, 113 COLUM. L. REV. SIDEBAR 204, 205 (2013) (identifying the varying interpretations courts and commentators could take from the *Windsor* decision).

9 *See* William Duncan, *Bad News for Marriage, Good News for Government Power*, SCOTUSBLOG (June 26, 2013, 3:50 PM), http://www.scotusblog.com/2013/06/bad-news-for-marriage-good-news-for-government-power/ ("Based on today's decisions, the future looks to

By removing, but not replacing, the definitional provision of DOMA,[10] the Court left application of its decision largely up to the federal agencies responsible for administering federal benefits.[11] Without a guiding, uniform definition, federal agencies have taken varying approaches in determining who will receive relevant marital benefits.[12] This Note asks the question: what guiding principles should federal agencies use to determine eligibility for federal marital benefits in the absence of DOMA's definitional provision? This Note suggests that the federalism language emphasized by the *Windsor* majority should be the principal guide for federal agencies in administering relevant federal benefits. Using a post-*Windsor* Internal Revenue Service Revenue Ruling that defines eligibility for marital benefits for federal tax purposes[13] as an example, this Note explains how federal agencies can best implement the sweeping ruling in *Windsor* while preserving state sovereignty.

Part I of this Note discusses the prolific federalism language in the *Windsor* opinion. Part II of this Note discusses commentators' interpretation of the federalism language in *Windsor* and the current state of affairs regarding same-sex marriage in the fifty states. Part III analyzes the structure and text of Revenue Ruling 2013-17 in light of the federalism language contained in the *Windsor* opinion. Subsumed in this discussion, this Note presents issues raised by the IRS's decisions to adhere to a "state of celebration" rule in administering benefits to migratory marriages and to exclude marriage-like institutions from receiving federal marital tax benefits.

## I. *WINDSOR*'S FEDERALISM LANGUAGE

Although the *Windsor* decision did not clearly rest on federalism principles, amidst the muddled majority opinion[14] it is undeniable that the

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hold more litigation, more judicial and executive discretion, but a diminished social role for marriage.").

[10] *Windsor*, 133 S. Ct. at 2695–96. The majority's reasoning relied, in part, upon the states' ability to define marriage and decided that DOMA's federal definition of marriage could not stand. *Id.* at 2692 ("DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage.").

[11] *See* Meg Penrose, *Something to [*Lex Loci*]* Celebrationis*?: Federal Marriage Benefits Following* United States v. Windsor, 41 HASTINGS CONST. L.Q. 41, 45–46 (2013) (discussing the lack of clarity created by *Windsor* and the responsibility thrust upon federal agencies).

[12] "The United States government has not spoken with a single voice regarding its reaction to *United States v. Windsor*. Instead, in piecemeal fashion, various federal agencies are beginning to announce who is considered married for certain federal purposes." *Id.* at 44.

[13] Rev. Rul. 2013-17, 2013-38 I.R.B. 201–02.

[14] "The sum of all the Court's nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role) because it is motivated

Court was greatly troubled by DOMA's encroachment upon the states' traditional role in regulating marital relations.[15] Chief Justice Roberts was so convinced by the majority's elucidation of concern for state sovereignty that he concludes in his dissent that "it is undeniable that [the majority's] judgment is based on federalism."[16] The other dissenting Justices took notice of the majority's federalism language but were not as convinced as to its ultimate applicability.[17] Similarly and unsurprisingly, commentators have reached opposite conclusions regarding the catalytic rationale of the Court's decision.[18] No matter which Justice commentators, practitioners, or lower court judges ultimately side with as to the definitive rationale of the *Windsor* majority, one cannot hide the bolded thread of federalism running throughout the opinion.

### *A. The Majority*

The Court begins its seven-page tribute to federalism[19] by acknowledging the "history and tradition" of limited federal involvement in domestic relations, stating that this "is 'an area that has long been

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by a '"bare . . . desire to harm"' couples in same-sex marriages." *Windsor*, 133 S. Ct. at 2707 (Scalia, J., dissenting) (alteration in original).

[15] "By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States." *Id.* at 2689–90 (majority opinion).

[16] *Id.* at 2697 (Roberts, C.J., dissenting).

[17] *Compare id.* at 2705 (Scalia, J., dissenting) ("[The majority opinion] fool[s] many readers, I am sure, into thinking that this is a federalism opinion."), *with id.* at 2720 (Alito, J., dissenting) ("Indeed, the Court's ultimate conclusion is that DOMA falls afoul of the Fifth Amendment . . . . To the extent that the Court takes the position that the question of same-sex marriage should be resolved primarily at the state level, I wholeheartedly agree.").

[18] *Compare* Courtney G. Joslin, Windsor, *Federalism, and Family Equality*, 113 COLUM. L. REV. SIDEBAR 156, 166 (2013) ("But while the Court did rely on the history of the allocation of power as between the states and the federal government as a trigger for more careful equal protection review, it is misleading to describe *Windsor* as a federalism-based opinion."), *and* Douglas Nejaime, Windsor*'s Right to Marry*, 123 YALE L.J. ONLINE 219 (2013) ("[T]hough the U.S. Supreme Court's decision in Windsor's favor is sprinkled with elements of federalism and due process, it ultimately rests on equal protection grounds."), *and* Elizabeth B. Wydra, *Reading the Opinions—and the Tea Leaves—in* United States v. Windsor, 20120–2013 CATO SUPREME CT. REV. 95, 103–04 (2013) ("For those who wish to maintain state laws excluding gay and lesbian couples from the institution of marriage, the threads of federalism running through the majority opinion might be cause for optimism . . . . But a close reading of the majority opinion suggests that it is not really about federalism . . . ."), *with* Ernest A. Young & Erin C. Blondel, *Federalism, Liberty, and Equality in* United States v. Windsor, 2012-2013 CATO SUPREME CT. REV. 117, 119 (2013) ("Federalism principles played a critical role in defining the contours of the equality right at stake . . . . Rather than choosing between federalism and rights-based approaches to the case, *Windsor* demonstrated how federalism can become an integral part of the rights calculus.").

[19] "[T]he opinion starts with seven full pages about the traditional power of States to define domestic relations . . . ." *Windsor*, 133 S. Ct. at 2705 (Scalia, J., dissenting).

regarded as a virtually exclusive province of the States.' "[20] The Court implies that a necessary facet within the regulation of domestic relations, and understood "'at the time of the adoption of the Constitution,'" was that states " 'possessed full power over the subject of marriage and divorce.' "[21] The Court then explains that the ability to define marriage is "central to state domestic relations law"[22] and "the foundation of the State's broader authority to regulate the subject of domestic relations."[23] Further bolstering the historic and constitutional grounding of state sovereignty in regulating marriage, the Court states that "[t]he significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for 'when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.' "[24] The Court acknowledges the limited power of the federal government in stating "'the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce.' "[25] The Court concludes, in the absence of any affirmative grant of power in the Constitution or any implied power from historical practice, that it is "[c]onsistent with this allocation of authority, [that] the Federal Government . . . defer[s] to state-law policy decisions with respect to domestic relations."[26]

The Court applauds New York's decision to "recognize and then to allow same-sex marriages."[27] It describes these actions as a "proper exercise of [New York's] sovereign authority within our federal system, all in the way that the Framers of the Constitution intended."[28] Further expanding on the importance of New York's role as a sovereign state in "the formation of consensus respecting the way the members of a *discrete community* treat each other in their daily contact and constant interaction with each other,"[29] the Court implies that, in this area, broad national standards do not adequately represent the social mores of states as "discrete communit[ies]."[30] The majority goes on to cheer the democratic process through which New York arrived at its final decision: "After a

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[20] *Id.* at 2691 (majority opinion) (quoting Sosna v. Iowa, 419 U.S. 393, 404 (1975)).

[21] *Id.* (quoting Haddock v. Haddock, 201 U.S. 562, 575 (1906)).

[22] *Id.*

[23] *Id.*

[24] *Id.* (quoting Ohio *ex rel.* Popovici v. Agler, 280 U.S. 379, 383–84, (1930)).

[25] *Id.* (quoting Haddock v. Haddock, 201 U.S. 562, 575 (1906)).

[26] *Id.*

[27] *Id.* at 2692.

[28] *Id.*

[29] *Id.* (emphasis added).

[30] *Id.*

statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage, New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood."[31]

These highlighted portions of the majority's tribute to federalism clearly demonstrate the Court's grave concern for states' ability to meaningfully define the bounds of domestic relations within each state's discrete community. With this language framing the debate, it is unsurprising that the Court characterizes DOMA as an "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage"[32] and infringement upon the "unquestioned authority of the States"[33] to define marriage.

### *B. The Dissent*

The disagreement amongst the Justices regarding the definitive rationale in striking down the definitional provision in DOMA displays the weight of concern the majority placed upon federalism principles in domestic relations. In their dissents, Chief Justice Roberts and Justice Alito echo the majority's federalism language, seemingly hoping to convince the majority of the weight of their words.

Worried about the impact the majority's equal protection and due process language[34] may have on states' ability to retain a traditional

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[31] *Id.* at 2689.

[32] *Id.* at 2693.

[33] *Id.*

[34] *See id.* at 2695 ("[T]hough Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment. What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution. The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws."). But even in its concluding remarks, the majority is careful to couch its language in the context of federalism:

> [DOMA] imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.

*Id.* at 2695–96.

definition of marriage,[35] Chief Justice Roberts carefully points out the emphasis the majority places upon state sovereignty in defining marriage and the majority Justices' displeasure with DOMA's encroachment:

> The majority extensively chronicles DOMA's departure from the normal allocation of responsibility between State and Federal Governments, emphasizing that DOMA "rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State." *But there is no such departure* when one State adopts or keeps a definition of marriage that differs from that of its neighbor, for it is entirely expected that state definitions would "vary, subject to constitutional guarantees, from one State to the next."[36]

Justice Alito expresses a similar concern in his dissent:

> To the extent that the Court takes the position that the question of same-sex marriage should be resolved primarily at the state level, I wholeheartedly agree. I hope that the Court will ultimately permit the people of each State to decide this question for themselves. Unless the Court is willing to allow this to occur, the whiffs of federalism in the [sic] today's opinion of the Court will soon be scattered to the wind.[37]

As demonstrated by the prolific federalism language in the majority's opinion and the reiteration of that language in the dissenting Justices' opinions, *Windsor* is—at least facially—a win for state sovereignty in defining domestic relations and marriage.

## II. WHAT DOES IT MEAN?

If the opinion did not ultimately rest on federalism grounds, as Justice Scalia insists,[38] what is to be made of all this federalism language? Some commentators suggest that DOMA's "unusual" departure from general principles of federalism merely triggered closer equal protection review.[39] Other commentators view the majority's language more

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[35] Roberts anticipates a subsequent suit challenging a state's definitional provision retaining a traditional definition of marriage:

> Thus, while "[t]he State's power in defining the marital relation is of central relevance[,]" . . . that power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions. So too will the concerns for state diversity and sovereignty that weigh against DOMA's constitutionality in this case.

*Id.* at 2697 (Roberts, C.J., dissenting) (quoting majority opinion at 2692).

[36] *Id.* (emphasis added) (citation omitted) (quoting majority opinion at 2692).

[37] *Id.* at 2720 (Alito, J., dissenting).

[38] "[The majority opinion] fool[s] many readers, I am sure, into thinking that this is a federalism opinion." *Id.* at 2705 (Scalia, J., dissenting).

[39] *See* Joslin, *supra* note 18, at 166–67 ("DOMA['s] unusual . . . departure from the tradition of deference to state marital status determinations . . . was not what rendered section 3 unconstitutional. This deviance or departure was simply a trigger for more careful equal protection review. Ultimately, what rendered DOMA unconstitutional was that it

cynically, suggesting that, in the *Windsor* world, states only retain the ability to define marriage more expansively.[40] Yet others view the federalism language as an outright affirmation of state sovereignty in defining marriage.[41]

State definitions of marriage are rapidly changing in the *Windsor* world. At the time of this writing, nineteen states ("recognition states") and the District of Columbia have expanded their definitions of marriage to include same-sex couples.[42] If the federal court decisions issued after

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failed equal protection review because its purpose was to mark a class of people as less worthy of dignity and respect." (footnote omitted)).

[40] *See* Elizabeth Oklevitch & Lynne Marie Kohm, *Federalism or Extreme Makeover of State Domestic Regulations Power? The Rules and the Rhetoric of* Windsor *(and* Perry*)*, 6 ELON L. REV. 337, 341 (2014) ("[I]t is unclear whether [federalism] principles are applied as strongly for state jurisdictions defining marriage traditionally. It is therefore possible that strong federalism is consistent with the ruling in *Windsor* only if it expands marriage." (footnote omitted)); *see also* Wydra, *supra* note 18, at 106 ("Justice Kennedy would likely have a difficult time justifying state authority to discriminate against gay and lesbian couples when it comes to marriage. As the *Windsor* majority opinion notes, states do enjoy traditional authority to regulate marriage, but this authority must be used in compliance with the Constitution.").

[41] Eric Restuccia and Aaron Lindstrom argue that the holdings in the twin decisions *Windsor* and Hollingsworth v. Perry, 133 S. Ct. 2652 (2013), "share an unexpected unifying theme—state sovereignty." Eric Restuccia & Aaron Lindstrom, *Federalism and the Authority of the States to Define Marriage*, SCOTUSBLOG (June 27, 2013, 3:49 PM), http://www.scotusblog.com/2013/06/federalism-and-the-authority-of-the-states-to-define-marriage/. They further argue that these holdings predict a more hopeful outcome for states wishing to retain a traditional definition of marriage:

> [T]he principles in *Windsor* of respect for state sovereignty and the authority of the people of the states to define marriage support the conclusion that the Court will affirm the constitutionality of those states that have reaffirmed the historic understanding of marriage—the union of one man and one woman.

*Id.*

[42] These jurisdictions have recognized same-sex marriage through state court decisions, legislation, or popular vote. *See* De Leon v. Perry, 975 F. Supp. 2d 632, 644 (W.D. Tex. 2014). The current recognition states are California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. *Id.*

On October 6, 2014, the U.S. Supreme Court denied certiorari in same-sex marriage cases from five states. Lyle Denniston, *Many More Same-Sex Marriages Soon, but Where?*, SCOTUSBLOG (Oct. 6, 2014, 3:35 PM), http://www.scotusblog.com/2014/10/many-more-same-sex-marriages-soon-but-where/. The Court let stand lower federal court rulings striking down same-sex marriage bans and effectively allowed same-sex marriage in Indiana, Oklahoma, Utah, Virginia, and Wisconsin. *Id.* Additionally, because the Supreme Court denied certiorari on federal circuit decisions, the jurisdictions affected are not only the states from which the cases originated, but all of the states in those circuits. *Id.* Consequently, Colorado, Kansas, North Carolina, South Carolina, West Virginia, and Wyoming, which did not recognize same-sex marriage at the state level, are now bound by their circuits' undisturbed decisions allowing same-sex marriage. *Id.*

On October 8, 2014, in an amusing turn of events, the U.S. Supreme Court, through Justice Kennedy, accidentally halted same-sex marriage in Nevada, which had been

*Windsor* regarding states' stances towards same-sex marriage are any indication, it would seem that *Windsor*'s federalism language is meaningless. In the sixteen months since the *Windsor* decision, twenty-one federal district court decisions by eighteen judges have modified states' definitions of marriage, and three federal appellate courts have affirmed, at least in part, the district court decisions.[43] Twenty-eight states have constitutional amendments and three have statutes that prohibit the recognition of same-sex marriage ("non-recognition states").[44]

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permitted just two days before. Lyle Denniston, *FURTHER UPDATE: Same-Sex Marriage OK in Nevada*, SCOTUSBLOG (Oct. 8, 2014, 1:04 PM), http://www.scotusblog.com/2014/10/same-sex-marriages-in-nevada-maybe-yes-maybe-no/. Idaho, not Nevada, had requested a stay on the implementation of the Ninth Circuit's previous ruling, but a typo in Justice Kennedy's order left hopeful Nevada couples and state officials confused. *Justice Kennedy Mistakenly Halts Gay Marriages in Nevada*, U.S. NEWS & WORLD REP. (Oct. 9, 2014, 1:14 PM), http://www.usnews.com/news/articles/2014/10/09/justice-kennedy-mistakenly-halts-gay-marriages-in-nevada. Later that day, Justice Kennedy issued a clarified order allowing same-sex marriage in Nevada. Otter v. Latta, No. 14A374, 2014 WL 5025970 (Oct. 8, 2014), *vacated by* 2014 WL 5094190 (mem.) (Oct. 10, 2014). Two days later, the Supreme Court lifted Idaho's stay on same-sex marriage.

[43] *See* Baskin v. Bogan, Nos. 14-2386, 14-2387, 14-2388, 14-2526, 2014 WL 4359059, at *21 (7th Cir. Sept. 4, 2014) (Posner, J.); Bostic v. Schaefer, 760 F.3d 352, 384 (4th Cir. 2014) (Floyd, J.); Kitchen v. Herbert, 755 F.3d 1193, 1229–30 (10th Cir. 2014) (Lucero, J.); Bishop v. Smith, 760 F.3d 1070, 1096 (10th Cir. 2014) (Lucero, J.); Majors v. Jeanes, No. 2:14-cv-00518 JWS, 2014 WL 4541173, at *6 (D. Ariz. Sept. 12, 2014) (Sedwick, J.); Brenner v. Scott, 999 F. Supp. 2d 1278, 1292–94 (N.D. Fla. 2014) (Hinkle, J.); Bowling v. Pence, No. 1:14-cv-00405-RLY, 2014 WL 4104814, at *5 (S.D. Ind. Aug. 19, 2014) (Young, C.J.); Burns v. Hickenlooper, No. 14-cv-01817-RM-KLM, 2014 WL 3634834, at *5 (D. Colo. July 23, 2014) (Moore, J.); Love v. Beshear, 989 F. Supp. 2d 536, 550 (W.D. Ky. 2014) (Heyburn, J.); Baskin v. Bogan, Nos. 1:14-cv-00355-RLY-TAB, 1:14-cv-00404-RLY-TAB, 1:14-cv-00406-RLY-MJD, 2014 WL 2884868, at *16 (S.D. Ind.) (Young, C.J.), *aff'd*, 2014 WL 4359059; Wolf v. Walker, 986 F. Supp. 2d 982, 1028 (W.D. Wis. 2014) (Crabb, J.), *aff'd sub nom. Baskin v. Bogan*, 2014 WL 4359059; Whitewood v. Wolf, 992 F. Supp. 2d 410, 431 (M.D. Pa. 2014) (Jones, J.); Geiger v. Kitzhaber, 994 F. Supp. 2d 1128, 1147 (D. Or. 2014) (McShane, J.); Latta v. Otter, No. 1:13-cv-00482-CWD, 2014 WL 1909999, at *29 (D. Idaho May 13, 2014) (Dale, C. Mag. J.); Henry v. Himes, No. 1:14-cv-129, 2014 WL 1418395, at *18 (S.D. Ohio Apr. 14, 2014) (Black, J.); DeBoer v. Snyder, 973 F. Supp. 2d 757, 775 (E.D. Mich. 2014) (Friedman, J.); Tanco v. Haslam, No. 3:13-cv-01159, 2014 WL 997525, at *9 (M.D. Tenn. Mar. 14, 2014) (Trauger, J.); De Leon v. Perry, 975 F. Supp. 2d 632, 666 (W.D. Tex. 2014) (Garcia, J.); Lee v. Orr, No. 13-cv-8719, 2014 WL 683680, at *2 (N.D. Ill. Feb. 21, 2014) (Coleman, J.); Bostic v. Rainey, 970 F. Supp. 2d 456, 484 (E.D. Va. 2014) (Allen, J.), *aff'd sub nom. Bostic v. Schaefer*, 760 F.3d 352; Bourke v. Beshear, 996 F. Supp. 2d 542, 550 (W.D. Ky. 2014) (Heyburn, J.); Bishop v. U.S. *ex rel.* Holder, 962 F. Supp. 2d 1252, 1296 (N.D. Okla. 2014) (Kern, J.), *aff'd sub nom. Bishop v. Smith*, 760 F.3d 1070; Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 1000 (S.D. Ohio 2013) (Black, J.); Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1216 (D. Utah 2013) (Shelby, J.), *aff'd*, 755 F.3d 1193; Gray v. Orr, No. 13 C 8449, 2013 WL 6355918, at *6 (N.D. Ill. Dec. 5, 2013) (Durkin, J.).

[44] ALA. CONST. art. I, § 36.03; ALASKA CONST. art. I, § 25; ARIZ. CONST. art. XXX, § 1; ARK. CONST. amend. 83, §§ 1–2; COLO. CONST. art. II, § 31; FLA. CONST. art. I, § 27; GA. CONST. art. I, § 4, para. 1; IDAHO CONST. art. III, § 28; KAN. CONST. art. XV, § 16; KY. CONST. § 233A; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. XIV, § 263A;

Twenty of these states' constitutional amendments also explicitly prohibit recognition of alternate marriage-like institutions such as civil unions.[45] Justice Alito recognized in his dissenting opinion what each state as a "discrete community" has demonstrated in taking its own approach to the marriage question: the democratic process is the best way to implement the rapid changes in the understanding of marriage in American states.[46] Although the Court recently denied certiorari petitions from three federal circuits,[47] the Sixth Circuit more recently reversed six district court

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MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; N.C. CONST. art. XIV, § 6; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13; IND. CODE ANN. § 31-11-1-1 (Westlaw through 2014 Pub. L. of 2d Reg. Sess. and 2d Reg. Technical Sess.), *invalidated by Baskin v. Bogan*, 2014 WL 4359059; W. VA. CODE ANN. § 48-2-603 (LEXIS through 2014, 2d Extraordinary Sess.); WYO. STAT. ANN. § 20-1-101 (LEXIS through 2014 Budget Sess.). Of those twenty-eight states, the following eight have constitutional amendments that allow for adoption of marriage-like institutions for same-sex couples: Alaska, Arizona, Colorado, Mississippi, Missouri, Montana, Nevada, and Tennessee. *See* ALASKA CONST. art. I, § 25; ARIZ. CONST. art. XXX, § 1; COLO. CONST. art. II, § 31; MISS. CONST. art. XIV, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEV. CONST. art. I, § 21; TENN. CONST. art. XI, § 18.

[45] The following states constitutionally prohibit any legal recognition of same-sex relationships: Alabama, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, Wisconsin. *See* ALA. CONST. art. I, § 36.03; ARK. CONST. amend. 83, §§ 1–2; FLA. CONST. art. 1, § 27; GA. CONST. art. I, § 4, para. 1; IDAHO CONST. art. III, § 28; KAN. CONST. art. XV, § 16; KY. CONST. § 233A; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; NEB. CONST. art. I, § 29; N.C. CONST. art. XIV, § 6; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13.

[46] *See Windsor*, 133 S. Ct. at 2716 (Alito, J., dissenting) ("At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment. The Members of this Court have the authority and the responsibility to interpret and apply the Constitution. Thus, if the Constitution contained a provision guaranteeing the right to marry a person of the same sex, it would be our duty to enforce that right. But the Constitution simply does not speak to the issue of same-sex marriage. In our system of government, ultimate sovereignty rests with the people, and the people have the right to control their own destiny. Any change on a question so fundamental should be made by the people through their elected officials.").

[47] Petition for Writ of Certiorari, Bogan v. Baskin, 766 F.3d 648 (7th Cir. 2014) (No. 14-277), *cert. denied*, 2014 WL 4425162 (U.S. Oct. 6, 2014); Petition for a Writ of Certiorari, Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014) (No. 14-124), *cert. denied*, 2014 WL 3841263 (Oct. 6, 2014); Petition for a Writ of Certiorari, Shaefer v. Bostic, 760 F.3d 352 (4th Cir. 2014) (No. 14-225), *cert. denied*, 2014 WL 4230092 (U.S. Oct. 6, 2014); Petition for Writ of Certiorari, Smith v. Bishop, 760 F.3d 1070 (10th Cir. 2014) (No. 14-136), *cert. denied*, 2014 WL 3854318 (U.S. Oct. 6, 2014); Petition for a Writ of Certiorari, Walker v. Wolf, *aff'd sub*

decisions that collectively struck down four states' bans on same-sex marriage.[48] With this development of a circuit split, it seems that Justice Scalia's "guess"—that the Court would decide in a following term that states cannot retain traditional definitions of marriage—is accurate.[49]

Although the degree of reliance *Windsor* actually places upon federalism principles is unclear, one cannot deny that the Court is hesitant to override—even protective of—the states' ability to define marriage.[50] The Court illustrates this respect by approvingly citing the democratic process through which New York came to recognize same-sex marriage.[51] Its lengthy description of "an area that has long been regarded as a virtually exclusive province of the States"[52] makes clear that the States' roles as "discrete communit[ies]"[53] in defining marriage is of critical importance. Therefore, federal agencies implementing *Windsor*'s holding should be cautious not to override the states' "exclusive sovereignty" in the area of domestic relations.[54] States should have the freedom to meaningfully engage in this "public controvers[y] [that] touch[es] an institution so central to the lives of so many, and . . . inspire[s] such attendant passion by good people on all sides."[55] As Ryan T. Anderson states, in *Windsor*'s wake, "the federal government should look to each

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*nom. Baskin v. Bogan*, 766 F.3d 648 (No. 14-278), *cert. denied*, 2014 WL 4425163 (U.S. Oct. 6, 2014).

48 DeBoer v. Snyder, Nos. 14-1341, 14-3057, 14-3464, 14-5291, 14-5297, 14-5818, 2014 WL 5748990, at *2–5, *27 (6th Cir. Nov. 6, 2014).

49 *See Windsor*, 133 S. Ct. at 2705 (Scalia, J., dissenting) ("My guess is that the majority, while reluctant to suggest that defining the meaning of 'marriage' in federal statutes is unsupported by any of the Federal Government's enumerated powers, nonetheless needs some rhetorical basis to support its pretense that today's prohibition of laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state-law shoe to be dropped later, maybe next Term). But I am only guessing." (footnote omitted)).

50 *See supra* Part I.A.; *see also Windsor*, 133 S. Ct. at 2692 ("The State's power in defining the marital relation is of central relevance in this case . . . .").

51 *See Windsor*, 133 S. Ct. at 2689 (discussing New York's codification of same-sex marriage).

52 *Id.* at 2691 (quoting Sosna v. Iowa, 419 U.S. 393, 404 (1975)).

53 *Id.* at 2692.

54 The majority cites:

> "[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." *Haddock v. Haddock*, 201 U.S. 562, 575, 26 S. Ct. 525, 50 L.Ed. 867 (1906); see also *In re Burrus*, 136 U.S. 586, 593–94, 10 S. Ct. 850, 34 L.Ed. 500 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States").

*Id.* at 2691 (alterations in original).

55 *Id.* at 2710 (Scalia, J., dissenting).

state's definition of marriage as governing for federal law. This respects both federalism and democratic self-government. A bad Supreme Court ruling should not allow federal bureaucrats to redefine marriage across America for their agency."[56] However, at least one federal agency has foreclosed the possibility of states meaningfully engaging in democratic governance regarding the recognition of same-sex unions.[57]

## III. REVENUE RULING 2013-17 AND ITS IMPACT ON STATE SOVEREIGNTY

In the immediate aftermath of *Windsor*, practitioners greatly anticipated how federal agencies—and the IRS in particular[58]—would implement the broader federal definition of marriage that *Windsor* requires.[59] One major concern left open by *Windsor* was how the IRS would treat couples validly married under the laws of one state but who later become domiciled in a state that does not recognize same-sex marriage.[60] Would the IRS allow a same-sex couple validly married in New York who later moved to Kansas, a non-recognition state, to file their taxes jointly? On August 29, 2013 the IRS answered this much anticipated question; Revenue Ruling 2013-17 ("the Ruling") provided the much anticipated guidance.[61] In three holdings, the Ruling answered questions raised by the

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[56] Ryan T. Anderson, *The Obama Administration, Marriage, and the States*, DAILY SIGNAL (Aug. 29, 2013), http://dailysignal.com/2013/08/29/the-obama-administration-marriage-and-the-states/.

[57] *See infra* Part III.

[58] Tax issues are especially relevant in analyzing *Windsor*; the challenge to section 3 of DOMA originated from the estate tax that Edith Windsor was required to pay on the death of her longtime partner and "spouse," as defined by New York law, but not applicable for federal purposes. *Windsor*, 133 S. Ct. at 2682.

[59] *See, e.g.*, Howard M. Zaritsky, *Estate Planning Implications of the Supreme Court's DOMA Decision*, EST. PLAN., Sept. 2013, at 12, 17–18 (discussing, just prior to the issuance of Revenue Ruling 2013-17, the uncertain tax consequences of same-sex couples validly married in one state and subsequently domiciled in a state that does not recognize same-sex marriage).

[60] *Id.* at 17 (identifying the need for guidance regarding married same-sex couples who change domicile). Justice Scalia identified this problem in his dissenting opinion in *Windsor*:

> Imagine a pair of women who marry in Albany and then move to Alabama, which does not "recognize as valid any marriage of parties of the same sex." When the couple files their next federal tax return, may it be a joint one? Which State's law controls, for federal-law purposes: their State of celebration (which recognizes the marriage) or their State of domicile (which does not)? (Does the answer depend on whether they were just visiting in Albany?) Are these questions to be answered as a matter of federal common law, or perhaps by borrowing a State's choice-of-law rules? If so, *which* State's? And what about States where the status of an out-of-state same-sex marriage is an unsettled question under local law?

*Windsor*, 133 S. Ct. at 2708 (Scalia, J., dissenting) (citation omitted).

[61] Rev. Rul. 2013-17, 2013-38 I.R.B. 201; *see also Treasury and IRS Announce That All Legal Same-Sex Marriages Will Be Recognized for Federal Tax Purposes; Ruling Provides*

*Windsor* opinion: (1) whether the terms "marriage," "spouse," "husband and wife," "husband," and "wife" extended to same-sex marriages lawful under states' authority; (2) whether the IRS would recognize the marriage of a same-sex couple validly married in one state who subsequently acquire domicile in a non-recognition state; and (3) whether the above listed terms extend to other marriage-like relationships recognized by states.[62]

### *A. Interpreting Marital Terms as Gender-Neutral to Include Same-Sex Marriages*

The Ruling's first holding is:

> [F]or Federal tax purposes, the terms "husband and wife," "husband," and "wife" include an individual married to a person of the same sex if they were lawfully married in a state whose laws authorize the marriage of two individuals of the same sex, and the term "marriage" includes such marriages of individuals of the same sex.[63]

The IRS provided four rationales to support this conclusion pertaining to the "more than two hundred Code provisions and Treasury regulations relating to the internal revenue laws that include the[se] terms."[64]

First, the Ruling cites to the majority's language in *Windsor* identifying the procedural burden that DOMA placed on same-sex couples in filing federal taxes and the expectation that *Windsor* would affect "tax administration in ways that extended beyond the estate tax refund at issue."[65] Second, the Ruling posits that a literal interpretation of gender-specific terms—effectively excluding same-sex couples—would raise serious constitutional questions by "diminishing the stability and predictability of legally recognized same-sex marriages."[66] Third, the IRS reasoned that "the text of the Code permits a gender-neutral construction of the gender-specific terms."[67] Through citation to section 7701 of the Internal Revenue Code,[68] the Ruling makes reference to the Dictionary

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*Certainty, Benefits and Protections Under Federal Tax Law for Same-Sex Married Couples*, IRS (Aug. 29, 2013), http://www.irs.gov/uac/Newsroom/Treasury-and-IRS-Announce-That-All-Legal-Same-Sex-Marriages-Will-Be-Recognized-For-Federal-Tax-Purposes%3B-Ruling-Provides-Certainty,-Benefits-and-Protections-Under-Federal-Tax-Law-for-Same-Sex-Married-Couples.

62 2013-38 I.R.B. at 201.

63 *Id.* at 203.

64 *Id.* at 202.

65 *Id.* (citing *Windsor*, 133 S. Ct. at 2694).

66 *Id. But see infra* Part III.C. (discussing equal protection concerns raised by the Ruling's holding to exclude state-created, marriage-like institutions from receiving federal tax benefits).

67 2013-38 I.R.B. at 202.

68 "Section 7701 of the Code provides definitions of certain terms generally applicable for purposes of the Code when the terms are not defined otherwise in a specific Code

Act[69] "which provides, in part, that when 'determining the meaning of any Act of Congress, unless the context indicates otherwise, . . . words importing the masculine gender include the feminine as well.'"[70] Also, the Ruling suggests that context and legislative history indicate that use of "the terms 'husband and wife' [in the Code] were used because they were viewed, at the time of enactment, as equivalent to the term 'persons married to each other.'"[71] Fourth, the Ruling cites "other considerations" that "strongly support this interpretation."[72] An appeal to fairness—treating similarly situated couples similarly regardless of gender—and administrative efficiency, absent an existing mechanism to "collect or maintain information on the gender of taxpayers," comprise the whole of the Ruling's "other considerations" in support of applying gender-specific marital terms, for federal tax purposes, to same-sex couples lawfully married in a recognition state.[73]

This first holding of the Ruling has little direct impact on state sovereignty and federalism principles because it merely expands provisions within the Internal Revenue Code relating to marriage so as to apply to validly married same-sex couples.

### *B. Overlooking State of Domicile for "State of Celebration"*

The Ruling's second holding "adopts a general rule recognizing a marriage of same-sex individuals that was validly entered into in a state whose laws authorize the marriage of two individuals of the same sex even if the married couple is domiciled in a state that does not recognize the validity of same-sex marriages."[74] It looks to the IRS's "longstanding position expressed in Revenue Ruling 58-66"[75] and the anticipated administrative difficulty in adopting a rule that would favor the laws of a same-sex couple's domiciliary state.[76] Revenue Ruling 58-66 makes

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provision and the definition in section 7701 is not manifestly incompatible with the intent of the specific Code provision." *Id.*

[69] *Id.*; 1 U.S.C. § 1 (2012); *see also* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014) (citing 1 U.S.C. § 1 as the "Dictionary Act").

[70] 2013-38 I.R.B. at 202. Interestingly, a subsection cited, section 7701(17)(a), neuters the gender-specific terms "husband" and "wife" in two specific instances: sections 682 and 2516, both relating to tax treatment of former spouses. *Id.* The Ruling contemplates, yet dismisses, the principle of the maxim *expressio unius est exclusio alterius* in favor of a general neutering of provisions elsewhere in the Code citing the "circumstances presented[,] . . . *Windsor*[,] and the principle of constitutional avoidance." *Id.*

[71] *Id.* at 203.

[72] *Id.*

[73] *Id.*

[74] *Id.* at 204.

[75] *Id.* at 203.

[76] *Id.*

express the IRS's reliance on state law definitions of marital status concerning common-law marriage.[77] It also makes marital recognition for federal tax purposes equally applicable "to a couple who entered into a common-law marriage in a state that recognized such relationships and who later moved to a state in which a ceremony is required to establish the marital relationship."[78] Achievement of uniformity, stability, efficiency, and certainty is cited in support of analogizing treatment of migratory common-law marriages and same-sex marriages.[79] After detailing the administrative headache that adopting a state-of-residence rule would cause to "[the IRS], employers, [employee benefit] plan administrators, and individual taxpayers[,]" the Ruling "amplifie[s]" the rule pronounced in Revenue Ruling 58-66 to apply to same-sex couples validly married in recognition states who later move to non-recognition states.[80]

This may be the most practical approach for the IRS, but it is very impractical for same-sex couples who are validly married in one state but domiciled in a state that does not recognize their marriage.[81] One reason the majority decided to declare the definitional provision of DOMA unconstitutional was that "[i]t force[d] [same-sex married couples in New York] to follow a complicated procedure to file their state and federal taxes jointly."[82] But as Professor Anthony C. Infanti points out:

> [T]he IRS's approach to recognizing same-sex marriage creates a mirror image of this problem. With valid same-sex marriages recognized regardless of the law of the couple's state of residence, same-sex couples living in states that do not recognize their marriages will be required to file as married filing jointly or married filing separately for federal purposes but will be prohibited from using those statuses when filing their state tax returns. This nonconformity will give rise to precisely the same complexity and administrative burden that existed pre-*Windsor*; it will just be a different group of same-sex couples that will be burdened (i.e., those who are already saddled with state nonrecognition of their relationships).[83]

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77 *Id.* at 201.

78 *Id.*

79 *Id.* at 203.

80 *Id.* at 204.

81 Anthony C. Infanti, *The Moonscape of Tax Equality:* Windsor *and Beyond*, 108 NW. U. L. REV. COLLOQUY 110, 126 (2013) (discussing the burden on same-sex couples without state recognition of their relationships).

82 *Windsor*, 133 S. Ct. at 2694.

83 Infanti, *supra* note 81.

Beside the filing headache that a "[s]tate of celebration"[84] approach will create for same-sex married couples in non-recognition states,[85] one must wonder how this will affect the guarantee afforded by section 3 of DOMA to states wishing to retain a traditional definition of marriage. At least one federal district judge has recognized the Ruling's inconsistency with the remaining, valid section of DOMA.[86]

Professor Lynne Marie Kohm's prediction regarding states' authority after *Windsor* to define marriage only if states choose a more expansive definition of marriage[87] seems to be confirmed by this holding. Through this ruling, the IRS is effectively choosing to accept as more valid a recognition state's expansive definition of marriage over a taxpayer's non-recognition, domiciliary state's definition. The Ruling places immense pressure on non-recognition states[88] to embrace an expansive definition of marriage by suggesting that non-recognition of valid out-of-state marriages violates the United States Constitution.[89] But even though the IRS's adoption of a "state of celebration" approach is viewed as a victory for same-sex marriage, ambiguities and challenges remain for same-sex couples.[90]

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[84] *Windsor*, 133 S. Ct. at 2708 (Scalia, J., dissenting) (defining "state of celebration" approach).

[85] Infanti, *supra* note 81, at 125–26.

[86] *See* Bishop v. United States, 962 F. Supp. 2d 1252, 1270 (N.D. Okla. 2014) (Kern, J.) ("Section 3 of DOMA will no longer be used to deprive the Barton couple of married status for any federal tax purpose because (1) they have a legal California marriage, and (2) Oklahoma's non-recognition of such marriage is irrelevant for federal tax purposes. Any ongoing threat of injury based upon deprivation of married status for tax purposes has been rendered moot by *Windsor* and the IRS' response thereto.").

[87] *See supra* note 40 and accompanying text.

[88] "[G]ay-marriage advocates [suggest] that the IRS decision will not only force non-gay-marriage states to figure out a way to align their tax policies with federal returns, it will also apply new public pressure on civil-union states to move toward recognizing same-sex marriage." Peter Weber, *How the IRS Just Handed Gay Marriage a Huge Win*, WEEK (Aug. 30, 2013), http://theweek.com/article/index/248984/how-the-irs-just-handed-gay-marriage-a-huge-win.

[89] Although not related to the IRS's ruling, the federal district court ruling in *Obergefell v. Wymyslo* is indicative of the pressure non-recognition states face. *See* Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 973 (S.D. Ohio 2013) (requiring Ohio, a non-recognition state, to recognize valid out-of-state same-sex marriages on Ohio death certificates).

[90] *See* Infanti, *supra* note 81, at 111. Infanti asks how the IRS will determine what "married" means:

> But what about couples who enter into so-called evasive marriages? An evasive marriage occurs when a couple domiciled in a state that does not recognize same-sex marriage travels to another state to marry and immediately returns to their state of domicile to live. . . .
>
> Are the many same-sex couples in evasive marriages now considered "married" for federal tax purposes? The IRS guidance does not even acknowledge—much less address—this category of marriages. Is it enough that

Although the IRS may have suffered administrative difficulties in applying a "state of residence"[91] standard for administering federal tax benefits, that application would have been more appropriate and consistent with the extensive federalism language in the *Windsor* opinion and the remaining effectiveness of section 2 of DOMA.[92]

### *C. "Marriage" Means "Marriage"*

The Ruling concludes by excluding state-created, marriage-like institutions from receiving marriage-like federal tax treatment. No further explanation is given; the entire analysis is:

> For Federal tax purposes, the term "marriage" does not include registered domestic partnerships, civil unions, or other similar formal relationships recognized under state law that are not denominated as a marriage under that state's law, and the terms "spouse," "husband and wife," "husband," and "wife" do not include individuals who have entered into such a formal relationship. This conclusion applies regardless of whether individuals who have entered into such relationships are of the opposite sex or the same sex.[93]

This position surprised some commentators;[94] in 2011, the IRS indicated that it would allow joint filing for different-sex couples in civil unions treated by their states as legally equal to marriages.[95] Also, as Infanti

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> these couples satisfied the legal formalities imposed by the state where they were married?

*Id.* at 119–20 (footnote omitted).

[91] Kathryn J. Kennedy, *DOMA Implications for Employee Benefit Plans*, TAX NOTES, Sept. 30, 2013, at 1571, 1572. Under this approach, eligibility for federal marital benefits is determined by the definition provided by the state in which a same-sex couple lives. *Id.* Currently, the Department of Labor and Social Security Administration have taken this approach. *See id.* at 1578.

[92] *See* Joseph Henchman, IRS Issues "State of Celebration" Guidance for Same-Sex Couples—Further Guidance by 24 States May Be Required, *in* FISCAL FACT, at 1 (Tax Found., No. 393, Aug. 29, 2013), *available at* http://taxfoundation.org/sites/taxfoundation.org/files/docs/ff393.pdf ("[*Windsor*] invalidated a federal definition of marriage as between one man and one woman, and general reaction at the time suggested that the definition of marriage would thus revert to state law: if a state recognized your marriage, the federal government would recognize it; however, if a state did not recognize your marriage, the federal government would not. This interpretation is supported by the fact that section 2 of DOMA, which permits states to refuse to recognize marriages that are at odds with their state's public policy, was not struck down.").

[93] Rev. Rul. 2013-17, 2013-38 I.R.B. 201, 204 (2013).

[94] Infanti, *supra* note 81, at 124.

[95] At the time, this indication was also surprising to some. *Id.* at 123.

> Some commentators expressed surprise at this position, believing that the most important factor in determining whether a couple is married for federal tax purposes is whether their legal relationship carries the *marriage* label under state law. In its post-*Windsor* guidance, the IRS reversed course and embraced the commentators' view by exalting the importance of the *marriage* label and ignoring the legal equivalence of these relationships.

points out, "[i]f any area of federal law were to recognize domestic partnerships and civil unions as *marriages*, one would expect it to be tax law because '[t]he principle of looking through form to substance . . . is the cornerstone of sound taxation.' "[96] It would seem that the principle of "substance over form" requires the IRS to treat civil unions and domestic partnerships as marriages.[97] Other commentators, however, were unsurprised by the IRS's exclusion of marriage-like institutions from marriage-like treatment.[98]

It is this final holding of the Ruling that most encroaches upon state sovereignty and the principles of federalism announced in *Windsor*. Infanti recognizes the pressure this holding places on civil union states and current non-recognition states wishing to grant benefits to same-sex couples without compromising a traditional definition of marriage:

> The IRS guidance effectively crowds out all other relationships and permits marriage to occupy the field. In the short term, this creates a strong incentive for couples in states with only civil unions or domestic partnerships to travel to one of the states that will allow them to marry, so long as that marriage will be valid and recognized for federal tax purposes. In the long term, it creates a strong incentive for civil union and domestic partnership states to abandon those relationship recognition regimes in favor of same-sex marriage. Moreover, any state that currently refuses to recognize same-sex relationships but later considers a change in its legal treatment of same-sex couples will choose to extend marriage to those couples rather than explore alternative options that might be afforded to all couples. . . . In the future, states will be less likely to provide such different options for relationship recognition because the federal tax laws place a thumb firmly on the scales in favor of marriage.[99]

Indeed, New Jersey, for example, has abandoned its civil union statutory scheme and its traditional definition of marriage due, in part, to the IRS's refusal to recognize marriage-like institutions for federal tax

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*Id.* at 124 (footnote omitted).

[96] *Id.* at 124 (alteration in original) (quoting Estate of Weinert v. Comm'r, 294 F.2d 750, 755 (5th Cir. 1961)).

[97] *See id.*

[98] *See, e.g.*, Patricia A. Cain, *IRS Ruling on Same-Sex Marriage and Six Impossible Things Before Breakfast*, Op-Ed, TAXPROF BLOG (Sept. 3, 2013), http://taxprof.typepad.com/taxprof_blog/2013/09/cain-.html ("[T]his position on RDPs and CUPs is not surprising. It is clear that the federal government wishes to apply as uniform a rule as possible and so the IRS is following the lead of other agencies . . . ."); *see also* Infanti, *supra* note 81, at 123–24 (noting the original surprise some commentators expressed before *Windsor* when the IRS indicated it might recognize those in marriage-like arrangements as married for federal tax purposes).

[99] Infanti, *supra* note 81, at 126–27.

benefits.[100] In support of its declaration that New Jersey's civil union statute was not a constitutional substitute for a same-sex marriage allowance, the New Jersey Supreme Court specifically cites and quotes the Ruling's decision not to extend federal marital tax benefits to same-sex couples whose relationship is not designated as a "marriage."[101] The court found that designating same-sex couples' relationships as civil unions violated the equal protection guarantees of the New Jersey Constitution and did not reach the question of whether the State's refusal also violated the United States Constitution.[102] But not much extrapolation is required to see that similar principles could be used to find a violation of the latter.[103] Commentators have noted that the IRS's refusal to recognize state designations of civil unions or domestic partnerships raises Equal Protection concerns on the federal level.[104]

In fact, the Equal Protection concerns are very apparent when applying the majority's language regarding DOMA's effect on state sovereignty to the IRS's refusal to grant marital benefits to states' marriage-equivalent institutions. Borrowing from a word-processing technique utilized by Justice Scalia in his *Windsor* dissent,[105] by substituting the implications of the Ruling into the *Windsor* majority's language, the Ruling's Equal Protection concerns—in relation to states

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[100] *See* Garden State Equal. v. Dow, 82 A.3d 336, 347, 367–69 (N.J. 2013) (holding that civil unions' inequality with marriage violated the state constitution's equal protection clause because married couples enjoyed the many federal benefits, including the ability to file joint federal income tax returns, that were not available to those in civil unions).

[101] *Id.* at 347, 368–69.

[102] *Id.* at 367–68.

[103] The language used by the New Jersey Superior Court judge is very broad:

> The ineligibility of same-sex couples for federal benefits is currently harming same-sex couples in New Jersey in a wide range of contexts: civil union partners who are federal employees living in New Jersey are ineligible for marital rights with regard to the federal pension system, all civil union partners who are employees working for businesses to which the FMLA applies may not rely on its statutory protections for spouses, and civil union couples may not access the federal tax benefits that married couples enjoy. And if the trend of federal agencies deeming civil union partners ineligible for benefits continues, plaintiffs will suffer even more, while their opposite-sex New Jersey counterparts continue to receive federal marital benefits for no reason other than the label placed upon their relationships by the State.

*Id.* at 368–69.

[104] *See, e.g.*, Cain, *supra* note 98; *cf.* Nicholas A. Mirkay, *Equality or Dysfunction? State Tax Law in a Post-*Windsor *World*, 47 CREIGHTON L. REV. 261, 283–84 (2014) (suggesting the Rulings' raising state equal protection issues (1) caused the New Jersey Superior Court to conclude New Jersey's civil union law was an insufficient substitute for same-sex marriage allowance and (2) might spell the end of civil unions).

[105] *See Windsor*, 133 S. Ct. at 2709–10 (Scalia, J., dissenting).

that wish to implement an alternate, marriage-like institution—become clear.

The majority announces:

> Here the State's decision to give this class of persons the right to ~~marry~~ *engage in a civil union* conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the ~~marital~~ relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. ~~DOMA,~~ *Revenue Ruling 2013-17,* because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage.[106]

And:

> The ~~Federal Government~~ *IRS* uses this state-defined class for the opposite purpose—to impose restrictions and disabilities. That result requires this Court now to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment. What ~~the State of New York~~ *any state implementing a marriage-equivalent statutory scheme* treats as alike ~~the federal law~~ *Revenue Ruling 2013-17* deems unlike by a law designed to injure the same class the [s]tate seeks to protect.[107]

Also:

> ~~DOMA's~~ *Revenue Ruling 2013-17's* unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their ~~marriages~~ *marriage-like institutions*. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex ~~marriages~~ *marriage-like institutions* made lawful by the unquestioned authority of the States.[108]

And:

> As the ~~title and dynamics of the bill~~ *lack of reasoning supporting the third holding of Revenue Ruling 2013-17* indicate[s], its purpose is to discourage enactment of state same-sex ~~marriage~~ *marriage-equivalent* laws and to restrict the freedom and choice of couples ~~married~~ *engaged in marriage-like institutions* under those laws if they are enacted. The ~~congressional~~ *IRS's* goal was "to put a thumb on the scales and influence a state's decision as to how to shape its own marriage laws." The ~~Act's~~ *Ruling's* demonstrated purpose is to ensure that if any [s]tate decides to recognize same-sex ~~marriages~~ *marriage-like institutions*, those unions will be treated as second-class ~~marriages~~ *institutions* for

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[106] *Id.* at 2692 (majority opinion) (author's alterations indicated in strikethrough and italic text).

[107] *Id.* (author's alterations indicated in strikethrough and italic text).

[108] *Id.* at 2693 (author's alterations indicated in strikethrough and italic text).

> purposes of federal law. This raises a most serious question under the Constitution's Fifth Amendment.[109]

Finally:

> When ~~New York~~ *any civil union state* adopted a law to permit same-sex ~~marriage~~ *marriage-like institutions*, it sought to eliminate inequality; but ~~DOMA~~ *Revenue Ruling 2013-17* frustrates that objective through a system-wide enactment with no identified connection to any particular area of federal law. ~~DOMA~~ *Revenue Ruling 2013-17* writes inequality into the entire ~~United States Code~~ *Internal Revenue Code*.[110]

Clearly, the IRS's refusal to recognize state-created, marriage-like institutions and even marriage-equivalent institutions is not consistent with *Windsor*'s federalism language. It effectively limits states' meaningful options to two in dealing with this "public controvers[y] [that] touch[es] an institution so central to the lives of so many, and . . . inspire[s] such attendant passion by good people on all sides."[111] The first option is for states to deny any and all benefits to same-sex couples by retaining a traditional definition of marriage and refusing to permit same-sex couples from engaging in any marriage-like institution. This option is extremely unpopular and untenable in the heated political climate surrounding the issue of LGBT rights.[112] The second option is for states to abandon their traditional definition of marriage to include same-sex couples. This option is not advisable by those concerned with preserving the traditional institution of marriage.[113] As demonstrated above, unless states wish to defend against an imminent Equal Protection lawsuit, states will not compromise on this issue and permit marriage-like institutions. This demonstrated limitation imposed by the Ruling is an encroachment upon states' ability to meaningfully define marriage, "'put[ting] a thumb on the scales and influenc[ing] a state's decision as to how to shape its own marriage laws.'"[114]

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[109] *Id.* at 2693–94 (citation omitted) (author's alterations indicated in strikethrough and italic text).

[110] *Id.* at 2694 (author's alterations indicated in strikethrough and italic text).

[111] *Id.* at 2710 (Scalia, J., dissenting).

[112] *See* Laurence H. Tribe & Joshua Matz, *The Constitutional Inevitability of Same-Sex Marriage*, 71 MD. L. REV. 471, 472–73 (2012) (footnotes omitted) (noting victories for both sides of the same-sex marriage debate and that there have been "high-profile, hard-fought legislative battles"); Charles Fried, *The Courts, the Political Process, and DOMA*, SCOTUSBLOG (Aug. 25, 2011, 12:23 PM), http://www.scotusblog.com/2011/08/the-courts-the-political-process-and-doma/ (arguing that changing demographics make same-sex marriage inevitable in the absence of an event, such as a Supreme Court decision mandating it, that would galvanize opposition for a long fight).

[113] *See* Sherif Girgis et. al., *What Is Marriage?*, 34 HARV. J.L. & PUB. POL'Y 245, 247 (2011).

[114] *Windsor*, 133 S. Ct. at 2693 (quoting Massachusetts v. U.S. Dep't of Health and Human Servs., 683 F. 3d 1, 12–13 (2012)).

## CONCLUSION

This Note has demonstrated the prolific federalism principles guiding the majority in its decision to strike down section 3 of DOMA in *Windsor*.[115] These principles should be the primary guide for federal agencies in their implementation of the *Windsor* decision. The IRS has effectively ignored *Windsor*'s federalism principles in its second and third holdings of Revenue Ruling 2013-17.[116] So what alternatives should the IRS implement?

Some have proposed drastic changes to the federal income tax system.[117] This Note proposes a much simpler solution. First, the IRS should abandon its "State of celebration" standard for the "state of residence" rule. This approach most respects states' authority to regulate marital relations in their respective sphere of sovereignty. Second, the IRS should allow federal marital benefits to extend to any marriage-like institution that a state establishes. This would give states a third, politically prudent option in giving benefits traditionally reserved for married couples to those engaged in marriage-like same-sex institutions. Sovereign states could choose to allow same-sex couples to participate in society in the functional equivalent of a marriage while retaining the traditional definition of marriage, and thereby satiate advocates on both sides of this debate. By adopting these approaches, the IRS will give the most latitude for the "people of each State to decide this question for themselves. Unless the [IRS] is willing to allow this to occur, the whiffs of federalism in the [*Windsor* opinion] will soon be scattered to the wind."[118]

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[115] *See supra* Part I.

[116] *See supra* Part III.

[117] *See* Infanti, *supra* note 81, at 128 ("In light of the numerous problems associated with the IRS's implementation of the *Windsor* decision, we should take this opportunity to pause and consider more fundamental reforms of the tax system—ones that might both better address these problems and improve the tax system for everyone. So long as the patchwork of legal recognition of same-sex relationships continues among the states, the IRS is going to find it impossible to come up with a workable and fair solution for addressing the tax treatment of same-sex couples. With this future in mind, it is worth recalling that commentators have for decades been leveling devastating critiques at the choice to adopt the married couple as a taxable unit. This literature suggests an easier and fairer approach than that adopted by the IRS—one that would address the plight of same-sex couples and improve the overall fairness of the federal tax system. Under this approach, we would eliminate the privileging of marriage in the federal tax laws by adopting the individual as the taxable unit. This approach avoids the need to determine when and how to take same-sex marriage into account for federal tax purposes. It also holds the promise of a relationship-neutral tax system that could recognize a wide array of human relationships." (footnotes omitted)).

[118] *Windsor*, 133 S. Ct. at 2720 (Alito, J., dissenting).

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